Permewan Wright Consolidated Pty Ltd v Trewhitt [1979] HCA 58; (1979) 145 CLR 1 (22 November 1979)

HIGH COURT OF AUSTRALIA

PERMEWAN WRIGHT CONSOLIDATED PTY. LTD. v. TREWHITT [1979] HCA 58; (1979) 145 CLR 1

Constitutional Law (Cth)

High Court of Australia
Barwick C.J.(1), Gibbs(2), Stephen(3), Mason(4), Murphy(5) and Aickin(6) JJ.

CATCHWORDS

Constitutional Law (Cth) - Freedom of interstate trade and commerce - State law prohibiting retail sale of eggs unless graded and tested by State authority - Fee payable to authority for grading and testing - Retail sale by agent of producer in another State - Whether regulatory law - Validity - The Constitution (63 & 64 Vict. c. 12), s. 92 - Marketing of Primary Products Act 1958 (Vict.), ss. 41C, 4 1D.

HEARING

Melbourne, 1979, May 1, 2;
Sydney, 1979, November 22. 22:11:1979
ORDER TO REVIEW removed from the Supreme Court of Victoria under the Judiciary Act 1903 (Cth), s. 40.

DECISION

1979, November 22.
The following written judgments were delivered: -
BARWICK C.J. The basic facts which give rise to the challenge in this case Act") may be stated quite shortly. (at p8)

2. The appellant is a producer of poultry eggs in the State of New South Wales. Part of its production is exported to the State of Victoria there to be sold by retail. So much of the appellant's product as is sold in New South Wales must, by the law of that State, be candled and graded in accordance with a regulation made under the State Act. As a matter of business convenience, eggs destined for any particular market are not segregated from the bulk. All the eggs which the appellant exports to Victoria are subjected to the same regimen for ensuring soundness, quality and grade as are the eggs sold or to be sold in New South Wales, though there is no legal obligation to do so. It is not suggested that eggs submitted to that regimen would at the conclusion of the process be in any wise unfit for human consumption. It is, however, pointed out that over a period of time, eggs in sound condition at the outset may deteriorate. But I do not understand it to be said that the interval elapsing in the appellant's regular course of business between the conclusion of that process and their availability for sale by retail in Victoria could be expected to have caused any such deterioration. (at p9)

3. Section 41D of the Act prohibits the sale of eggs by retail unless they have been submitted to the Victorian Egg Marketing Board ("the Board") and by the Board inspected, graded and marked. Those who submit eggs to the Board for this purpose must pay the fees fixed by the Board for its "services". (at p9)

4. The appellant claims that these provisions placed an unjustifiable burden on its interstate trade in the eggs. It relies substantially on the reasons expressed by me in my dissent in Harper v. Victoria [1966] HCA 26; (1966) 114 CLR 361 and invites the Court to reconsider the decision in that case. (at p9)

5. That the requirement to submit eggs not suspected to be a danger to the health of consumers, and to pay the fees set by the Board is a burden on the appellant's trade, can scarce be denied. But it is said that the statutory requirements, including the obligation to pay the fees, are no more than a regulation of interstate trade compatible with its freedom. In other words, that the relevant parts of the Act are only regulatory in nature within the concept which has been developed of what is regulatory. (at p9)

6. I have reread my reasons for judgment in Harper's Case in the light of the argument in this case and of the subsequent decisions of this Court. With due respect to those of a different opinion, I find no need to alter or qualify anything which I there said. The amendment to s. 41D effected by Act No. 8965 of 1976 does not require any change in my opinion: nor, in my opinion, does it furnish any added reason for concluding that the Act is invalid. (at p9)

7. I would, however, wish to expand upon some of the ideas which I have expressed in Harper's Case and elsewhere as to the approach which I think should be made to the application of s. 92 of the Constitution. I would also take the opportunity to discuss the reasons given by those Justices who formed the majority in Harper's Case. (at p9)

8. Two relevant principles have emerged in the case law on the constitutional provision. First, that it is the effect of the impugned statute in the circumstances in which according to its proper construction it was intended to operate, excluding consequentially remote effects, which must be taken into account when deciding whether the Act infringes the constitutional guarantee, i.e. whether the effect of the statute leaves the interstate trade free,

i.e. the citizen free to trade interstate. Second, that statutory provisions merely regulatory in nature, and thus the effect they produce, are compatible with and not in denial of that freedom. Perhaps this might better be expressed by saying that laws which produce an effect which is compatible with freedom of interstate trade may be regarded as regulatory in nature and valid. (at p10)

9. These principles have become axiomatic except with those who think that only border duties would infringe the section: a view I must observe long since exploded and, indeed, in my opinion, never tenable. I expressed my reasons for that conclusion in Clark King & Co. Pty. Ltd. v. Australian Wheat Board [1978] HCA 34; (1978) 140 CLR 120, at p 151 . (at p10)

10. But, though axiomatic, I feel the principles should be brought to attention in the resolution of the problem presently posed. The corollary of the first of these principles is that the validity of a law vis a vis s. 92 can never be determined by the subject matter of the statutory provision. I shall endeavour to point out a consequence of this result when discussing the second principle. (at p10)

11. The acknowledgment of the second of the two principles does not involve any qualification of the constitutional provision or of the freedom of trade which it guarantees. There can be no warrant whatever for this Court to qualify or limit the freedom which the Constitution guarantees. It is at least absolute in that sense: it is unqualified. But, within the concept of freedom there are inherent restraints. I have attempted elsewhere to describe their basis. It might be said that they are in a real sense a manifestation of the guaranteed freedom. They are in a real sense part of it, just as a prohibition of defamation is not a qualification of freedom of speech but an inevitable part of it, if freedom of speech is distinguished as it should be from unbridled individual licence. Laws which in terms prohibit dealing in deleterious substances, in practices injurious to human safety, or restrictive or fraudulent practice in trade are not qualifications on or of freedom of trade: they are but extrapolations of what is inherent in the concept of freedom in a civilized society, civilized because freedom is distinguished from licence. (at p10)

12. Laws to be acceptable as manifestations of freedom, in the sense that they do no more than represent the restraints inherent in the concept, do not represent any closed class. But it is not the topic or subject matter with which they deal which warrants their acceptance as compatible with freedom of trade. It is the effect they produce as indicative of their nature which will determine their acceptability, not their subject matter. To do something in trading which is injurious or potentially injurious to the health of one's fellows is not an exercise of freedom: it is an example of unbridled licence. But that does not make the laws on the topic of public health necessarily compatible with freedom of the individual in interstate trade. In other words, a law upon the subject of public health cannot, in my opinion, be held to be valid vis a vis s. 92 simply because of its subject matter. To be valid its terms in relation to public health must produce no effect which is incompatible with that freedom of interstate trade: that is to say, the test of validity is not the subject matter but the relevant effect which in its operation the law produces on the individual's interstate trade. It can be held to be valid because those effects are compatible with that freedom of interstate trade, in which case it can be said to be no more than regulatory of that trade. (at p11)

13. If in its nature a law so tested can be considered to be regulatory, the particular way in which the legislature has sought to achieve the regulatory purpose will be a matter for the legislature and not the Court, unless the legislative method is unreasonable in all the circumstances: the unreasonable quality of the legislative provision is in that case indicative of the incompatibility of the law with freedom of interstate trade. (at p11)

14. The question is not, in my opinion, one in which so-called "public interest" can be decisive. There are no doubt laws made in the public interest which considerably infringe individual freedom. In such cases the legislative judgment has been that the individual must concede such a limitation of his freedom for the good or the supposed good of his fellows. But the constitutional guarantee, paramount in its nature, binding all legislatures and to which all legislative power is subject, does not, in my opinion, brook of any such treatment. Its clear constitutional purpose is that that individual freedom to trade interstate is itself paramount and not required to yield to some actual or supposed public interest by a law or executive action which is in its nature incompatible with that freedom. (at p11)

15. The problem for the Court, and it is undoubtedly a difficult problem, is to determine whether the effect of the operation of a given law or executive action is compatible with that paramount freedom. The problem cannot be resolved by deciding either that the law is a reasonable one, reasonable according to some standard other than compatibility with freedom, or by deciding that the law or executive action is in the public interest. (at p11)

16. I applied these concepts in my reasons in Harper's Case [1966] HCA 26; (1966) 114 CLR 361 . In my view, the interstate trade of the individual in wholesome eggs included an ability to retail them upon importation into the second State in an honest and not misleading fashion. If the State desired to verify their wholesome quality, it could of course do so by some means which did not substantially impede the conduct of that trade or add to the expense of implementing it. It is clear to my mind that the effect of the challenged sections of the Act is to do both. Consequently, these sections cannot, in my opinion, validly operate to prevent the appellant selling its wholesome eggs by retail. (at p12)

17. I should now say something of the reasoning of the Justices who formed the majority in Harper's Case. (at p12)

18. Sir Edward McTiernan said that the relevant section of the Act operated "after importation or the interstate commerce has ended" (1966) 114 CLR, at p 377 . His Honour thought the reasoning of Sir Owen Dixon in Wragg v. New South Wales [1953] HCA 34; (1953) 88 CLR 353 decisive of the appeal. In other words, his Honour held that retail sale by the appellant of its eggs imported for sale by retail was exclusively an intrastate transaction. (at p12)

19. But importation in the course of interstate commerce does not end when the relevant border is crossed in the transit of the goods. That trade must continue, at least until the commercial purpose of sale according to the purpose of the transit has been achieved by sale in the second State. To import goods interstate for sale by retail is, in my opinion, to engage in interstate trade until the retail sale is made, i.e. until the first sale after such importation. The sale of the imported goods upon their importation is, in my opinion, a sale in interstate trade: cf. North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W. [1975] HCA 45; (1975) 134 CLR 559 . The reasoning in Wragg's Case properly understood does not, in my opinion, deny that proposition. If that decision is to be justified, it must be on the footing that the potatoes in that case had by some act or activity after the importation was complete become part of the aggregation of goods within the State and so subject of a purely intrastate transaction. (at p12)

20. Sir Alan Taylor also was of opinion that Wragg's Case was decisive. (at p12)

21. Sir Douglas Menzies took a radically different line. He expressed the opinion that "full validity" could be given to "standard fixing" legislation which was general and not discriminatory of interstate trade. Having accepted that view, he conceded to the legislature the power to subject the interstate trade to delay and cost in the implementation of a method of "standard fixing" chosen by the State. Sir Douglas did not indicate any limit to the standard fixing and, in particular, he did not confine the standard fixing to matters of health. Nor did he elaborate on his reasons for the opinion expressed. In particular, he did not discuss any relationship of what he asserted to any reported discussion of the scope of s. 92. For the reasons I have already indicated, with the utmost and unfeigned respect to Sir Douglas, I am unable to accept the proposition as stated by him. His expressed views

would support the majority in Hartley v. Walsh [1937] HCA 34; (1937) 57 CLR 372 , which I think has now been disfavoured and the view of Sir Owen Dixon accepted. (at p13)

22. I cannot think that a law which required fabrics, whether woollen, cotton or of mixed components, to be of stated weight or width could be held to be compatible with freedom of an interstate trade in fabrics: this would be a law setting standards. It might, of course, be in the public interest of the State, or at least in that of manufacturers or traders within the State, to trade only in fabrics of such dimensions: or it might even be thought, perhaps reasonably thought, to be in the interest of the consumers of the State that only fabrics of such standards should be vended in the State, avoiding by the adopted standard confusion. But, in my opinion, s. 92 would secure that interstate traders in fabrics be free to trade in fabrics of other weights or widths. Such a law, though a standard fixing law general in character and non-discriminatory of interstate trade, would, in my opinion, offend the constitutional guarantees because in its nature such a law would be incompatible with the freedom of the interstate trade. It would not be said to be invalid merely because it was unreasonable or imposed an unreasonable burden. It would be invalid because in its nature it was incompatible with the guaranteed freedom. (at p13)

23. Sir William Owen felt that Wragg's Case was decisive and appears to have adopted the view that the retail sale by the interstate importation for sale by retail was itself no more than an intrastate sale. I have already indicated my inability to accept this view. (at p13)

24. In my opinion, if the view of the majority in Harper's Case is to be supported, it must, in my opinion, be for some reason that was not given by any of the Justices forming the majority. For my part, I have not heard any such acceptable reason. I remain unable to accept the majority view. For the reasons I have given here and in Harper's Case, the terms of the Act here produce an effect which, in my opinion, is incompatible with the freedom of interstate trade. (at p14)

25. I would make absolute the orders to review the convictions. (at p14)

GIBBS J. The appellant was convicted of two offences against s. 41D(1) of the Marketing of Primary Products Act 1958 (Vict.), as amended, ("the Act") which provides as follows:

> "Any person who -
> (a) sells or causes to be sold by retail;
> (b) uses or causes to be used in the preparation of any meal, or food,

for sale; or
(c) uses or causes to be used in the preparation of any meal or food to be supplied to any person pursuant to or incidental to any contract or arrangement, other than an arrangement of a domestic nature, whether or not the person to whom the meal or food is supplied is a party to that contract or arrangement -
any eggs which have not been graded and tested for quality and standard and marked or stamped in accordance with this Act and the regulations -

> (i) by the Board or a person authorized by the Board; or
> (ii) by a producer who has the permission of the Board pursuant to

sub-section (4) of section 41C -
shall be guilty of an offence and liable, in respect of each offence to a penalty of not more than $200."
The circumstances of the case so far as they are relevant were as follows. The appellant entered into an agreement with a group of companies which traded under the name of Bartters Enterprises ("Bartters"), whereby the appellant was appointed as Bartters' agent to sell on Bartters' behalf eggs which would be delivered by Bartters from Hanwood in New South Wales to the appellant in Victoria. Under the agreement the eggs remained the property of Bartters until the appellant sold them; if unsold they were to be returned to Bartters. The eggs the subject of the charges were produced in New South Wales by Bartters and were carried by Bartters' employees to Victoria and delivered there to the appellant, who, acting as Bartters' agent, displayed them for sale and sold them. The eggs were tested for quality and standard (by candling) and graded by Bartters in New South Wales in a way that would have satisfied the law of New South Wales if the eggs had been sold in that State. Bartters were not obliged, by the law of New South Wales, to test or grade any eggs which they sent to Victoria for sale; if, however, they chose to test and grade any eggs which they sent to Victoria for sale, those eggs would, if s. 41D applied, have to be tested and graded again. In the course of testing and grading some eggs - perhaps five per cent - may be damaged or cracked, but the process does not otherwise harm the eggs. The Board referred to in the relevant sections of the Act has an unfettered discretion to refuse to grant permission under s. 41C (4) to a producer to grade and test and mark or stamp his own eggs, and Bartters have not been given permission under that section. If Bartters are required to submit to the Board for grading and testing and marking or stamping the eggs which they wish to sell, they will be put to inconvenience and some delay, and will be required to pay to the Board the fee which may be charged under s. 41C (5) of the Act to defray the expense of grading, testing, marking and stamping the eggs - a fee which exceeds the cost to Bartters of doing their own testing and grading. (at p15)

2. The question for decision is whether, in these circumstances, the application of the provisions of s. 41D (1) of the Act would infringe s. 92 of the Constitution. (at p15)

3. The argument advanced on behalf of the appellant, that s. 41D (1) cannot apply to the case consistently with s. 92, would, if accepted, require us to overrule Harper v. Victoria [1966] HCA 26; (1966) 114 CLR 361 . In that case, the plaintiff, who bought eggs in New South Wales and brought them into Victoria for sale there by retail, unsuccessfully sought declarations that the relevant provisions of the Act, as amended by the Marketing of Primary Products (Egg Marketing) Act 1965 (Vict.), were invalid or alternatively inapplicable by reason of s. 92. Since that case a number of amendments have been made to the Act but the only amendment that is material is that which was made by the Marketing of Primary Products (Marketing Boards) Act 1976 (Vict.) which substituted the present s. 41D (1) for the former sub-section which had read as follows:
"Any person who sells by retail any eggs which have not been graded and tested for quality and standard and marked or stamped in accordance with this Act and the regulations -

> (a) by the Board or a person authorized in that behalf by the Board; or
> (b) by a producer who has the permission of the Board pursuant to

sub-section (4) of section forty-one C of this Act -

> shall be liable to a penalty of not more than $200."

