Constitutional Powers, the High Court and Australian Transport

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Abstract:

The focus is on s 92 of the Australian Constitution, dealing with freedom of interstate trade. The High Court has, by various interpretations of that section, created three different frameworks for the regulation of interstate trade within the last 40 years. The paper examines the effect of these decisions, and questions the High Court's wisdom in ignoring economic efficiency. Since a major objective of the Founders was the creation of a common Australian market, the most recent of these decisions is argued to be in conflict with the objects of the Constitution. There is doubt about the High Court's ability to reach appropriate conclusions because it was originally envisioned as having the Inter-State Commission as an adviser, and the Privy Council as a constraint

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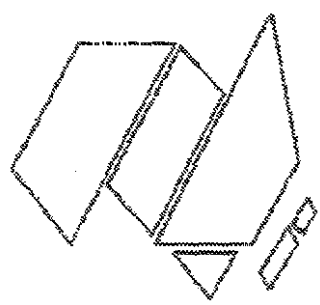

1. Introduction and Outline

Recent cases on matter related to section 92 of the Australian Constitution before the High Court of Australia have reached findings which differ very significantly from earlier conclusions. Section 92 states: "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 Court's decisions on the meaning of this apparently unambiguous statement have presented the transport sector with three quite different legal frameworks in the last forty years. The fact that such abrupt changes have taken place in the past suggests that further changes may occur in the future. The past changes have had significant impacts on the transport sector. Future changes can also be expected to require costly adaptations by the transport sector, without necessarily creating the conditions for economic efficiency.

This paper briefly examines the earlier changes, and then concentrates attention on the possible effects of the most recent change on the transport sector. The reason for including previous interpretations is to show the High Court's inconsistency in its decisions. Complex economic issues were, and continue to be, decided without reference to their economic effects.

The most important case, popularly known as the Crayfish case, fundamentally re-appraised previous decisions on s. 92. While the Court acknowledged the importance of the Common Market concept as the primary basis for s. 92, this view was speedily forgotten in its findings. Instead, a legalistic version of "discrimination in a protectionist sense" dominated the conclusions. The effects of its findings on the efficiency with which Australia's resources are allocated did not rate a mention.

It is necessary to re-state the original economic objectives of those who wrote the Australian Constitution. This is done, very briefly, in section 2. The evolution of the High Court's decisions, which include some severe reversals of previous findings, is examined in section 3. The major problem is to be found in the conflict between concepts as understood by the legal profession and by economists.

It is also clear that the Court is more concerned with the "objects" of legislative Acts than with their "effects". This is looked at in section 4. The short conclusion in section 5 draws attention to the changed role of the High Court, particularly in the absence of the original constraints placed upon it by the Privy Council. Furthermore, the functions which were to be performed, under the provisions of the Constitution, by the Inter-State Commission have not been permitted to provide the necessary independent information input which is required for decisions on matters having such wide impact on the national economy.

2. The Constitution: Original Economic Objectives

> "The fundamental principles of union thus laid down were – intercolonial free trade, a federal tariff, federal defence and the reservation of provincial rights in provincial matters..." (Quick and Garran, 1901, p. 126).

> "The grant to the Commonwealth of the exclusive power to levy customs and excise duties, at a time when these were the predominant forms of taxation, was intended to achieve the basic federal objective of a uniform tariff and internal free trade." (Commonwealth Grants Commission, 1983, p. 3).

These quotes are a reminder that the Constitution was seen as a means to a number of ends, of which the attainment of a Common Market or Customs Union was a principal objective. It did not have a legal objective per se, though inevitably it was subject to the meaning of "absolutely free" in section 92 in the context of the objectives of the Constitution, this has not been so for the judges of the High Court. Economists and lawyers might have problems in the first instance, but, given the objectives, it is not likely that economists would change the interpretation so readily, so frequently and so radically as the High Court has done.