The scope of the section has been somewhat enlarged by this amendment, in particular in relation to the use of eggs in the preparation of meal or food, but the amendment does not render the legislation in its present form distinguishable from that considered in Harper v. Victoria. (at p15)

4. The majority of the Court in Harper v. Victoria held that the retail sale made in Victoria formed no part of the plaintiff's interstate trade, and that s. 41D (1) entailed, at most, only an economic consequence to the interstate trade. Menzies J. however based his decision on an additional ground. He said (1966) 114 CLR, at p 378 :
"I do not regard s. 92 as denying full validity to what may be described as standard-fixing legislation of a general character which has no special features which burden inter-State trade. Nor do I think it would necessarily constitute an infringement of s. 92 were such legislation to require further that, upon the retail sale of goods for which standards have been fixed, the standard attributed to the goods being sold must for some reason, such as the protection of consumers, be evidenced in some satisfactory way, by marking, by certificate or otherwise. It might possibly happen that legislation, by imposing onerous requirements as to these matters, could burden inter-State trade in breach of s. 92; but I am unable to find that, upon its face, the legislation here in question does so."
Barwick C.J., who dissented, expressed disagreement with the suggestion that the requirements of the legislation could be justified as regulatory, as well as with the other reason given by the majority. (at p16)

5. In Cantarella v. Egg Marketing Board (N.S.W.) [1972] HCA 16; (1972) 124 CLR 605 the Court was called on to consider a New South Wales regulation which prohibited the sale, offer or display for sale of any eggs which had been transported for a distance of over 300 miles in New South Wales unless the eggs had been candled and graded by a government marketing board. It was held by a majority of the Court (Windeyer, Walsh and Owen JJ., McTiernan and Menzies JJ. dissenting) that the regulation did not, in its application to eggs brought from Queensland to New South Wales for sale in the latter State, infringe s. 92. In that case no-one doubted the validity of Harper v. Victoria; the question was whether it was distinguishable. Menzies J. (with whom McTiernan J. expressed agreement) said (1972) 124 CLR, at p 611 that the regulation in question prohibited the sale of the eggs because of something, forming part of interstate trade, occuring in relation to the eggs, whereas the prohibition upheld in Harper v. Victoria was not conditioned upon something itself forming part of interstate trade. He accordingly regarded Harper v. Victoria as distinguishable. Windeyer J. held not only that the sale of the eggs was merely a sale in New South Wales but also that the legislation was regulatory (1972) 124 CLR, at pp 613-615 ; he expressly agreed (1972) 124 CLR, at p 614 with part of the passage from the judgment of Menzies J. in Harper v. Victoria (1966) 114 CLR, at p 378 which I have already cited. Owen J. said (1972) 124 CLR, at p 616 that: "the regulation can fairly be regarded as regulatory in character designed to ensure that eggs intended to be marketed in New South Wales accord with the standards of quality and the like prescribed by the regulations." (at p17)

6. Walsh J. said (1972) 124 CLR, at p 617 that counsel for the plaintiff did not challenge the correctness of the decision in Harper v. Victoria and that in those circumstances he proceeded upon the assumption that the decision of the majority in that case was correct. He accordingly held that the law operated on the domestic trade and commerce of a State (1972) 124 CLR, at p 618 but he further said (1972) 124 CLR, at pp 619-620 :
"The law is part of a set of regulations dealing with the standard and the qualities of eggs being sold in that domestic trade and what it does is to provide that when the facts that I have mentioned exist, the intending vendor of the eggs must take steps to have the eggs candled and graded and in some cases stamped with words describing their quality. In my opinion, such a law does not impose upon the activities of any of the plaintiffs, as those activities are described in the amended statement of claim, any burden or restriction from which the plaintiffs or any of them can claim protection by reason of s. 92." (at p17)

7. I shall assume that in the light of North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W. [1975] HCA 45; (1975) 134 CLR 559 , it should be held in the present case, notwithstanding Harper v. Victoria and Cantarella v. Egg Marketing Board (N.S.W.), that the sale by the appellant, as agent for Bartters, was an inseparable concomitant of Bartters' interstate trade. The question however remains whether s. 41D (1) of the Act is regulatory. The judgments of Menzies J. in Harper v. Victoria and of all the members of the majority of the Court in Cantarella v. Egg Marketing Board (N.S.W.) require that question to be answered in the affirmative, and the judgments of the minority in the latter case are in no way opposed to that conclusion. (at p17)

8. I have already indicated in Bartters Enterprises v. Todd [1978] HCA 36; (1978) 139 CLR 499, at p 510 my opinion that the difficulties inherent in s. 92 will be enhanced if the Court does not adhere to "doctrines that have been painstakingly evolved in a succession of careful judgments". Similarly I consider that where the Court has reached a decision on the question whether particular statutory restrictions are regulatory, and for that reason do not offend against s. 92, that decision should be followed, unless of course it appears contrary to principle. The question whether legislation is regulatory involves matters of degree, and, as Lord Porter said in The Commonwealth v. Bank of New South Wales [1949] HCA 47; (1949) 79 CLR 497, at p 639; (1950) AC 235, at p 310 in determining whether an enactment is regulatory or something more "there cannot fail to be differences of opinion". There seems to me no error of principle in the approach of Menzies J. in Harper v. Victoria or of the majority in Cantarella v. Egg Marketing Board (N.S.W.). The conclusion there reached on this point is quite consistent with that reached in North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W., where the legislation which was held not to be regulatory in effect prohibited the interstate trade in pasteurized milk. The Act now in question does not prohibit interstate trade in eggs; it controls the incidents of that trade and does so in the interests of public health and of affording protection to consumers. The regulation which the Act effects is not unreasonable and applies equally to interstate and to intrastate trade. It should be held, following Harper v. Victoria and Cantarella v. Egg Marketing Board (N.S.W.), that the provisions in question validly apply to a sale even if it was made in the course of, or was inseparably connected with, interstate trade. (at p18)

9. It seems to me, with all respect, quite irrelevant that Bartters are prepared voluntarily to test and grade their eggs in New South Wales. A regulatory law does not necessarily cease to be reasonable because a person subject to it offers to provide an alternative method of achieving the same result as that sought by the regulation. In any case, the method which Bartters adopted is not subject to official supervision and does not result in the eggs, when tested and graded, being marked or stamped. (at p18)

10. The legislation is not rendered invalid in its application to interstate trade by reason of the fact that a person who presents eggs under s. 41c is required to pay to the Board for the grading, testing, marking and stamping such fee or fees as may be fixed by the Board to defray the expenses incurred therfor (s. 41c (5)). In the present proceedings the Court is concerned with the effect of the Act, administered properly and in accordance with its terms, and not with any possible breaches of its provisions: cf. Cantarella v. Egg Marketing Board (N.S.W.). (1972) 124 CLR, at pp 617-618 , per Walsh J., and Buck v. Bavone [1976] HCA 24; (1976) 135 CLR 110, at p 119 . If the Board attempted to fix a fee which went beyond defraying expenses, its action would be open to challenge and the question would arise whether the provisions of s. 41c (8), which attempt to make the decision of the Board as to the method of estimating the fees final and conclusive, are invalid and severable so far as interstate trade is concerned. (at p19)

11. For these reasons the appellant was rightly convicted and the orders to review the convictions should be discharged. (at p19)

STEPHEN J. The substance of this case is whether a Victorian law which requires eggs sold by retail in Victoria to be tested, graded and marked for

grade by the Victorian Egg Marketing Board, which charges for doing that work, offends against s. 92 of the Constitution in its application to the sale of eggs in the course of interstate trade. (at p19)

2. The sales here in question form a part of the interstate trade of the present appellant's principals, a group of New South Wales egg producers trading as Bartters Enterprises ("Bartters"). It transports some of its eggs into Victoria where its agent, the appellant, disposes of them on its behalf by retail sales. That the law restricts Bartters' ability and that of its agent, the appellant, to do as they please in selling these interstate eggs in Victoria is clear. The question is whether the restrictions which the Victorian law imposes involve an impermissible burden upon interstate trade. (at p19)

3. Bartters is a very large producer of eggs in New South Wales. At its premises in that State it tests and grades all eggs which it produces. It is expressly authorized to do so by the Egg Marketing Board of New South Wales and thereby satisfies the inspection laws of that State in relation to all eggs which it sells in New South Wales. With eggs which are sold in Victoria New South Wales law has no concern but Bartters in fact applies to them the same testing and grading processes as it accords to eggs destined for the New South Wales market. However, if any of its eggs are to be sold by retail in Victoria the law of that State requires that they be tested and graded by the Board or its authorized agents at the producer's expense and that grade marks be placed on them. This involves Bartters in having its eggs candled and graded twice over and in the incurring of considerable expense, inconvenience and some delay before its eggs can lawfully reach the Victorian consumer, all of which the appellant relies upon in support of the contention that the Victoria law runs counter to s. 92. (at p19)

4. The Board contends that these requirements of the legislation which it administers, which apply to all eggs sold by retail in Victoria and are not especially aimed at eggs produced in other States, involve no more than permissible regulation, inoffensive to the freedom of interstate trade. It also relies upon a number of distinctions between its testing and grading processes and those which satisfy New South Wales law and points out that that law does not, in any event, compel Bartters to subject such of its eggs as are sold outside New South Wales to any testing or grading whatever. (at p20)

5. The terms of the legislation herein question, ss. 36 to 48 of the Marketing of Primary Products Act 1958 (Vict.), were described in detail in the judgment of the Chief Justice in Harper v. Victoria [1966] HCA 26; (1966) 114 CLR 361 and accordingly require no restatement here. The only subsequent amendment of any present significance is that made to s. 41D, whereby the reach of the law has, by Act No. 8965 of 1976, been somewhat extended so as to apply not only to the sale of eggs by retail but to the use of eggs in the preparation of meals or food for sale. My references to sale by retail must be understood, where appropriate, as extended in this way. (at p20)

6. As earlier mentioned, a result of this legislation is that the appellant may only lawfully sell its eggs by retail in Victoria if they have first been "graded and tested for quality and standard and marked or stamped" in accordance with the Act and regulations - s. 41D (1). The Act obliges the Victorian Egg Marketing Board to grade, test and mark or stamp all eggs presented to it and empowers it to estimate its expenditure in doing this work and to "determine and fix accordingly" the fees payable to it for those services. Quality grades of eggs are specified by the regulations, weight being a factor in quality grading; the regulations also provide for particular quality marks and require quality and weight classifications to be shown when eggs are displayed for retail sale. The Board may, pursuant to s. 41D (4), permit a producer to itself grade and test its eggs but, subject to that, it is only at the Board's floors and at those authorized by it that eggs may be so processed as to accord with the requirements of the legislation and be capable of being lawfully sold by retail in Victoria. (at p20)

7. The practical effect of the law upon Bartters is that, although its eggs, when they enter Victoria, are already graded and tested and so packed as to enable quality and weight to be accurately stated when they are displayed for sale, they must nevertheless, before retail sale, be presented to the Board for regrading and retesting and for marking and stamping, all at the appellant's cost. In the latter half of 1977 that cost was over 8 cents per dozen eggs, whereas Bartters could itself grade, test and pack its own eggs at its premises in New South Wales at considerably less than half that cost. (at p21)

8. Not only would compliance with the law involve Bartters in substantial expense; it has in the past found the Board's requirements as to the mode of packing of eggs to be inconvenient and commercially unsatisfactory and it has also complained of aspects of the Board's system of grading eggs. Some of these complaints have since been remedied but, cost apart, Bartters will still suffer considerable inconvenience and delay, and some loss of eggs due to breakage in the course of handling, if it is to comply with the law. In fact it has not done so: its eggs have been sold by retail in Victoria without regard to this law, hence the prosecution and conviction of its agent which has given rise to this appeal. (at p21)

9. In 1977 Bartters applied to the Board, pursuant to s. 41D (4), to be permitted to itself grade, test and mark or stamp its own eggs but permission to do this out of the State of Victoria at Bartters' New South Wales premises was, perhaps not surprisingly, refused. Bartters has not since made application to do this work at premises within Victoria, however it relies upon certain evidence to suggest that had it done so that request would also have been refused. There are four testing and grading floors in or near Melbourne operated by or authorized by the Board where eggs may be submitted; four or five others floors also exist in country districts. Some years ago the Board refused at least one Victorian applicant permission to establish in Victoria a new floor for the grading and testing of eggs imported from New South Wales; in fact these were to have been Bartters' eggs. More recently it has apparently sought to discourage both Victorian dealings in interstate eggs which have not complied with Victorian law and, in particular, the sale in Victoria of Bartters' New South Wales eggs. (at p21)

10. That there exists a tension between the constitutionally declared freedom of interstate trade and the need of governments to legislate in aid of what they perceive to be the public interest is obvious. On those occasions when this conflict has been resolved in favour of legislative power this has been attained in a variety of ways. A strict view has been taken of the requirement of interstateness as an element in the concept of interstate trade itself; a quite direct and legal, as distinct from merely consequential and economic, effect upon interstate trade has been demanded before validity is called in question. Perhaps more radical than either of these approaches has been the recognition that, despite the declared absoluteness of its freedom, interstate trade may validly be subjected to regulatory laws. Each one of these approaches, although quite distinct from the others, may on occasion be found in combination with another of them. In the present case there is no room for either of the first two, Bartters' retail trade in eggs in Victoria is indisputably interstate trade and the restrictions imposed upon that trade are direct and substantial. If the present legislation is to be upheld as valid it can only be by resort to the concept of permissible regulation as a substantial qualification of the freedom of interstate trade. (at p22)

11. That the absolute freedom of interstate trade of which s. 92 speaks must be subject to some such qualification is undoubted. The necessity for it appears most clearly in the case of those laws which impose restrictions which from their nature may be seen to be for the benefit of interstate trade and of those engaged in it. Thus, rules of the road for motor vehicles can scarcely be regarded as offending against s. 92 although applicable to interstate carriers as well as to those engaged only in intrastate trade. The process of reasoning which justifies such a law as this as valid, reconciling its apparent conflict with the absolute freedom which s. 92 guarantees, is a familiar one: since true freedom of interstate trade cannot be enjoyed in a state of anarchy, laws which subject the conduct of that trade to reasonable regulation may be seen to promote its freedom of enjoyment rather than to burden it. Rules of the road are, in our community of habitual travellers by road, especially easy to recognize as conforming to this analysis, they are essential to the enjoyment of free use of the roads by all, including those engaged in interstate trade. Other instances abound, their ease of recognition depending

upon one's degree of familiarity with the areas of activity to which they apply. (at p22)

12. However, many laws having a direct effect upon interstate trade will not conform to this narrow concept of permissible regulation since they have nothing to do with the promotion of the enjoyment, by those engaged in that trade, of the freedom which s. 92 guarantees. The extent to which they may nevertheless validly affect the freedom of interstate trade, being permitted that operation because they accord with some wider notion of permissible regulation, is a question upon which judicial views have to some extent differed in the past. The question arises quite directly for decision in this case, concerned as it is with a law which, because of its effect upon interstate trade, must fall foul of s. 92 unless, although not regulatory in the narrow sense described above, its impact upon interstate trade may nevertheless be regarded as involving no more than permissible regulation. (at p23)

13. Counsel for the appellant, in their attack upon the validity of the law, take as their test the dissenting judgment of the Chief Justice in Harper's Case [1966] HCA 26; (1966) 114 CLR 361 . In that case his Honour, dealing with the present legislation, described its effect upon the retail sale of interstate eggs as prohibitory unless the "services" of the Egg Board in grading, testing and marking or stamping were employed and paid for. It was the legislation's insistence that this work be undertaken by the Board at the expense of the owner that his Honour regarded as decisive of invalidity (1966) 114 CLR, at pp 370-371 . Having said (1966) 114 CLR, at p 374 that legislative control of trading and commercial activity must, to be valid, be such as to be compatible with freedom of interstate trade, to which s. 92 had given constitutional emphasis, his Honour continued (1966) 114 CLR, at p 375 :
"It is not enough that there are perceptible reasons for the enactment of the law valid enough in the eyes of a legislature pursuing some policy conceived by it to be for the public good or the general welfare. The basic nature of the permissible limitations on the trader's activities so far as inter-State trade and commerce is concerned must be the mutual accommodation of the rights and actions of those engaged in that trade and commerce so that each is free in respect of such trade and commerce, though none have licence."
and later said (1966) 114 CLR, at p 375 :
"But limitations on the activities of inter-State traders are not compatible with that freedom upon which the Constitution insists merely because they appear reasonable in the interests of the public as a whole or of the public regarded as consumers of goods, or as reasonable administrative expedients to ensure compliance with laws which might in their general provisions be thought to be no more than regulatory.
Whilst very conscious of the room for different views on such a question, I find myself quite unable to accept the proposition that the requirement that the inter-State importer of eggs must submit them to the Board for grading, testing, marking and stamping before he may sell them by retail however reasonable in the interests of consumers is compatible with the absolute freedom which s. 92 demands. That a fee quantified according to the Board's costs of performing these acts should also be payable is but an additional circumstance making such acceptance to my mind impossible." (at p23)

14. The appellant's primary contention is, then, that permissible regulation as it is understood in the context of s. 92 must be confined to those laws which, in their regulation of interstate trade, affect if only so that those who engage in it may the better enjoy the freedom which s. 92 guarantees; that is to say, to laws which ensure that interstate trade is not anarchic and that true freedom, not mere licence, prevails in that trade. (at p24)

15. In my view the category of laws which, for the purposes of s. 92, may be treated as instances of permissible regulation cannot be so confined. Neither the state of authority in this Court nor any satisfactory theory of the proper place of s. 92 in the Constitution will support such a limitation upon the nature of permissible regulation. (at p24)

16. It is a commonplace of the decided cases that laws concerned with, for example, public health may validly restrict the freedom of interstate trade so long as they do not do so unreasonably or in a discriminatory manner. Yet public health laws do not answer that narrow definition of valid regulatory laws for which the appellant contends. The authorities provide similar examples in areas of the law other than public health, but I instance it since it is peculiarly appropriate to the circumstances of the present case. (at p24)

17. It will be enough to refer to three recent decisions in this Court. In S.O.S. (Mowbray) Pty. Ltd. v. Mead (1972) 124 CLR 529 three members of the Court spoke of the protection of public health as a subject matter on which laws might validly be made notwithstanding that they had an adverse effect upon the freedom of interstate trade. The Chief Justice (1972) 124 CLR, at p 544 referred to regulatory laws "protecting the community from many hazards such as health, nutrition, inimical and fraudulent practices in trade and the like"; Windeyer J. (1972) 124 CLR, at p 574 spoke in similar terms of laws to promote the health of the public and reference to the matter also occurs in the judgment of Walsh J. (1972) 124 CLR, at p 596 . In North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W. (1975) 134 CLR, at p 581 the Chief Justice again spoke of "laws to ensure public health and honesty and fairness in commercial dealings" as examples of laws which the concept of freedom of trade and commerce did not deny Gibbs J. (1975) 134 CLR, at p 600 referred in a similar context to the need for the protection of the public against the contamination or pollution of the food there is question, milk. Mason J. said (1975) 134 CLR, at p 607 that a law which did no more than protect the community from hazards affecting health was regulatory in the relevant sense and he made specific reference to noxious foods. His Honour observed (1975) 134 CLR, at p 615 that there were many fields other than public health in which interstate trade might be regulated in the public interest in conformity with s. 92. Jacobs J. also referred to the question (1975) 134 CLR, at p 634 . In the recent case of Clark King & Co. Pty. Ltd. v. Australian Wheat Board [1978] HCA 34; (1978) 140 CLR 120 the Chief Justice once more referred to laws as to health, safety, fraud and restrictive practices as being, dependent on their terms, compatible with the freedom afforded by s. 92. (at p25)

18. The reason why public health has had such ready judicial acceptance as a proper area for valid legislative intervention, despite s. 92, is, perhaps, because with it is associated a relatively long history of legislative intervention in the past, the fruits of which have led to a general acceptance by the community of the need for such legislation. Whether by a conscious use of judicial notice or by some less conscious absorption of community acceptance, there has at all events been a quite general judicial recognition of such laws as ones which may validly bear upon and restrict interstate trade. (at p25)

19. The law in question in the present case is not simply a general public health measure; it has two distinct aspects, one relates to that area of public health concerned with the fixing and enforcement of standards for perishable foodstuffs, the other to an elementary form of consumer protection and fair dealing in trade, requiring fair weights and measures and accurate labelling as to weights and quantities. This latter aspect, no less than that of public health, possesses a long history of legislative intervention and accompanying public acceptance and, in terms of permissible regulation for the purposes of s. 92, can, I think, stand in no different position from public health. Indeed, in their particular application to foodstuffs, the history of each in English Law has been closely interwoven. As early as the thirteenth century the Assize of Bread and Ale, 51 Hen. III c. 1 (1266), prescribed varying qualities of bread and standard weights of loaf dependent upon the particular quality and also laid down general standards of weight for food and drink. Instances recur throughout the following centuries of laws concerning weights and measures and of presentments for the use of fraudulent weights and measures: Holdsworth, History of English Law, vol. II, pp. 222, 382, 390 and 467. Bread remained for long the especial concern of the legislature, as attested to by the numerous Acts of the eighteenth and early nineteenth centuries concerned not only with its price but also with its purity and freedom from adulteration. For at least the past hundred years legislation as to the purity of foodstuffs generally has been on the statute books: the Adulteration

of Food or Drink Act 1860 (U.K.) and its successors were followed by similar colonial legislation and in 1878 consolidating legislation introduced a comprehensive code of Imperial weights and measures, continuing the system established in 1824 by 5 Geo. IV c. 74. Throughout the present century all Australian States have legislated extensively upon food standards and weights and measures. (at p26)

20. It is not only by reference to the cases and to history that I have concluded that the present law is concerned with a topic which is a proper subject matter for permissible regulation, consistently with s. 92. Interstate trade and those engaged in it cannot in my view be treated in total isolation from the activities of the community as a whole. The existence of areas of anarchy, beyond the reach of the law, in a community is as injurious to that whole community, including the part of it which is concerned with interstate trade, as is such a state of anarchy if confined to interstate trade itself. Neither is, in my view, predicated by the existence in our Constitution of s. 92. It is well established that, consistently with s. 92, the guaranteed freedom of interstate trade must be qualified in the interests of those engaged in that trade, so that there may be a mutual accommodation of their rights and actions, each being free in respect of that trade though none has licence in t. It cannot be any less consistent with s. 92 that its guaranteed freedom should also be qualified in the interests of the community at large, of which community interstate traders form a part. Interstate trade must to that extent accommodate itself to the interests of the wider community, upon whose well-being that trade itself depends for its very existence. It was to no narrow neighbourhood or society of interstate traders that the words of Kitto J. were confined when he said, in Hughes and Vale Pty. Ltd. v. New South Wales (No.2) [1955] HCA 28; (1955) 93 CLR 127, at p 218 that regulatory laws were of that kind whereby the individual's latitude of conduct was circumscribed "in the interests of fitting him into a neighbourhood - a society", membership of which entailed acts and forebearances on the part of each in the interests of all. How the necessary accommodation of interests is to be arrived at in particular cases must depend upon the circumstances of each case. (at p26)

21. If permissible regulation is not to be confined to laws concerned only with ensuring that those engaged in interstate trade may better enjoy its freedom, are any limits to be placed upon the concept? For my part I would not regard those particular categories of laws which have been instanced in the reported cases as necessarily marking out the boundaries of the areas in which regulatory laws may validly affect the freedom of interstate trade. As Mason J. said in the North Eastern Dairy Case (1975) 134 CLR, at p 615 , there are "many other fields" apart from public health in which interstate trade may lawfully be regulated in the interests of the public. Jacobs J. said (1975) 134 CLR, at p 621 that
"the question whether by the operation of any impugned legislative or other act an act or event of trade, commerce, or intercourse among the States is in the particular circumstances not absolutely free is a question of fact and different answers to very similar questions may need to be given at different times and in different generations. For instance, the difference between Australia at war and Australia at peace may result in different answers to the question proposed. The degree to which the exigencies of modern industrial society may require the governments of our society to control or participate in the trade, commerce, and intercourse of that society may likewise require different answers to the question of fact to be given at different times and in different ages."
Because, as their Lordships observed in The Commonwealth v. Bank of New South Wales (1949) 79 CLR, at p 639; (1950) AC, at p 310 , the decision whether a restriction is regulatory or something more "will often be not so much legal as political, social or economic" it is not something to be laid down in advance and in vacuo but rather case by case and with regard to those considerations of which Jacobs J. has spoken. The boundaries of permissible regulation extend, in my view, at least as far as to include such traditional areas of legislative intervention as the protection of standards of public health by ensuring the purity and wholesomeness of foodstuffs and the prohibition of deceptive or fraudulent practices engaged in by traders to the detriment of the public: that it as far as I need go in the determination of this present appeal. (at p27)

22. For a law to be valid as permissible regulation for the purposes of s. 92 its effect upon interstate trade must be no more restrictive than is reasonably necessary in all the circumstances and if it is shown to discriminate against that trade it will forfeit its claim to be no more than regulatory. In any discussion of the application of these requirements to the present law reference must be made to certain passages from the judgments of the members of the majority in Harper's Case [1966] HCA 26; (1966) 114 CLR 361 , a decision of particular relevance since it dealt with the very legislation currently under challenge. (at p28)

23. The reasons for judgment of Menzies J. in Harper's Case (1966) 114 CLR, at pp 378-379 are particularly in point and I would, with respect, adopt them as my own. His Honour, speaking of the present legislation, said
"I do not regard s. 92 as denying full validity to what may be described as standard-fixing legislation of a general character which has no special features which burden interState trade. Nor do I think it would necessarily constitute an infringement of s. 92 were such legislation to require further that, upon the retail sale of goods for which standards have been fixed, the standard attributed to the goods being sold must for some reason, such as the protection of consumers, be evidenced in some satisfactory way, by marking, by certificate or otherwise. It might possibly happen that legislation, by imposing onerous requirements as to these matters, could burden inter-State trade in breach of s. 92; but I am unable to find that, upon its face, the legislation here in question does so. All it requires is that no eggs should be sold by retail unless they have been tested and graded and marked to show their standard. This testing, grading and marking must be done by the Board, a person authorized by the Board, or by a producer who holds the requisite permit from the Board. Of course, the testing, grading and marking of eggs as the Act requires must add to the cost of eggs for retail sale but this will be so whether the testing, grading and marking of eggs is done by a producer himself, by the Board, or by some other person." (at p28)

24. In that case Taylor J., who also upheld the validity of the legislation but did so in reliance upon the decision of Wragg v. New South Wales [1953] HCA 34; (1953) 88 CLR 353 , observed in passing (1966) 114 CLR, at p 378 that the fee charged by the Board for the "services" it rendered "would constitute an infringement of s. 92 if the fees were fixed in such a way that there was discrimination between the fees payable with respect to eggs produced in Victoria and those produced in other States and such discrimination operated adversely to persons presenting eggs of the latter character. No such questions, however, arise in the present case." (at p28)

25. Owen J. (1966) 114 CLR, at pp 382-383 also relied upon Wragg's Case but went on to say of an importer into Victoria of eggs that he "is not required to place them at the disposal of the Board. He may sell them wholesale, he may turn them into egg pulp, he may send them on to another State and he may sell them by retail, provided that in such last-mentioned case he first submits them to be graded and tested for quality and marked or stamped to indicate their grade and quality. To say that this last requirement infringes s. 92 seems to me to be a proposition that cannot be supported. It amounts to saying that a State law which has the effect of increasing the cost of selling goods by retail is invalid because by increasing that cost an importer of those goods from another State finds it less profitable or perhaps unprofitable to do so." There is, in my view, no element of discrimination present in this legislation, nor in the evidence adduced as to its administration so far as it relevantly affects the appellant. Nor can I regard as unreasonably restrictive of interstate trade a legislative requirement, in the case of a commodity such as eggs, that it should be made subject to the sort of impartial testing and grading which the present Act and regulations contemplate, processes which the legislature may well have concluded should not be entrusted to producers generally but only to a government agency and to those whom that agency authorizes and whose operations it can supervise. Eggs are so notoriously perishable a foodstuff that in their deteriorated state they have much enriched the English language in a number of picturesque phrases. There are, perhaps, few other foodstuffs which combine the qualities of being so dependent for their wholesomeness upon freshness, of being so prone to deterioration and the freshness of which at the time of purchase it is so difficult for the consumer to determine from outward appearance.