This is, in part, because the High Court has, until recently, taken no notice whatever of the intentions of particular sections, for which evidence may be obtained from the Convention Debates. We are, as economists, concerned with the effects of various interpretations on the allocation of resources. We are also concentrating on effects in the transport sector. In a short paper, it is not possible to take a broader view, though the effects elsewhere are also of obvious interest and concern.

3. The Evolution of the High Court's Interpretations

Section 92 and Transport

A brief review of the more important interpretations of relevant parts of the Constitution affecting the transport sector is necessary. We will concentrate on section 92, but must mention that other parts of the Constitution have also been variously interpreted by the High Court or, in some cases, have not been effectively utilised by the Federal Government. Objections by the States, together with unwillingness by the Federal Government to incur the political cost of overriding such objections, are the main reasons for non-utilisation of powers available to the Federal Government.

Before the watershed in 1954 (Hughes and Vale Pty Ltd v NSW (1954) 93 CLR 1), the interpretation of section 92 was that, so long as there was no discrimination against interstate trade, any State could regulate transport in any way

it saw fit. The relevant "discrimination" was legally defined, and thus not the same as economically defined. Under this interpretation, a ton-mile tax in NSW could be, and was, levied on all road transport, regardless of whether it was interstate or not. The actual objective of the tax was the protection of the State railways. This was made obvious by exempting journeys of less than 50 miles from Sydney's centre from the tax. The tax was therefore discriminatory anyway.

The effects of such a tax, which virtually doubled the cost of road transport, on "free trade" was not noted by the High Court. The odd view, of Evatt J, prevailed that any law which did not adversely affect the flow of trade and commerce was not in conflict with section 92 (Coper, 1987, p. 294). The naive view was, apparently, that commodities which were restrained from moving by road would just simply by transferred to rail. The implication was that road and rail transport were perfect substitutes, which could only be believed by persons with a peculiarly legal definition of transport, which totally disregarded the costs and qualities of different transport modes which could be used to move goods from origins to destinations.

The "friction of distance" is shown by the real resource costs incurred in the competitive provision of transport of all modes. In practice, this requires that transport inputs are treated in the same way, i.e. have a relationship between prices and costs which is roughly the same as for all inputs into all productive activities in the economy. The distribution and size of productive units reflects those costs. Any increase in the "friction of distance" has an effect on resource allocation. Internal economies of scale in firms are reduced because more distant markets cannot be reached because the cost of transport has increased. Location decisions by producers, including primary producers, are affected by changes in transport costs. Thus the allocation of resources generally, not just transport resources, is significantly affected by changes in costs which are not a reflection of resource scarcity.

The High Court, in a split decision in 1953 (Hughes and Vale Pty Ltd (1953) 87 CLR 49), upheld the validity of the State legislation. However, as mentioned above, the Appeal to the Privy Council overturned this in 1954, making all such legislation invalid. The road tax was removed. Subsequent attempts to bring in various charges by various means were rejected, except insofar as the wear and tear costs on roads were recoverable by a ton-mile charge. Other cases included, inter alia, border-hopping as a means for avoiding the charges on intrastate road transport and involved problems in defining interstate transport. Overall, however, interstate road transport was freed from attempts by States to divert interstate traffic to the railways by imposts on road transport.

This did not mean that the States gave up the idea of carrying more traffic by rail than was warranted by their costs and quality characteristics. Subsidies for rail transport reduced the effects of the removal of restrictions on road transport. It is of course possible to achieve the same result as the road tax by a subsidy on rail. The

High Court has never been asked for a ruling on this matter. In the event, road transport expanded by taking traffic from rail, while rail was able to attract traffic from coastal shipping by a subsidy which was not available to shipping. The eventual result was to reduced coastal shipping on non-bulk traffics to a very low level, effectively ending regular coastal schedules.

There are a number of important points to be mentioned before the next about-face of the High Court is examined. First, the result was obtained via private action, with the Federal Government not presenting a national interest view. It seems likely that the Federal Government would have taken some initiative in this area if the Inter-State Commission (ISC) had been in operation. The evidence for this view is that the Federal Government eventually required the ISC to do so in 1985-89.