They are not merely perishable but are enigmatic to the ordinary shopper; nor is this quality confined to their state of freshness, it can be no easy matter to distinguish by eye alone between the various weight-related grades of egg. (at p29)

26. The appellant urges that the objects of this legislation might have been attained by other means, by punitive rather than preventive measures and that the present law is excessively restrictive because the protection of the public which it seeks to attain might have been achieved by those other means with less interference to Bartters' interstate trade. The law might, it is said, have been confined to merely punitive measures as, for instance, by the imposition of penalties upon those selling bad or underweight eggs, coupled, no doubt, with measures for the detection of such breaches and for the seizure of offending eggs. Because the form which the law in fact takes, employing preventative rather than punitive measures and accordingly insisting upon the testing and grading of all eggs by the Board or its agents before sale, imposes greater burdens upon those wishing to sell eggs to the public, it is said to be invalid so far as it affects interstate trade in eggs. (at p29)

27. To accede to this submission would be to relegate the power to regulate to a mere ability to punish for detected breach, in this instance depriving the legislature of the ability to ensure, by laws for the inspection and testing of foodstuffs before sale, that faulty products do not reach the public. Thus arbitrarily to confine the power of regulation to one particular mode, the punitive, because that mode involves a minimum of interference with the freedom of interstate trade, cannot, I think, be justified as some general rule necessarily predicated by the terms of s. 92. Nor should it be supported as applicable to the particular circumstances here in question. When the quality and freshness of perishable foodstuffs and their fair grading for weight and quality are in question, the particular means which a legislature may adopt to achieve the desired ends must lie largely in its hands. When its choice has been made and is seen to be neither discriminatory as against interstate trade nor to involve the outright prohibition of that trade, as it did in the Clark King Case [1978] HCA 34; (1978) 140 CLR 120 , but to involve a means which ensures perhaps the highest possible degree of protection for the buying public, it can but rarely be open to this Court to deny the propriety of that legislative choice. Any choice of means, as between the prevention of an evil at its source and the punishment of its manifestations, must involve the assessment of a wide range of factors. The outcome of that assessment, reflected in the legislature's choice, should generally prevail unless the material before the Court allows it to say that the legislature's choice is clearly unreasonable, a conclusion far more readily open to it when the effect of the choice upon interstate trade is its virtual prohibition. (at p30)

28. This leads me to the suggestion made in argument that quite precise rules govern this question of choice between means of attaining desired legislative objectives. It was said that where a law prohibited interstate trade its validity would depend upon it being the only reasonable method of regulation, whereas where no outright prohibition was in question the fact that the law was one of a number of reasonable alternative methods of regulation might suffice to uphold validity. (at p30)

29. In the Clark King Case it appeared to me to be appropriate, in light of the legislative and evidentiary context, to apply what their Lordships had said in the Banking Case (1949) 79 CLR, at p 641; (1950) AC, at p 311 where they referred to the valid prohibition of interstate trade with a view to State monopoly where that course was "the only practical and reasonable manner of regulation". However no neat formula, to be used for the resolution of different cases on quite different facts, can be extracted from their Lordships' words. If a law which bears upon interstate trade is nevertheless to be valid because regulatory the restrictions which it imposes must be no greater than are reasonably necessary in all the circumstances. The harsher the restrictions the more critically will the necessity be scrutinized and the greater will be the significance to be attached to the existence of other means of attaining the end in view which are, at the same time, less injurious to interstate trade. To say this is, perhaps, to do no more than to repeat, in different words, what I said in Clark King (1978) 140 CLR, at p 172 , when I observed that "validity will always involve questions of degree and of the relative reasonableness of such laws". Any attempt at greater elaboration of analysis than is afforded by the quite general standard of reasonableness in all the circumstances appears to me to be as unprofitable as it is unnecessary. (at p31)

30. Judged by that standard I find this law to be valid, and this very much for the reasons expressed by Menzies J. in Harper's Case. There is nothing in the judgments in later cases, especially in that of the Chief Justice in the North Eastern Dairy Case [1975] HCA 45; (1975) 134 CLR 559 in which I concurred, which appears to me to call for any different conclusion. In that case the factual situation was wholly different and that not only because, as Mason J. observed (1975) 134 CLR, at p 607 , the practical effect of the legislation was to prohibit interstate trade in milk and was discriminatory of that trade. (at p31)

31. The appellant makes much of the fact that its eggs are all tested and graded before leaving New South Wales. If it chooses in this way to ensure that it wastes no interstate freight on already faulty eggs, that is its concern. But it can scarcely complain that Victoria, having established an independent tresting and grading system, should not be prepared to accord recognition to testing and grading not only conducted by the producer itself but conducted out of the Board's own jurisdiction and not even subject to any necessary supervision by the government agencies of another State. While it is true that the appellant is authorized by New South Wales law to test and grade eggs sold in that State, that law is unconcerned with eggs which it may sell outside its home State; whatever testing and grading it carries out on eggs destined for Victorian markets is uncontrolled by any law and is no more than a voluntary act on its part. There is no evidence of uniformity of testing and grading criteria as between the Board's officers and the appellant's operatives who do that work in New South Wales: the processes no doubt involve some criteria which are to a degree subjective and thus differ from the objective scientific standards associated with the pasteurization of milk which was in question in the North Eastern Dairy Case. This, together with the physical impossibility of subjecting milk to pasteurization a second time, provides further grounds, were they needed, for distinguishing the decision in that case from the present appeal. (at p32)

32. Apart from all this, the appellant's eggs enter Victoria unmarked. In a system designed to ensure the grade and freshness of a perishable commodity, and in which consumers may come to rely upon marks or stamps as a sign of quality, the introduction into the marketplace of unmarked eggs is likely to produce confusion among both consumers and retailers. (at p32)

33. One further matter requires brief mention. The appellant relied upon the fact, already noted, that since the date of Harper's Case s. 41D (1) had been amended by now making it an offence not only to sell by retail eggs which have not been processed in accordance with the Act but also to use or cause the use of such eggs "in the preparation of any meal, or food," for sale or for supply otherwise than in a domestic setting. This amendment no doubt usefully blocks a loophole in the law but in my view it neither detracts from the two aspects of its general character which I have earlier described nor does it cast any new light upon the general question of the law's reasonableness. (at p32)

34. I regard the challenged law as a reasonable and non-discriminatory measure which legislates upon topics well recognized as proper subject matter for permissible regulation. I therefore conclude that it is proof against the present challenge to its validity. The order nisi should be discharged. (at p32)

Mason J. The Marketing of Primary Products (Egg Marketing) Act 1965 (Vict.) introduced into the Marketing of Primary Products Act (Vict.) ss. 36A, 41B, 41C and 41D. These provisions required all eggs, wherever produced, sold by retail in Victoria to be graded and tested for quality and standard and marked and stamped as prescribed, and required owners of eggs to present them to the Egg and Egg Pulp Marketing Board, now called the Victorian Egg Marketing Board ("the Board"), for grading, testing, marking and stamping. In Harper v. Victoria [1966] HCA 26; (1966) 114 CLR 361

the Court decided that the provisions did not infringe s. 92 of the Constitution. The ground taken for this conclusion by all members of the Court, other than Barwick C.J. who dissented, was, to quote the words of McTiernan J. (1966) 114 CLR, at p 377 :
"The section" (s. 41D) "operates after importation or the inter-State commerce has ended. When the obligation imposed by s. 41D to grade, test and mark the eggs arises the eggs are already committed to the intra-State retail trade of Victoria." (at p33)

2. Menzies J. took an additional ground to sustain the conclusion that the legislation was regulatory. His Honour said (1966) 114 CLR, at p 378 :
"I do not regard s. 92 as denying full validity to what may be described as standard-fixing legislation of a general character which has no special features which burden inter-State trade. Nor do I think it would necessarily constitute an infringement of s. 92 were such legislation to require further that, upon the retail sale of goods for which standards have been fixed, the standard attributed to the goods being sold must for some reason, such as the protection of consumers, be evidenced in some satisfactory way, by marking, by certificate or otherwise. It might possibly happen that legislation, by imposing onerous requirements as to these matters, could burden inter-State trade in breach of s. 92; but I am unable to find that, upon its face, the legislation here in question does so." (at p33)

3. As I read the judgments, McTiernan, Taylor and Owen JJ. did not express any opinion on this point. They confined themselves to the one ground which was common to the majority. Barwick C.J. emphatically rejected the proposition that the provisions were regulatory. He said (1966) 114 CLR, at p 375 :
"It is not enough that there are perceptible reasons for the enactment of the law valid enough in the eyes of a legislature pursuing some policy conceived by it to be for the public good or the general welfare. The basic nature of the permissible limitations on the trader's activities so far as inter-State trade and commerce is concerned must be the mutual accommodation of the rights and actions of those engaged in that trade and commerce so that each is free in respect of such trade and commerce, though none have licence."
Later, his Honour said:
"I find myself quite unable to accept the proposition that the requirement that the inter-State importer of eggs must submit them to the Board for grading, testing, marking and stamping before he may sell them by retail however reasonable in the interests of consumers is compatible with the absolute freedom which s. 92 demands. That a fee quantified according to the Board's costs of performing these acts should also be payable is but an additional circumstance making such acceptance to my mind impossible." (at p34)

4. It has been evident, at least since the delivery of judgment in North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W. [1975] HCA 45; (1975) 134 CLR 559 , that the ground which was common to each of the majority judgments in Harper v. Victoria can no longer be sustained. In the North Eastern Dairy Case the Court decided that the first sale made by the importer within the State after importation from another State formed part of the importer's interstate trade or was inseparably connected with it and was therefore protected by s. 92. All the members of the Court arrived at this conclusion though there was some difference in the reasoning which led to the result. It is neither necessary nor profitable to identify the different approaches then taken. It is quite-sufficient to say that the first sale by an importer within a State may be protected on the footing that it is part of, or that it is inseparably connected with, his interstate trade. (at p34)

5. Unless the ground taken by Menzies J. can be sustained, the decision in Harper v. Victoria can no longer stand. The question to be decided is whether the statutory provisions now under attack constitute a permissible regulation of interstate trade and commerce. Section 41D was amended in 1976; otherwise the provisions now under attack are those which were considered in Harper v. Victoria. (at p34)

6. The freedom which s. 92 guarantees is a qualified, not an absolute, freedom. This is because it has been generally agreed that s. 92 is designed to ensure freedom of trade "in a civilized society" or "within the society organized under and controlled by law", to use the words of Barwick C.J. in Samuels v. Readers' Digest Association Pty. Ltd. [1969] HCA 6; (1969) 120 CLR 1, at p 15 or within "the field of regulated conduct in an ordered society", to quote the remarks of Kitto J. in Hughes and Vale Pty. Ltd. v. New South Wales (No. 2) [1955] HCA 28; (1955) 93 CLR 127, at p 219 . But when we seek to identify the characteristics of the ordered society and the regulated conduct which s. 92 assumes, that general agreement gives way to difference of opinion. (at p34)

7. One view of the regulated conduct in an ordered society which the section presupposes is that which underlies the dissenting judgment of Barwick C.J. in Harper v. Victoria. There the Chief Justice said (1966) 114 CLR, at p 375 : "The basic nature of the permissible limitations on the trader's activities so far as inter-State trade and commerce is concerned must be the mutual accommodation of the rights and actions of those engaged in that trade and commerce." This statement may reflect the prevailing view of freedom or of regulated conduct in an ordered society in 1900. However, for my part I see no compelling reason why we should interpret s. 92 by reference to doctrines which were current at the end of the nineteenth century. As I said in the North Eastern Dairy Case (1975) 134 CLR, at p 615 :
"The freedom guaranteed by s. 92 is not a concept of freedom to be ascertained by reference to the doctrines of political economy which prevailed in 1900; it is a concept of freedom which should be related to a developing society and to its needs as they evolve from time to time. Section 92 finds its place in a Constitution which was intended to operate beyond the limits of then foreseeable time - it would be a serious mistake to read the guarantee or immunity which it offers as one which necessarily and rigidly reflects ideas accepted almost a century ago. Instead, the section should be seen as a provision whose operation may fluctuate as the community develops and as the need for new and different modes of regulation of trade and commerce become apparent."
In the same case Jacobs J. stated that a qualified construction of the section "has been forced on the Court by the sheer necessity of life in an organized society as that society exists and evolves" (1975) 134 CLR, at p 620 . His Honour went on to say (1975) 134 CLR, at p 621 :
"The degree to which the exigencies of modern industrial society may require the governments of our society to control or participate in the trade, commerce, and intercourse of that society may likewise require different answers to the question of fact to be given at different times and in different ages." (at p35)