Secondly, the effect on resource allocation was not a focus of interest by any of the parties. While the allocation of resources is likely to have been more efficient than before, it was also less efficient than it would have been without the rail subsidy.

Thirdly, economic efficiency was also ignored in the treatment of fuels taxation. Obviously, relative costs can be readily affected by taxes on fuels, then not paid by rail, having effects similar to the ton-mile regime which had been declared unconstitutional.

Fourthly, and perhaps of greatest importance, the effects on the allocation of non-transport resources was never considered. The location of economic activities and the size of factories are all affected by transport prices, not by transport costs. The price distortions caused by differential fuels taxation and by rail subsidies flowed on to many sectors.

The four points, and many others, highlight the complexity of the effects of changes in the treatment of the transport modes. It is not, therefore, a criticism of the High Court per se that somewhat idiotic decisions have been made, but a criticism of the extent to which successive Federal Governments have failed to play their proper constitutional role in ensuring economic efficiency. The Inter-State Commission, which could have supplied the necessary expertise and advice, was always regarded with suspicion (except by Mr Gough Whitlam and Mr Peter Morris), and either was not allowed to function at all, or only to function under very severe constraints.

The next revolution in High Court interpretations came in 1988, in what is popularly known as the Crayfish case (Cole v Whitfield (1988) 165 CLR 360). The High Court no longer had the Privy Council as a higher body which could insist on consistency. It could therefore re-examine the bases for previous interpretations in the light of what they thought were the intentions of the Founders of the Constitution, without fear of being overturned by the Privy Council.

In essence, the findings in the Crayfish case re-asserted the rights of the States to regular any economic activity in any way, so long as there was no discrimination between intra and interstate activities. Under the previous interpretation, some economic regulation of interstate activities was impossible, although the rail subsidies escaped notice and apparently are not unconstitutional under any interpretation of s. 92, and transport fuels can be taxed differently for the different modes. However, there were no constraints on regulation of intrastate activities. Under the Crayfish decision, economic regulation of interstate activities is allowed, but only so long as the regulation applied equally to interstate and intrastate activities.

The High Court has therefore accepted one aspect of the rationale of a Common Market or Customs Union, but rejected another. The accepted aspect is the requirement that there be no discrimination between intra and interstate activities. The rejected rationale is the Founding Fathers' intention that, in a Common Market, identical regulation should apply across the Common Market. The result is that each of the six States (not to mention Territories) can now have a unique set of regulations, which interstate traders must adhere to.

The Crayfish interpretation re-introduces the borders of State as the points at which regulations may change. As an example, instead of paying duty at these border points, as was the case pre-Federation, trucks on interstate journeys could be required to pay tonne-kilometre taxes for any travel within a State's borders. This reverses the Hughes and Vale decision, which allowed intra but not interstate application of the tonne-kilometre tax.

We should emphasise that we are not arguing that any regulation is "good" just because it applies to every State and Territory. But the idea that six (or more) different sets of regulations are conducive to economic efficiency can be readily rejected. Perhaps more to the point, it can be rejected also on grounds of consistency with the Common Market objectives of the Constitution. Regulation can be seen as a non-tariff barrier to trade, and can be used to achieve the same objectives as other trade impediments.

Suppose NSW's objective to be the maintenance of revenues of its railways. A tax on road transport is imposed in that State. This tax is paid by road transport within NSW, regardless of whether it is inter or intrastate. Victoria does not impose such a tax. Nevertheless, the cost to the user of road transport between Melbourne and Sydney has increased sufficiently to shift some traffic from road to rail, and some traffic will now not be transported at all. Although Victoria might be attempting to use the economically more efficient transport mode, it will be prevented from doing so for interstate transport by the tax in NSW.

The effect of increases cost of road transport between Melbourne and Sydney will be especially severe for goods which require road transport for a variety of

quality requirements, including being located long distances from railway stops. Absence of "discrimination" thus does not ensure that there are no impediments to interstate trade.

The Crayfish interpretation thus leaves the way open for State regulations which are inconsistent with the concept of a Common Market. This is so in two main ways:

(i) allowing diversity of economic regulation between the States and

(ii) some of this diversity can now include regulations which effectively act as impediments to interstate trade.