8. It has been accepted that in the interpretation of the language of the Constitution it is legitimate to take account of any extension of the denotation of the words used which results from the development of new concepts (Lansell v. Lansell [1964] HCA 42; (1964) 110 CLR 353, at p 366). To this extent at least, it is incorrect to confine the application of the language of a constitutional provision by reference to the meaning which it had in 1900. But, quite apart from this principle of constitutional interpretation, we should recognize that the organized society which s. 92 assumes is not the society of 1900 but the Australian community as it evolves and develops from time to time. The frequently quoted observations of Lord Porter in the Banking Case (1949) 79 CLR, at pp 640-641; proceed upon this view of the section. (at p35)

9. If the concept of permissible regulation is limited to the mutual accommodation of the rights and actions of those engaged in interstate trade and commerce, then it would exclude many instances of the needs of necessary regulation which are common in Australia today. Permissible regulation would then be substantially confined to the prescription of conditions regulating the entitlement of persons to engage in interstate trade and to the elimination of deceptive and obnoxious practices on the part of those engaging in that trade. Regulation not involving the mutual accommodation of their rights and actions, even if it be designed to protect public health or otherwise protect the public from harm, would not be permissible. This interpretation of s. 92 is one which fails to take account of "the predominant public character" of s. 92 and gives emphasis to the incidental and consequential protection which the section affords to the rights of the individual to the detriment of that predominant public character (see Pilkington v. Frank Hammond Pty. Ltd. [1974] HCA 13; (1974) 131 CLR 124, at p 186). It is because the section has this predominant public character that it is to be readily understood as presupposing a society in which conduct is regulated in the interests of the community, rather than a society in which conduct is merely regulated in the interests of those engaged in trade (the North Eastern Dairy Case (1975) 134 CLR, at p 615). (at p36)

10. It has been generally accepted by members of this Court that legislation that prohibits trade in deleterious and dangerous goods or insists upon compliance with accepted standards of purity in relation to food and milk in the interests of public health and safety constitutes permissible regulation of interstate trade (S.O.S. (Mowbray) Pty. Ltd. v. Mead, per Barwick C.J. (1972) 124 CLR 529, at p 544 , per Windeyer J. (1972) 124 CLR, at p 578 , per Walsh J. (1972) 124 CLR, at p 596 ; the North Eastern Dairy Case, per Barwick C.J. (1975) 134 CLR, at p 581 , per Gibbs (1975) 134 CLR, at pp 600-601 , per Mason J. (1975) 134 CLR, at pp 607, 615 , and per Jacobs J. (1975) 134 CLR, at p 634). (at p36)

11. What is more, in Cantarella v. Egg Marketing Board (N.S.W.) [1972] HCA 16; (1972) 124 CLR 605, at p 614 Windeyer J. expressed his agreement with the observations of Menzies J. in Harper v. Victoria (1966) 114 CLR, at p 378 that standard-fixing legislation of the kind now in question falls within the field of permissible regulation. Owen J., in Cantarella v. Egg Marketing Board (N.S.W.) (1972) 124 CLR, at p 616 , thought that the regulation under attack in that case was regulatory because it was "designed to ensure that eggs . . . accord with the standards of quality and the like prescribed by the regulations". Walsh J. was of a similar opinion (1972) 124 CLR, at pp 619-620 . To the same effect were comments of Gibbs J. and Stephen J. in Perre v. Pollitt [1976] HCA 27; (1976) 135 CLR 139, at pp 151-152 . (at p37)

12. Menzies J. was correct when he stated in Harper v. Victoria that s. 92 does not deny validity to standard-fixing legislation "of a general character which has no special features which burden inter-State trade" (1966) 114 CLR, at p 378 . It is implicit in what his Honour then said that standard-fixing legislation, if it is not to contravene s. 92, should constitute a reasonable regulation of interstate trade. The court will be astute to ensure that legislation of this kind is not a mere device which operates so as to discriminate against interstate trade or to impose unfair or unreasonable burdens upon it. The Parliament or Executive Government of a State may from time to time consider that it is justified in protecting the interests of growers, manufacturers and traders in that State by insisting upon compliance with standards the effect of which is to impose unfair and unreasonable burdens on interstate trade. Protection of this kind is forbidden by s. 92, as the North Eastern Dairy Case [1975] HCA 45; (1975) 134 CLR 559 so clearly demonstrates. There, legislation which appeared on its face to protect public health in New South Wales by prohibiting the sale in New South Wales of pasteurized milk pasteurized in the State, in reality protected the New South Wales milk producers against competition from Victorian producers without advancing the interests of public health in New South Wales. (at p37)

13. As I observed in the North Eastern Dairy Case (1975) 134 CLR, at p 614 , the answer to the question whether particular legislation constitutes a reasonable regulation of interstate trade will depend upon a variety of factors. They will include the nature of the regulation sought to be imposed, the mischief which it is designed to remedy and the goal which it seeks to achieve, as well as the effect which the regulation has on the relevant interstate trade. It is for those who assert the validity of the legislation to establish that the regulation which it imposes is reasonable. However, in determining this question it is not for the court to conclude that the interests of the public would be better served by a method of regulation not selected by Parliament. In general, a mode of regulation selected by a Parliament as appropriate to the domestic or intrastate trade of a State will constitute a reasonable regulation of interstate trade unless it contains features which discriminate against interstate trade or subject it to particular disadvantages. Inevitably there will be cases like the North Eastern Dairy Case and McGraw-Hinds (Aust.) Pty. Ltd. v. Smith [1979] HCA 19; (1979) 144 CLR 633 in which the court is bound to hold that the particular method of regulation adopted by Parliament imposes an unfair or unreasonable burden on interstate trade because it is unnecessary for the protection of the public or for some other reason. Because it is less likely that the Commonwealth will seek to prefer growers, manufacturers and traders in one State over those in another State, it may be easier to sustain a Commonwealth-wide regulation of trade in a commodity than it is to sustain regulation within a State of the trade in that commodity. (at p38)

14. In general, legislation which permits interstate trade to go forward, albeit subject to compliance with standards and conditions affecting intrastate and interstate trade in like degree, will be acknowledged as a reasonable regulation of interstate trade: The same may be said of laws which prohibit or eliminate the interstate trade in dangerous or deleterious goods and commodities in order to protect public health and safety. But it is more difficult to sustain as a reasonable regulation of interstate trade marketing legislation which involves the entire acquisition of a crop or of a commodity and prohibits or eliminates interstate trade in that crop or commodity otherwise than with the marketing authority. In Clark King & Co. Pty. Ltd. v. Australian Wheat Board [1978] HCA 34; [1978] HCA 34; (1978) 140 CLR 120 Jacobs J. and I uphold the validity of the legislation which we considered to be the only practical and reasonable manner of regulating the trade (1978) 140 CLR, at pp 192-193 . (at p38)

15. Subject to one qualification to be mentioned later, I am satisfied that the legislation now in question is a reasonable regulation of the interstate trade in eggs. By requiring that eggs sold by retail in Victoria will be graded, tested, marked and stamped as prescribed the legislation insists upon compliance with standards of quality which will obviously protect and advance the interests of the public. The requirement is quite general in its operation, applying to interstate and intrastate trade alike, and has no special features which burden interstate trade. (at p38)

16. Section 41D, as amended in 1976, requires that eggs sold by retail in Victoria or used in the preparation of any meal or food for sale or used in the preparation of any meal or food to be supplied to any person pursuant or incidental to a non-domestic contract or arrangement shall be graded, tested, marked and stamped by a producer who has the permission of the Board pursuant to s. 41C (4) to grade, test, mark and stamp his eggs. This requirement will likewise, in my opinion, protect and advance the interests of the public. The restriction of this processing to the Board and to producers which it approves offers a greater measure of protection to the public than would be afforded by a system in which every producer is at liberty to grade, test, mark and stamp his own eggs, but is liable to conviction and penalty if he fails to observe the statutory requirements. (at p39)

17. It was argued that the statutory requirements impose an unfair burden on the interstate producer, and in particular, Bartters Enterprises, the New South Wales producer which supplies eggs to the appellant, because the Board's premises at which eggs may be processed are inconveniently situated and because the processing of eggs by the Board is less speedy and more costly than the processing of eggs by the interstate producer. Inconvenience which is the result of the producer's remote location cannot be attributed to the legislation. Inconvenience which arises from the lack of celerity in processing eggs presented to it presumably affects producers and traders generally. Likewise, it does not appear that the greater cost of having eggs processed by the Board is in any sense a disadvantage peculiar to interstate trade. (at p39)

18. I do not regard the statutory provisions as unreasonable because the operation of the Act, in its application to Bartters Enterprises, requires Bartters Enterprises to have its eggs graded, tested, marked and stamped in Victoria, notwithstanding that they have already been candled and graded by the producer in New South Wales pursuant to reg. 32A under the Marketing of Primary Products Act, 1927 (N.S.W.), as amended. For one thing, the producer is not required in New South Wales to mark and stamp his eggs. For another thing, it has not been established that the New South Wales requirements for candling and grading are precisely the same as those prescribed in Victoria or that there is no need for further testing after eggs have been transported over a long distance. (at p39)

19. Some attempt was made to suggest that the Board has improperly refused to grant permission to Bartters Enterprises to process their own eggs in New South Wales. This is not a matter which is presently relevant to the validity of the legislation. Whether the Board has exercised its statutory discretion under s.41C (4) correctly or incorrectly is not a matter for the Court to determine in these proceedings. (at p39)

20. The imposition upon every person presenting eggs to the Board for grading, testing, marking and stamping of a liability to pay "such fee or fees as may be fixed by the Board to defray the expenses incurred therefor" (s. 41C (5)) does not make the statutory regulation unreasonable. This provision limits the Board to fixing such fees as will entitle it to recoup its expenses, though of necessity the calculation of the fees is made by reference to an estimate of expenditure to be made by the Board (s. 41C (6)). Section 41C (5) may therefore be supported as a provision which entitles the Board to recover the cost of providing a service or facility. (at p40)

21. However, the matter is complicated by the presence of s. 41C (8) which makes the decision of the Board as to the method of estimating expenditure, including the costs, charges and expenses to be included therein, and as to fees final and conclusive. The effect of this provision, when read in conjunction with the earlier sub-sections, is to invest the Board with an uncontrolled power to fix fees. There may be a question as to the validity of s. 41C (8) - see Finemores Transport Pty. Ltd. v. New South Wales (1978) 139 CLR, at p 352 . But I do not find it necessary to determine this question in these proceedings. Section 41C (8) is clearly severable from the other provisions. (at p40)

22. For these reasons the appellant was rightly convicted and the orders to review the convictions should be discharged. (at p40)

MURPHY J. The appellant was found guilty of two offences under s. 41D of the Marketing of Primary Products Act 1958 (Vict.), as amended, of displaying for sale, and of causing to be sold by retail, eggs which had not been graded and tested for quality and standard and marked or stamped in accordance with the Act and regulations. The conduct which constituted the offences was part of trade and commerce among the States. The question is whether s. 41D is invalid or inapplicable (by reason of s. 3 of the **Acts Interpretation Act 1958** (Vict.) which confines legislation within constitutional limits) to the conduct of the appellant because of s. 92 of the Constitution. The Act is not in terms relevantly distinguishable from the legislation which was upheld in Harper v. Victoria [1966] HCA 26; (1966) 114 CLR 361 . (at p40)

2. Section 92 is concerned with freedom from customs duties and other discriminatory fiscal imposts (see Buck v. Bavone [1976] HCA 24; (1976) 135 CLR 110 and other cases in which I have expressed this view). The question whether s. 41D is invalid or inapplicable requires consideration of related sections in Pt 1 Div. 2 of the Act. The only fiscal impost is found in s. 41C (5) which requires that a fee or fees be paid to the Egg and Egg Pulp Marketing Board to defray its expenses in grading, testing, marking and stamping of the eggs. As there is no discrimination in the impost against trade and commerce among the States, either in the legislation or in its administration, s. 92 is not offended. (at p41)

3. The order nisi to review should be discharged. (at p41)

AICKIN J. Permewan Wright Consolidated Pty. Ltd. ("Permewan") was prosecuted at Springvale in the State of Victoria on an information laid by the respondent, an officer of the Victorian Egg Marketing Board ("the Board") upon a charge that it "did sell eggs by retail contrary to the provisions of the Marketing of Primary Products Act 1958 in that . . . it did sell by retail to one Trewhitt a quantity of eggs which had not been graded and tested for quality and standard and marked or stamped in accordance with the said Act and the Regulations made thereunder". A second information charged Permewan with displaying eggs for sale contrary to the Act and regulations. The magistrate convicted Permewan on both charges. Permewan applied to the Supreme Court of Victoria for an order nisi to review the decision of the magistrate and that application was granted on 8th December 1978. By an order made in this Court on 14th December 1978 the proceedings were removed into this Court pursuant to s. 40 of the Judiciary Act 1903 (Cth), as amended. (at p41)

2. The material facts now relevant are not in dispute. Thus it is not disputed that Permewan did sell or cause to be sold eggs which had not been graded and tested for quality and standard and marked or stamped by the Board pursuant to the Marketing of Primary Products Act 1958 (Vict.), as amended, ("the Act") and the regulations made thereunder, and that, in relation to the second offence of displaying eggs for sale by retail, the eggs so displayed had not been graded and tested for quality and standard and marked or stamped by the Board in accordance with the Act and the regulations. (at p41)

3. The eggs in question had been produced by hens owned and kept in New South Wales by a group of companies incorporated in New South Wales and trading as Bartters Enterprises. Bartters Enterprises had entered into an agreement dated 9th August 1978 with Permewan. By that agreement Bartters Enterprises appointed Permewan as its agent to sell eggs on its behalf, such eggs to be delivered from Hanwood in the State of New South Wales to various premises of Permewan in Victoria. The agreement provided that Bartters Enterprises should deliver eggs to Permewan in accordance with a schedule and that so many of such eggs as had not been sold within a period of twenty-one days after delivery should be reclaimed by Bartters Enterprises. The agreement set out the prices at which the eggs were to be sold and the amount of commission payable to Permewan on each dozen eggs sold. Permewan was to use its best endeavours to sell the eggs delivered to it at the prices stated and to account for amounts so received after deducting commission. The agreement provided that the eggs in question would be of grades, qualities and standards at least comparable with eggs available from the Board and should be "at least of the same freshness and wholesomeness as eggs available from the Victorian Egg Board from time to time". It was common ground that under this agreement property in the eggs remained in Bartters Enterprises until they were sold or agreed to be sold to Permewan's customers. For the purposes of the proceedings it was common ground that the eggs in question were in fact at least of the same freshness and wholesomeness as those available from the Board. (at p42)

4. It appeared that the eggs in question were "graded and tested for quality and standard" and "candled" at the premises of Bartters Enterprises in Hanwood. Bartters Enterprises held a licence from the relevant marketing board in New South Wales to grade and pack eggs for sale in a specified area in New South Wales and eggs to be dealt with in that way were required under the New South Wales legislation to be marked in a specified manner. At the same premises the eggs sent by Bartters Enterprises to Permewan were graded and tested for quality and standard in the same manner as those destined for sale in New South Wales but they were not marked or stamped in any way. (at p42)

5. It will be necessary to refer to the relevant provisions of the Act and to the regulations made thereunder. The general scheme of the Act is that the Governor in Council may by proclamation declare any product (an expression which is defined and includes eggs) "to be a product for the purposes of

this Act" (s.5). Under s. 7 (1) the Governor in Council may by proclamation declare that a "product" shall be "a commodity under and for the purposes of this Act". Section 8 provides that as soon as practicable after the application of the Act to a commodity the Governor in Council may by order appoint a marketing board in relation to that commodity and that such boards are to be bodies corporate. By s. 17 it is provided that where a product has been declared to be a commodity and a board has been appointed in relation thereto the Governor in Council may by proclamation provide and declare that:
". . . the commodity shall forthwith, . . . be divested from the producers of the commodity and become vested in and be the absolute property of the board as the owner thereof, and that upon any of the commodity coming into existence within a time specified in the same or a subsequent proclamation it shall by virtue of this Act become vested in and be the absolute property of the board as the owner thereof . . . " (at p43)

6. Section 17 (2) provides that on and from the date of the publication of the proclamation:
"(a) the commodity shall become the absolute property of the board freed and discharged from all mortgages charges liens pledges interests trusts contracts and encumbrances affecting the same; and
(b) the rights and interests of every person in the commodity shall thereupon be and be deemed to be converted into a claim for payment in accordance with this Act." (at p43)

7. Section 17 (3) provides:
"Nothing in this section and no proclamation under this section shall affect such portion of any commodity as is the subject of trade commerce or intercourse between the States or as is required by the producers thereof for the purposes of such trade commerce or intercourse or as is intended by the producers thereof to be used for such trade commerce or intercourse." (at p43)

8. Section 21 provides:

"(a) if a proclamation vesting the commodity in the board has been made then, save as otherwise prescribed, all the commodity so vested . . . shall be delivered by the producers thereof to the board or its authorized agent within such times at such places and in such manner as the board by public notice, or in a particular case in writing, directs or as are prescribed:

(b) . . .
(i) delivery of any of the commodity in relation to which a board has been

appointed may be tendered to the board by the producers thereof or by any person then entitled to sell or dispose thereof;

. . .
(c) every producer who, except in the course of trade commerce or

intercourse between the States and save as prescribed, sells or delivers any of the commodity to any person other than the board and every person (other than the board) who, save as prescribed, buys or receives any of the commodity from a producer shall be liable to a penalty of not more than $200 . . . ." (at p43)

9. Sections 36-48 make special provisions with respect to the Board. By s. 41A the Governor in Council is authorized to "make regulations for all or any purposes necessary or expedient for ensuring that eggs and egg products supplied and distributed to consumers in Victoria are of satisfactory grade quality and standard" and in addition with respect to the following specific matters:
"(2) In particular and without affecting the generality of the last preceding sub-section or section fifty-eight of this Act the Governor in Council may make regulations -
(a) generally for or with respect to the handling cleaning storing freezing packing processing treatment marketing and carriage of eggs and egg products by the Board or by any person;
(b) prescribing grades qualities and standards for eggs and egg products and names to indicate such grades qualities and standards;
(c) making all necessary or expedient provision for or in relation to the grading testing marking and stamping of eggs and egg products." (at p44)

10. Section 41B (1) provides as follows:
"All eggs and egg products sold by retail in Victoria shall be sold according to such grades qualities and standards as are prescribed and under such names as may be prescribed for such grades qualities and standards." (at p44)

11. Section 41C (1) provides as follows:
"Any person who owns or is entitled to sell or dispose of any eggs may present the same to the Board or a person authorized in that behalf by the Board at a place and in such manner as the Board by notice published in the Government Gazette directs for grading and testing and for marking and stamping so as to indicate the grade and quality." (at p44)

12. It is clear from the provisions already referred to that the only persons who could own or be entitled to sell or dispose of eggs would be those Victorian producers whose eggs were the subject of trade, commerce and intercourse between the States, or which were required or intended by the producers to be used in interstate trade and commerce, producers in other States who had brought or sent their eggs into Victoria, and those "small producers" who are excluded from the operation of the Act by s. 41E as owning not more than 40 hens. (at p44)

13. Section 41C (6) provides:
"The Board shall from time to time estimate the expenditure incurred by the Board with respect to the grading testing marking and stamping of all eggs delivered and presented to the Board under this Act and, subject to any regulations, shall determine and fix accordingly the fee or fees payable for the grading testing marking and stamping of eggs." (at p44)

14. Again it is to be observed that the only persons who would be obliged to pay a fee for grading, testing, marking and stamping of eggs would be those who owned or were entitled to dispose of eggs and who decided to present them to the Board for such grading testing marking and stamping. (at p45)

15. Section 41D (1), for which a new sub-section was substituted in 1976, reads as follows:

> "(1) Any person who -
> (a) sells or causes to be sold by retail;
> (b) uses or causes to be used in the preparation of any meal, or food,
>
> for sale; or
> (c) uses or causes to be used in the preparation of any meal or food to be supplied to any person pursuant to or incidental to any contract or arrangement, other than an arrangement of a domestic nature, whether or not the person to whom the meal or food is supplied is a party to that contract or arrangement -
> any eggs which have not been graded and tested for quality and standard and marked or stamped in accordance with this Act and the regulations -
>
> (i) by the Board or a person authorized by the Board; or
> (ii) by a producer who has the permission of the Board pursuant to
>
> sub-section (4) of section 41C -
> shall be guilty of an offence and liable, in respect of each offence to a penalty of not more than $200." (at p45)

16. This provision substantially extends the operation of the former s. 41D (1) which dealt only with sales by retail. The new sub-section applies to all persons who sell eggs by retail but must primarily, if not solely, apply to persons who bring into Victoria eggs produced in other States. This must follow from the fact that all eggs produced in Victoria immediately vest in the Board, the only exception being such Victorian eggs as are destined for interstate trade and thus not likely to be sold in Victoria for any of the purposes contemplated by the sub-section, and eggs from small producers which are exempted from s. 41D. Thus the sub-section operates only upon eggs brought into Victoria from other States for sale in Victoria, or for use in Victoria in any manner falling within the sub-section. It does not directly apply to sales by wholesale, other than to manufacturers who are however forbidden to use eggs not graded, tested and stamped by the Board. Theoretically eggs may be sold by wholesale but the retailers who may purchase them are prohibited from selling them unless they are graded etc. by the Board. (at p45)

17. In the result s. 41D appears to me to apply only to eggs imported from other States, or from other countries if that be a realistic possibility. (at p45)

18. The exception contained in s. 17 (3) which exempts from the vesting provision any commodity which is the subject of interstate trade or required or intended by the producers thereof for interstate trade applies only in respect of producers in Victoria who would otherwise be within the direct ambit of the compulsory acquisition provision. It is to be observed that there is no such exception in the case of the penal provisions of s. 41D. (at p46)

19. It is necessary also to examine the regualtions made under the Act. The present regulations came into operation after the date of the offences charged but are said not to be materially different from those in operation at the relevant time. The material provisions in the regulations are regs. 26, 27 and 30. Regulation 26 classifies eggs into three categories, first quality, second quality and useless eggs, as follows:

> "(a) 'First Quality' eggs which shall consist of eggs -
> (i) the shells of which are clean, uncracked, and free from stain, and
>
> which are not thin or misshapen; which when candled, are free from blood spots;
>
> (ii) the yolks of which are translucent or but faintly visible;
> (iii) the whites of which are translucent and firm;
> (iv) the air cells of which are not more than 0.5 cm in depth; and
> (v) which are each 45 grams or more in weight.
> (b) 'Second Quality' eggs, which shall consist of eggs which do not
>
> conform to all First Quality standards in that -
>
> (i) they are less than 45 grams in weight;
> (ii) they have an air cell size in excess of 0.5 cm;
> (iii) they are cracked, but not leaking;
> (iv) the shells are stained, dirty, thin, rough or misshapen; or
> (v) when candled the yolk is off centre, free or prominent or the white is
>
> not firm;
>
> but when candled are free from blood and meat spots.
> (c) 'Useless' eggs which shall consist of eggs which are not first
>
> quality or second quality. Useless eggs shall not be used for human consumption." (at p46)

20. Regulation 27 provides that first quality eggs are to be divided into five weight categories, namely those of minimum weights of 65 grams, 60, 55, 50 and 45 grams. Second quality eggs are defined in a manner which is not material for present purposes. Regulation 29 prohibits the use of a mark prescribed in reg. 30, in respect to first quality eggs, by any person without the prior permission of the Board. Regulation 30 prescribes as follows:
"(1) (a) First Quality eggs shall be marked with a blue mark which shall be in the shape of a circle.
(b) Inside the circle there may be placed such symbols being figures and/or letters of the alphabet, as the Board may determine for the purpose of denoting to the Board the date on which, place at which, and person by whom such eggs have been graded or to designate the weight category of the egg.

(2) Second Quality eggs shall be marked with a red mark.
(3) Useless eggs shall be marked with a green mark." (at p47)

21. It may be observed that reg. 30 does not require the marking of eggs or stamping them in a manner which will reveal to the customer, rather than to the Board, the date on which and the place at which the eggs have been graded, nor the date before which they should be consumed. The particular sub-regulation is not easy to construe in relation to the final phrase but on the whole the probable intention is that the words "the Board may determine" also govern the phrase "to designate the weight category of the egg" but whether in a manner to reveal that information to the Board or to the customer as well is by no means clear. (at p47)

22. We were asked by counsel for Permewan to re-examine the decision in Harper v. Victoria [1966] HCA 26; (1966) 114 CLR 361 in the light of subsequent cases and in the light of the change in the form of the legislation. At the time when Harper's Case was decided the provisions of s. 41D (1) applied only to sale of eggs by retail and thus a market remained for eggs to be dispatched from other States into Victoria and sold in the course of interstate trade to restaurants and manufacturers but those avenues of trade are now affected by the operation of the Act because it prohibits the use of eggs which have not been graded and tested by the Board by restaurants and food manufacturers. (at p47)

23. The first critical question for consideration is whether the present case is governed by the decision in Harper's Case. I am unable to see any sound basis for regarding the change in the legislation, or the relatively minor differences in the facts as a basis for distinguishing Harper's Case except perhaps on the view adopted by Owen J. (at p47)

24. That however does not dispose of the case. The submission was that Harper's Case was contrary to established principle and had been overtaken by subsequent decisions which showed it to be no longer authoritative. Each of these factors would be sufficient to warrant its re-examination, and, if the contentions were accepted by the Court, its being overruled in accordance with the matters to which I referred in Queensland v. The Commonwealth [1977] HCA 60; (1977) 139 CLR 585 . The second critical question therefore is whether Harper's Case should be overruled. (at p47)

25. The most convenient course to follow is to begin with an analysis of Harper's Case and the bases upon which those members of the Court who comprised the majority (McTiernan, Taylor, Menzies and Owen JJ.) reached the conclusion that the plaintiff in that case was not protected by s. 92. The case was decided on demurrer and not much by way of factual background was available. (at p48)

26. In Harper's Case the material facts were that Harper, who was a retailer of eggs, imported them from New South Wales into Victoria and there sold them by retail without submitting them for grading and testing in accordance with the Act. He commenced proceedings against the State of Victoria seeking declarations that the Act in its then form was invalid on the grounds that its provisions constituted an infringement of s. 92 and imposed a duty of excise, and a declaration that the Act in so far as it required the plaintiff to submit his eggs for grading, testing, marking or stamping before selling them by retail did not apply to his retail sales of eggs which he had imported from New South Wales for sale in Victoria. To this statement of claim the State of Victoria demurred. The demurrer was upheld by McTiernan, Taylor, Menzies and Owen JJ., Barwick C.J. dissenting. McTiernan J. (1966) 114 CLR, at p 377 said that the sections did not directly interfere with the interstate commerce of poultry farmers in New South Wales and that the Act operated after importation or interstate commerce had ended. He said that when the obligation imposed by the Act arose the eggs were already committed to intrastate retail trade in Victoria and that the legislation operated at that stage and not earlier and thus did not restrict the plaintiff's trade "as at the frontier". He regarded the matter as determined by the terms of the judgment of Dixon J. in Wragg v. New South Wales [1953] HCA 34; (1953) 88 CLR 353 . (at p48)

27. Taylor J. also regarded the case as clearly covered by Wragg's Case (1966) 114 CLR, at pp 377-378 and said that it was plainly distinguishable from Fish Board v. Paradiso [1956] HCA 60; (1956) 95 CLR 443 in which case he had said that the Queensland law interfered with the performance of an interstate contract calling for the delivery of goods from the vendor in one State to the purchaser in another. It will be necessary for me to return to Fish Board v. Paradiso at a later stage but it is plain that Taylor J. regarded Harper's trade as purely intrastate trade and therefore beyond the reach of s. 92 and it was for this purpose that he relied upon Wragg's Case where it was held that the sale there in question was a sale in the course of intrastate commerce. (at p49)