Other Relevant Sections

Some reference to other parts of the Constitution of importance to the transport sector is necessary, though this cannot go past mere mention. They are mentioned only to highlight the importance of interstate trade and transport in the Constitution, and the inter-related nature of some of these provisions. These provisions are further evidence for the Common Market vision of the Founding Fathers.

The most relevant sections are 51, 96, 98, 99, 101 and 102. Of these, brief mention should be made of section 96, which allows the Federal Government to make grants to the States "...on such terms and conditions as the Parliament thinks fit". Road funding is provided under this section. By contrast, section 99 requires that "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

Section 98 states: "The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State." Sections 101 and 102 deal with the Inter-State Commission which the Commonwealth "shall" have.

4. The Problem: Legal Interpretation and Economic Effects

The absence of careful considerations of the economic effects of High Court decisions means that the economic effects are a consequence of a judicial process. They are not an important input in the process by which the decision is reached. The original objective of many of the relevant provisions was economic efficiency, yet this is not regarded as the dominant, nor even as a remotely relevant, consideration.

The problems which arise can be demonstrated by reference to the legal and economic definitions of "discrimination". Lawyers put this term in a slightly wider context, and refer to "discrimination in a protectionist sense". Thus if a particular

State regulation left the comparative advantages of intra and interstate trade unchanged, there would be no "discrimination". Just how impractical that is can be shown by the simple example of a tonne-kilometre tax on road vehicles. The "discrimination" is against longer trips, whether intra or interstate. Yet interstate trips are mostly considerably longer than intrastate journeys.

As already mentioned, other distortions will result. If rail does not pay the tax, some traffic will shift from road to rail. Less obvious, it may result in disadvantages to producers in particular locations. Thus potatoes for the Sydney market can be grown in Victoria or Tasmania. A tax on road transport from the NSW border to Sydney may result in Tasmanian potatoes, using sea transport, transplanting Victorian potatoes on the Sydney market.

Vehicle standards afford another example. Under the Crayfish ruling, each State can impose its own standards. A vehicle travelling in two States will have to meet both standards (ISC, 1988). Interstate vehicles will be more expensive than intrastate trucks. Again, "discrimination" here is between States, but not according to the Crayfish decision. A "reductio absurduum" example may make this point clearer. Suppose truck trays must be made of stainless steel in NSW, and of aluminium in Victoria. A truck wishing to engage in trade between these two States must then either have a tray made of both stainless steel and aluminium, or change trays at the border. The analogy with change of rail gauges is no accident.

This has been noted by Coper (1991, p. 11/2), though he eventually reaches conclusions different from ours.

> "The discriminatory protections will more likely come about through the disparate impact of a law upon interstate trade than be evident (sic) from the terms of the law. Difficulties may be expected in areas such as...product standards." Therefore, "...factual enquiry is necessary to determine whether interests in the legislating State are benefiting at the expense of competing interests outside the State and whether the law is an appropriate and proportionate pursuit of a non-protectionist object."

If the definition of "discrimination in a protectionist sense" is accepted, then it follows that the impact of a particular tax or regulation on inter and intrastate trade must be assessed. The Crayfish decision was reached without such evidence. It cannot therefore be concluded to have been "correct" or "incorrect" in terms of its own objective of "non-discrimination".

The High court has not been very aware of the necessity of obtaining the facts on which a conclusion of non-discrimination, in terms of the effects of its finding, could be based. The Founders of the Constitution can be credited with some wisdom in foreseeing such unwillingness of judicial minds to be bothered with the

gathering of facts. This more humble task was to be performed by the ISC, and would then be available to the High Court.

We must draw a distinction between the stated object of a State regulation, and its actual effects. Thus the object may be said to be "safety" (e.g. in removing traffic from road onto rail), but its effect is to increase the friction (cost) of distance). This is to the advantage of producers closer to their market, and to the disadvantage of producers at greater distances. The efficiency with which resources (not just in the transport sector) are allocated has clearly been impaired. The economy is less efficient as a consequence. The High Court's version of what was the object of s. 92 is thus different from a view which gives primacy to economic efficiency.