28. Menzies J. (1966) 114 CLR, at pp 378-379 said that he did not regard s. 92 as preventing "standard fixing" legislation which required that goods should bear some indication of the relevant standard to which they belonged and that the additional cost of having the eggs tested graded and marked was not an unlawful burden. Owen J. (1966) 114 CLR, at p 382 said that the case was answered by Wragg's Case and that, although the Victorian law might indirectly result in some prejudice to the plaintiff's interstate trade of importing eggs by affecting the price which he could pay to the original supplier, the retail sale of eggs brought from New South Wales was not part of the plaintiff's interstate trade. He said that it was not because Harper was an importer of the eggs that he was required to comply with the law; he was so required because he wished to conduct an intrastate business of selling eggs by retail. Owen J. regarded Fish Board v. Paradiso as distinguishable because the importer of eggs into Victoria from another State was not required to place them at the disposal of the Egg Board. He said (1966) 114 CLR, at p 383 "he may sell them wholesale, he may turn them into egg pulp, he may send them on to another State and he may sell them by retail, provided that in the last-mentioned case he first submits them to be graded and tested for quality and marked or stamped to indicate their grade and quality". Those observations would have only very limited application under the present Act because the purchaser on the wholesale sale can sell them by retail, use them in manufacture, or in a restaurant, only if he first submits them to the Board. If the owner turns them into egg pulp they are immediately diverted from him and vested in the Board under s. 21 because by s. 45 (1) egg pulp is itself a "commodity". Barwick C.J. dissented because he regarded the retail sale of eggs by the plaintiff as part of his interstate trade. (at p49)

29. Thus three of the four members of the Court comprising the majority characterized the plaintiff's sale of imported eggs in Victoria as being no more than an intrastate sale made after interstate trade and commerce in the eggs had come to an end. Menzies J. took a somewhat different view in that he did not regard the legislation as imposing an unlawful burden on interstate trade, evidently recognizing that the retail sale in Victoria by the importer of the eggs was part of his interstate trade. Accordingly he said that legislation which fixed standards with which goods placed on the market must comply was not a "burden" on the interstate. (at p50)

30. Harper's Case [1966] HCA 26; (1966) 114 CLR 361 was discussed in S.O.S. (Mowbray) Pty. Ltd. v. Mead (1972) 124 CLR 529 In that case the appellant company carried on the business of the retail sale of foodstuffs in supermarkets in Tasmania. In one of such supermarkets it sold packets of margarine which had been manufactured by Marrickville Holdings Ltd. in Sydney. They formed part of an order for such margarine placed by the defendant with Marrickville Holdings Ltd. The written order had been handed by the managing director of the appellant in Tasmania to an employee of Marrickville Holdings Ltd. who took the order to Sydney where it was accepted by Marrickville Holdings Ltd. To comply with that order, the margarine was manufactured in New South Wales and loaded into a refrigerated van belonging to a carrier. The carrier caused the van to be loaded on a ship in

Sydney for shipment to Hobart and there unloaded. The van was then driven by the carrier directly to Launceston where its contents were placed on display for sale in the supermarket and there sold to a purchaser. The precise form of the written order does not appear from the report but it is plain from what is said in the judgments that the order required the delivery of the margarine by the New South Wales manufacturer for carriage to the purchaser in Tasmania. The Dairy Produce Act 1969 (Tas.) provided that no person should within Tasmania manufacture or sell cooking margarine to which there had been added any "prohibited colouring substance" or "prohibited flavouring substance". Cooking margarine was defined, as were the prohibited colouring substances and the prohibited flavouring substances. It was not disputed that the margarine in question did contain those prohibited substances nor that the margarine so sold fell within the statutory definition, and that the prohibited substances had been added in the ordinary course of the manufacture of the margarine. The appellant was prosecuted for contravening the prohibition on sale and convicted by the magistrate. In this Court McTiernan, Menzies, Windeyer and Gibbs JJ. upheld the conviction, Barwick C.J., Owen and Walsh JJ. dissenting. Again I consider first the majority judgments. McTiernan J. relied on Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd. [1939] HCA 28; (1939) 62 CLR 116 and examined the terms of the legislation there dealt with. He concluded that none of the provisions in the Tasmanian Act could be regarded as simple legislative prohibitions in that they did not have the effect of precluding persons from importing cooking margarine as such but only margarine which contravened the section. He therefore classified the legislation as being regulatory only in that it controlled the composition of the commodity. I pause at this point to observe that in North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W. [1975] HCA 45; (1975) 134 CLR 559 the decision in Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd. was overruled and accordingly this aspect of the reasons for judgment of McTiernan J. in the Mowbray Case can no longer be sustained. (at p51)

31. Menzies J. after examining the Privy Council decisions said (1972) 124 CLR, at p 561 that: "nothing in any of the decisions of the Privy Council upon s. 92 supports the appellant's central proposition that the sales which constituted the offences here were in the course of inter-State trade." (at p51)

32. He then reviewed many of the authorities on s. 92 but it is sufficient for present purposes to examine the basis for his ultimate conclusion. After his discussion of some of the authorities he concluded (1972) 124 CLR, at pp 567, 572 that they established that the sale which constituted the offence was not part of the interstate trade of the appellant and that the particular prohibition of an act of intrastate trade was not in contravention of s. 92 because a detrimental effect upon interstate trade was not within the direct operation of the law. (at p51)

33. After referring to Fish Board v. Paradiso [1956] HCA 60; (1956) 95 CLR 443 he said (1972) 124 CLR, at p 566 :
"The terms of the judgment flatly contradict the proposition that a general prohibition of the retail sale of a commodity in a State cannot, by reason of s. 92, apply to the sale of goods imported from another State. Rather than supporting the appellant's case, Fish Board v. Paradiso makes untenable two principal prpositions upon which it was based - (1) that the sale of the margarine was not an intra-State transaction, and (2) that a prohibition of retail sale in a State simpliciter cannot constitutionally apply to goods imported from another State for such sale."
With due respect to his Honour I am unable to agree that is a correct analysis of Fish Board v. Paradiso and, even if it were so, it is a proposition which cannot stand in the light of the decision of the Full Court in the North Eastern Dairy Case. In dealing with Harper's Case his Honour regarded it as applying in Wragg's Case and quoted from the judgment of McTiernan J. to the effect that the legislation operated after importation, that is after intrastate commerce had ended. He referred to the fact that Owen J. had distinguished Fish Board v. Paradiso. His Honour then dealt with O'Sullivan v. Miracle Foods (S.A.) Pty. Ltd. [1966] HCA 64; (1966) 115 CLR 177 and said that it was unthinkable that Taylor J. could have departed from Wragg's Case without referring expressly to it, and that in the joint judgment of Taylor and Owen JJ. they regarded the legislation as imposing a burden on the importation of margarine into the State and a burden which could not be justified as a provision concerned with public health. (at p52)

34. Windeyer J. said that the mere importation of goods which may not be used in a particular State was not necessarily forbidden by s. 92. He concluded that the prohibitions were regulatory in nature as they related only to labelling and to the colouring and flavouring of the margarine and regarded Fish Board v. Paradiso as presenting no analogy. (at p52)

35. Gibbs J. took the view that there was no interstate element in the sales at all and that the sales formed part of the appellant's trade in Tasmania. He said that the practical effect might have been to put an end to the appellant's interstate trade in margarine, but that the legal effect of the legislation was different and that the appellant was still entitled to import the margarine though not to sell it. He further said that the possession by the appellant of the margarine in Launceston might be described as an "inseparable concomitant or consequence of the interstate transaction", but the sale by the appellant of the margarine could not be so described. He distinguished O'Sullivan's Case [1966] HCA 64; (1966) 115 CLR 177 on the ground that it made it an offence for an importer to have the imported margarine in his possession but that, if it could not be distinguished in that way, he regarded it as contrary to Wragg's Case and Grannall v. Marrickville Margarine Pty. Ltd. Menzies J. and Gibbs J. both referred with approval to the decision in Harper's Case. (at p52)

36. In the Mowbray Case Barwick C.J., Owen and Walsh JJ. dissented but for the moment I defer an examination of their reasoning. (at p52)

37. The next case in the series after Harper's Case [1966] HCA 26; (1966) 114 CLR 361 was Cantarella v. Egg Marketing Board (N.S.W.) [1972] HCA 16; (1972) 124 CLR 605 . It was argued in November 1971 and judgment was delivered on 29th February 1972, the same day as the judgment in the Mowbray Case (1972) 124 CLR 529 . The case concerned legislation in New South Wales dealing with marketing boards but which was not entirely on all fours with that in Harper's Case. The relevant legislation prohibited the sale of eggs in New South Wales which had been transported from a distance of over three hundred miles in New South Wales unless the eggs had been candled and graded by a government marketing board. It was held by majority (Windeyer, Owen and Walsh JJ., McTiernan and Menzies JJ. dissenting) that the legislation did not infringe s. 92 in its application to eggs brought from Queensland for sale in New South Wales. (at p53)

38. McTiernan J. and Menzies J. distinguished Harper's Case and held the legislation to be invalid as contravening s. 92 in its application to the plaintiff. Menzies J., with whom McTiernan J. agreed, said that it was not necessary to re-examine the matters covered in S.O.S. (Mowbray) Pty. Ltd. v. Mead and that the case related merely to the application of established principles to a novel set of facts. He regarded Harper's Case as distinguishable. He said that the law operated by reason of the carriage of the goods from Queensland to Sydney which was part of interstate transport of eggs. He said (1972) 124 CLR, at p 611 :
"In my opinion s. 92 denies such an operation in the New South Wales law, notwithstanding that it is within the operation of the law that any eggs transported for three hundred miles in New South Wales, otherwise than in the course of inter-State trade, shall not be sold until the stipulated requirements have been fulfilled. The generality of the law cannot save so much of its operation as forbids sales because eggs have been carried for three hundred miles or more in New South Wales as part of their carriage from Queensland to Sydney. A law which in terms prohibited the sale of eggs because of their inter-State carriage, or part of it, would obviously be invalid; in a case where such a prohibition is but part of the operation of a more general law, that prohibition cannot, I think, stand with s. 92." (at p53)

39. The majority of the Court, Windeyer, Owen and Walsh JJ. held that the legislation did not infringe s. 92. Windeyer J. said (1972) 124 CLR, at pp

613-614
"In short, my view of this case is that the carriage of eggs from Queensland to Sydney is inter-State commerce: but the selling of eggs in Sydney wherever they came from is merely a sale of goods in New South Wales, and regulated by the law of New South Wales concerning the sale of goods, the inspection of premises and of goods for sale, the opening and closing hours of shops and other such matters, and in respect of eggs the grading of eggs."
He further said (1972) 124 CLR, at p 614 :
"For the reasons I have given the regulation in question does not, as I see it, put any impediment in the way of the importation of eggs from Queensland or in any other manner operate to contravene s. 92 of the Constitution. The provisions that eggs must be inspected and graded after a lengthy journey, are it seems to me, directed to ensuring that eggs offered for sale are described by reference to prescribed standards. They cannot be said to be 'directed agains inter-State trade and commerce'". (at p54)

40. He then said that he agreed with the opinion expressed by Menzies J. in Harper's Case that s. 92 did not deny full validity to what may be described as "standard fixing legislation of a general character", and further concluded that the legislation did no more than create some indirect or consequential impediment. As an alternative reason he said (1972) 124 CLR, at p 615 that the legislation was regulatory in the sense that that expression was used in the The Commonwealth v. Bank of New South Wales (1949) 79 CLR, at p 642; (1950) AC, at p 213 . (at p54)

41. Owen J. (1972) 124 CLR, at p 616 regarded the legislation as "regulatory in character designed to ensure that eggs intended to be marketed in New South Wales accord with the standards of quality and the like prescribed by the regulations". (at p54)

42. Walsh J. said that the correctness of Harper's Case had not been challenged and that he therefore proceeded upon the assumption that the decision of the majority in that case was correct. He said (1972) 124 CLR, at p 618 :
"In the course of the activities alleged in this case in the amended statement of claim, there is not any transaction, prior to those to which the regulation relates, which is itself a transaction in the course of inter-State trade, consisting of a sale of eggs in one State for delivery in another State. But even if there were such a prior transaction, that would not matter. Again, if there had been an inter-State journey by which the eggs were transported from one State to another State, that would not matter. The law would be regarded as one which in its direct operation fell only upon intra-State trade and commerce and which did not impose any relevant burden or restriction, either upon any earlier transaction in the course of inter-State trade in the eggs, or upon any inter-State journey upon which they had in fact been carried. What I have just stated seems to me to be the effect of the decision in Harper's Case."
He said also (1972) 124 CLR, at p 619 :
"It should be observed that the third plaintiff, who produces eggs in Queensland, does not sell them whilst they are still in Queensland. He sells them through the agency of the first and the second plaintiffs and at the time of the sale they have been transported by or on behalf of the third plaintiff into New South Wales. Thus there is no inter-State sale of the eggs. This case concerns a man who brings his eggs into New South Wales and then sells them in that State. That sale of them by him is not an inter-State transaction, but is a sale of eggs which are in New South Wales to a purchaser in New South Wales who is buying them to sell them again in New South Wales." (at p55)

43. On the same page he said:
"The sale of the eggs in New South Wales is not prohibited by the regulation. But it is made subject to the condition that the eggs must have been candled and graded as therein provided. Such a sale takes place after the journey has been completed and it forms part of the domestic trade of the State." (at p55)

44. It will thus be seen that the reasons given by the majority are not identical but both Windeyer J. and Walsh J. expressly concluded that the sale of the eggs whether in Queensland or in New South Wales was not part of interstate trade but was a purely intrasate transaction. Owen J. treated the legislation as merely regulatory. Windeyer J. appears, if I may say so with respect, to have reverted (1972) 124 CLR, at p 614 to an old and now discredited test of the application of s. 92 when he said "they (i.e. the regulations) cannot be said to be 'directed against inter-State trade and commerce'" though he also said that he regarded the legislation as "regulatory". In the circumstances it is difficult to attribute any single ratio to the majority of the Court. (at p55)

45. In North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W. [1975] HCA 45; (1975) 134 CLR 559 the general operation of s. 92, upon the sale of goods which had been moved from one State to another by the owner thereof for sale in the latter State, was considered. The legislation there in question was the Pure Food Act, 1908 (N.S.W.) which authorized the making of regulations "for securing the wholesomeness, cleanliness, freedom from contamination, and adulteration of any food". A regulation was made providing "no person shall supply or sell pasteurised milk for human consumption or use by man in New South Wales that has not been pasteurised by a holder of a certificate of registration issued under the provisions of the Dairy Industry Authority Act, 1970 that authorizes that holder to carry on the activity of pasteurising milk." (at p55)