The High Court's version is also inconsistent with its own statement in the Crayfish case, in which the High Court re-asserted that the object of section 92 was to create a Common Market within Australia. Further explanation is given in Barley Marketing Board (NSW) v Norman (65 ALJR, 1991). In essence, the bone of contention was whether the compulsory acquisition of barley grown in NSW, by the NSW Barley Board, and the setting of a minimum price for barley, was in contravention of s. 92.

The High Court found that the barley scheme was not in contravention of s. 92 because it did not discriminate between buyers of barley in any State, all of whom could readily buy from the Board. The object of compulsory acquisition and the setting of a minimum price was one of equity, permitting growers, especially smaller growers, to use the greater bargaining power of the Board. The question of whether it was economically efficient was not addressed.

The Barley case seems to confirm that, provided the object of a regulation is not discrimination in a protectionist sense, it will be consistent with s. 92. However, to refer again to transport examples, it also seems to confirm that various regulations which increased the costs of transport to users would be held to be valid if their object was, say, equity or safety. The effects of particular regulations on the economic efficiency of the economy are not part of the Court's deliberations. For example, arbitrarily high safety standards cannot, by this finding, be subjected to the economic efficiency test.

It may be, however, that it is too early to reach this gloomy conclusion. To ensure that jobs will be found for lawyers in the future, the High Court put in some "ifs and buts". It is impossible to paraphrase the passage which endeavours to make this "clear". Referring to an impugned State law (in Cole v Whitfield, p. 408), the Court stated:

> "If it applies to all trade and commerce, interstate and intrastate alike, 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 intrastate trade, it will nevertheless offend against s 92 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 s 92. But if a law, which may be otherwise justified to an object which is not protectionist, discriminates against interstate trade or commerce in pursuit of that object in a way or to an extent which warrants characterisation of the law as protectionist, a court will be justified in concluding that it nonetheless offends s 92."

So there you have it. Discrimination may be protectionist, or it may not. We take it that non-discrimination cannot be protectionist. It seems to follow that any regulation, regardless of object, which treats inter and intrastate traders alike, will not conflict with s. 92. So a tax in transport on a per tonne-kilometre basis, though clearly discriminating against long distance carriage, will not conflict with s. 92 if it is applied to intra and interstate transport. The effect on resource allocation may, depending on the size of the tax, be extremely destructive of economic efficiency, but be valid nevertheless. The conflict between a common market view of "discrimination", and the Court's apparent interpretation, has not been comprehended, and therefore not recognised, by the Court.

It might also be argued that the High Court's present functions are different in one other important respect from what was envisaged, and implemented in 1901. The Privy Council, for all its faults, was the final Court of Appeal. This forced a certain degree of consistency which is no longer necessary. Thus the ISC does not exist, and the Privy Council has been removed from the High Court's decision-making process. The High Court is now much more powerful than it was intended to be in 1901.

5. Conclusion

The conclusions reached by the High Court in the Crayfish case, and further explained in the Barley case, highlight the confusion and conflict between the objectives of economic efficiency and legal interpretations of relevant concepts. While we do not expect High Court judges to have sufficient economic expertise to understand this difference, we deplore the absence of any attempts to obtain the relevant information from appropriate and independent authorities. The Inter-State Commission would have been a suitable source of such information, but has, once more, been de-commissioned.

The further absence of an appeal to a higher court, such as the Privy Council, has aggravated this apparent unwillingness to obtain the necessary information about "facts" from independent sources. The adversarial process of court hearings also

militates against evidence about a national, rather than an interested person, interest being heard.

The absence of constraints on the High Court, as envisaged by the makers of the Constitution, in the form of a Privy Council and an Inter-State Commission, has not resulted in a different method of appointing the High Court judges. Unlike the Supreme Court in the USA, the appointments are still made as if the constraints were in place. Perhaps we should learn from the USA experience?

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