46. The appellant in that case was the owner of a milk processing plant in Victoria which distributed the milk and milk products from a depot in Wodonga in Victoria to persons in Albury in New South Wales, using for that purpose its own employees and vehicles which came from Wodonga. It also made deliveries to shopkeepers in Albury who acted as its agents under written agreements for the distribution and sale of its products. It was registered as a milk vendor in New South Wales conditionally upon the milk which it sold being obtained from registered pasteurizers in New South Wales. It was held by Barwick C.J., Gibbs, Stephen, Mason and Jacobs JJ., McTiernan J. dissenting, that the statutory provisions and the regulations so far as they applied to the activities of the owner of the milk and its agents, and the conditions attached to the certificates of registration as a milk vendor, were contrary to s. 92, and that Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd. [1939] HCA 28; (1939) 62 CLR 116 should be overruled. (at p56)

47. The judgments again review many of the earlier decisions and I shall not attempt to repeat those analyses. It is necessary to examine the reasons of each of the members of the majority, and some of the earlier judgments upon which they rely and upon which I have not so far made any comment. Barwick C.J. pointed out that if the Act and the Regulations were valid then the treated milk belonging to the plaintiff vested in the Authority the moment it crossed the border and, if the Authority were to choose to accept it, which apparently it was not prepared to do, the plaintiff would have lost all control over it and would have received only such price as the Authority might have fixed. If however the Authority declined to accept the milk the plaintiff, though it had lost all property in it, might have been permitted to dispose of the milk, subject to a written direction by the Authority, in a manner other than for human consumption or manufacture of dairy products. Moreover if the legislation did not operate to expropriate the plaintiff's milk, s. 35 would have prevented the sale of the milk to its customers either directly by the plaintiff itself or through its agents. He observed that it had been conceded that pasteurized milk could not be again pasteurized without damage, though as I read his judgment, that fact played no part in his reasoning. The Chief Justice said (1975) 134 CLR, at pp 577-578 :

"There can be no doubt whatever, in my opinion, that the transport of the milk and milk products from Victoria to New South Wales for sale in New South Wales is part of the first plaintiff's interstate trade and commerce. It is quite clear that when the milk and milk products enter New South Wales they are committed to interstate trade and commerce. Further, in my opinion, the first plaintiff's operation of interstate trade and commerce is not complete until the milk and milk products so introduced into New South Wales have been sold by it or on its behalf. It follows, in my opinion, that the activities of the second plaintiff (the agent) as I have described them form part of the first plaintiff's interstate trade in the treated milk and milk products. But, in any case, to forbid the agent to sell the first plaintiff's milk and milk products at least places a burden upon the first plaintiff's interstate trade. Accordingly, if s. 92 protects the first plaintiff's interstate trade in such milk and milk products, it will protect the activities of the second plaintiff in its handling of such milk and milk products as agent of the first plaintiff up to and including the sale and delivery of that milk and those milk products on behalf of the first plaintiff.

. . .
The Act thus operates of its own force upon the plaintiff's activity in

bringing his milk into New South Wales from Victoria and in consequently possessing it in New South Wales with a view to its sale in that State. Further the expropriation of the milk and milk products so soon as introduced into New South Wales is clearly for the purpose of preventing their sale and supply in the ordinary course in New South Wales as milk or milk products for human use and consumption."
He further said (1975) 134 CLR, at pp 578-579 :
"No doubt one of the purposes of the Act as a whole is to secure the wholesomeness and freedom from contamination of milk for human consumption and use. But the possession and overall detailed control of the commodity and of those who produce and handle it is not the only practicable way of securing that purpose. So far as intrastate activities are concerned, the provisions of the Act are within the competence of the State, whether or not less stringent or less comprehensive measures could secure the public against an unwholesome and contaminated commodity. Other considerations arise, however, in relation to interstate trade in milk and milk products. In that case, measures to ensure wholesomeness and freedom from contamination must be reasonable and no more onerous in their impact on interstate trade than may be regarded as reasonably necessary to achieve that purpose. It cannot properly be said, in my opinion, that expropriation of wholesome and uncontaminated milk or a prohibition on its sale are reasonably necessary to ensure that what is sold is wholesome and uncontaminated.
There can be no doubt whatsoever, in my view, that the movement of the first plaintiff's milk and milk products from Victoria to New South Wales was part of a commercial transaction and itself constituted a part of interstate trade and commerce. Further, the possession for sale and the sale of the milk in New South Wales as the purpose and end point of that interstate commercial movement would be itself, in my opinion, part and parcel of that interstate trade. Indeed, that purpose established the commercial character of the transportation.
. . . It is not suggested that there is anything in the nature, quality or condition of the first plaintiff's treated milk and milk products which in any way renders them unfit or unsuitable for human consumption, or that there is anything in the conduct of the plaintiff's relevant activities of a fraudulent or dishonest nature." (at p58)

48. He then said that any endeavour by a State to preserve for its citizens a monopoly in dealing in any particular commodity would be an obvious infraction of the freedom of interstate trade. Such attempt must be clearly distinguished from action on the part of the State to ensure that unhealthy or impure goods or dishonest practices are not introduced into the State or indulged in there. (at p58)

49. Barwick C.J. then examined a number of the authorities from Duncan v. Queensland [1916] HCA 67; (1916) 22 CLR 556 onwards and I do not need to comment on that discussion save to say that I respectfully agree with his analysis of the earlier cases and the effect of James v. The Commonwealth [1936] HCA 32; (1936) 55 CLR 1 . He discussed (1975) 134 CLR, at p 582 the Milk Board Case and concluded that the reasoning and the conclusions in that case could not be regarded as consistent with the decisions in The Commonwealth v. Bank of New South Wales [1949] HCA 47; (1949) 79 CLR 497; (1950) AC 235 and in Hughes and Vale Pty. Ltd. v. New South Wales (No. 1) [1954] UKPCHCA 5; (1954) 93 CLR 1 . A majority of the Court agreed in that conclusion, with which I also respectfully agree. He considered (1975) 134 CLR, at pp 588-589 the argument that the effect of the Act was merely economic and said that the reference by the Privy Council in the Bank Case to "some indirect or consequential impediment which may fairly be regarded as remote" was a reference to remoteness as understood in various areas of the law. He said (1975) 134 CLR, at p 589 :
"It was not intended to exclude the consequences produced by an Act operating upon the facts which, according to its proper interpretation, it intended to affect. The language of their Lordships' decision lends no support whatever, in my opinion, to the proposition that the economic result produced by an Act is not within its direct operation. When one remembers that the purpose of examining the operation of an Act in relation to s. 92 is to determine whether the situation produced by that Act leaves trade and commerce free, it immediately seems impossible to exclude the economic product of the Act as irrelevant - as outside the direct operation of the Act. In the instant cases, the matter to my mind is particularly plain. The legislative provisions directly produce the result that a trader may not lawfully sell within the State a commodity of commerce, except on terms dictated by or on behalf of the State. The fact that these provisions put an end to the trade of the trader cannot be regarded as but an 'economic' and thus irrelevant consequence of the legislation. It is fairly and plainly within its operations." (at p59)

50. I respectfully agree with this passage. (at p59)

51. In my opinion an economic effect is not necessarily remote in the relevant sense, though some particular economic effects may in some circumstances be remote. It may be observed that, even on the narrowest of all the views expressed as to the operation of s. 92, legislation having only an economic effect on trade is regarded as prohibited, namely the imposition of a fiscal impost upon importation of goods from one State into another.

52. In the present circumstances I do not need to examine the reasons in the dissenting judgment of McTiernan J. other than to say that he based his conclusion on the decision in the Milk Board Case and he regarded the legislation in question as regulatory and not prohibitory. (at p59)

53. Gibbs J. said (1975) 134 CLR, at p 599 that "the sales made within New South Wales to customers who made no stipulation that the milk should come from Victoria, and who were indeed quite indifferent as to the origin of the milk, were, considered by themselves, intrastate sales." However he then said that, as Walsh J. pointed out in the Mowbray Case (1972) 124 CLR, at p 582 an act may have a double aspect, being in one aspect an act which forms part of intrastate trade and in another aspect an act which forms part of interstate trade. Gibbs J., after having said that viewed from the point of view of the plaintiff's trade each sale was at least "an inseparable concomitant or consequence of that transaction", said (1975) 134 CLR, at pp 599-600 :
"The trade in which the first plaintiff engaged did not consist merely in bringing the milk across the border - it carried the milk from one State to another to sell it in the latter State. Trade is not limited merely to carriage. The essential object of s. 92 would be defeated if a State could, by the enactment of legislative provisions such as those now in question, entirely exclude from sale the products of another State. The present case is clearly

distinguishable from S.O.S. (Mowbray) Pty. Ltd. v. Mead. In that case the statutory burden was placed on the first sale made in Tasmania by a shopkeeper to whom goods had been consigned by the manufacturer in Sydney; the statute did not prevent the New South Wales seller and the Tasmanian buyer from completing their interstate transaction and the only effect which the statute had on interstate trade was an economic or commercial one. In the present case the person selling the goods within the State is the very person who has brought the goods across the border for that purpose, and the legislation prevents the plaintiffs' interstate transactions from being carried to their conclusion. The second plaintiff's activities occur entirely within New South Wales, but form an essential and integral step in the transactions of the first plaintiff, and take their colour accordingly - cf. Reg. v. Wilkinson; Ex parte Brazell, Garlick and Co. [1952] HCA 6; (1952) 85 CLR 467 . It should be added that it was not shown that any element of sham or contrivance attached to the relationship between the first plaintiff and its agents." (at p60)

54. Although I do not think it matters for present purposes I am, with respect, unable to accept that the distinction which is there drawn between the Mowbray Case (1972) 124 CLR 529 and North Eastern Dairy Case [1975] HCA 45; (1975) 134 CLR 559 is a satisfactory one. It appears to me that the situation in each case was that the vendor of the goods in New South Wales or in Tasmania, as the case may be, had either himself brought the goods across the border or had arranged for them to be sent to him across the border, in each case for the purpose of selling them in the State of destination. I can see no difference between those two situations. In the Mowbray Case the goods were consigned by the manufacturer pursuant to a contract with the plaintiff. That was a case in which, in accordance with ordinary principles, the property in the margarine would have passed to the plaintiff on its being appropriated in New South Wales to his order, so that in truth he had arranged to have his own goods brought from New South Wales to Tasmania for sale there. Moreover I am again with respect unable to agree that the effect of the Tasmanian legislation was "merely economic or commercial" or, if it were so, that it could be a determinative factor. (at p60)

55. Gibbs J. concluded (1975) 134 CLR, at p 601 by saying that the regulations went beyond what was reasonably necessary for the purpose of ensuring that no milk was sold which was likely to constitute a danger to health:
"However, reg. 79 goes far beyond what is reasonably necessary for the purpose of ensuring that no milk is sold which is likely to constitute a danger to health. It has not been established that milk pasteurized in accordance with the law of Victoria would be less wholesome than that pasteurized in New South Wales. I would not doubt that a law of New South Wales might validly prescribe standards of purity of milk sold in that State, even if imported by the seller from another State, and might insist that the milk should have been pasteurized in accordance with a prescribed procedure, assuming the prescription to be reasonable. However, reg. 79 (10) (c) enables the Authority to prevent entirely the sale in New South Wales of any milk pasteurized elsewhere, however free from defect it may be. Moreover, none of the provisions can be described as merely regulatory - each goes far beyond mere control of the incidents of the transactions in question."
Stephen J. agreed with the reasons for judgment of Barwick C.J. Mason J. said (1975) 134 CLR, at pp 605-607 :
"It is necessary, then, to proceed to the question of constitutional validity. If the first sale within a State of goods imported there for the purpose of sale forms part of interstate trade for the reasons given by Barwick C.J. in S.O.S. (Mowbray) Pty. Ltd. v. Mead (1972) 124 CLR, at pp 543-544 then a prohibition against the sale or supply of goods extending to imported goods is a burden on interstate trade, unless the prohibition can be classified as regulatory. But it does not follow that if the first sale by the importer is not part of interstate trade, a general prohibition against sale is consistent with s. 92. The prohibition may be held to constitute a burden on interstate trade either because the sale is inseparably connected with that trade or because it may appear that the effect of the prohibition is to destroy that trade: see Vacuum Oil Co. Pty. Ltd. v. Queensland [1934] HCA 5; (1934) 51 CLR 108 ; Fish Board v. Paradiso [1956] HCA 60; (1956) 95 CLR 443 ; O'Sullivan v. Miracle Foods (S.A.) Pty. Ltd. [1966] HCA 64; (1966) 115 CLR 177 . I regard each of these cases, as did Walsh J. in S.O.S. (Mowbray) Pty. Ltd. v. Mead (1972) 124 CLR, at pp 587-590 , as authority for the proposition that a prohibition applying to the first sale by an importer within a State may constitute a burden on interstate trade. To the extent to which the observations in Wragg v. New South Wales [1953] HCA 34; (1953) 88 CLR 353 may be thought to be inconsistent with this proposition I would not follow them. The distinction drawn by the Privy Council in the Banking Case (1949) 79 CLR, at p 639; (1950) AC, at p 310 was between laws which operated directly and immediately to restrict or burden interstate trade and laws which created some 'indirect or consequential impediment which may fairly be regarded as remote'. In deciding whether a given law falls within one category rather than the other, their Lordships did not intend in my view to exclude from consideration the practical effect of the law. It is said that this is a gloss added by the later cases, although it has been acknowledged that a law may operate as 'a circuitous means' of burdening operations of a kind that s. 92 protects: see Hospital Provident Fund Pty. Ltd. v. Victoria (1953) 87 CLR, at p 36 ; Grannall v. Marrickville Margarine Pty. Ltd. (1955) 93 CLR, at p 78 ; Mansell v. Beck [1956] HCA 70; (1956) 95 CLR 550, at p 565 ; and R. v. Connare; Ex parte Wawn [1939] HCA 18; (1939) 61 CLR 596, at p 618 where Dixon J. said: ' . . . an attempt to place a burden upon the first sale of goods after their introduction into a State well might be obnoxious to s. 92 because of its tendency to prevent or discourage the importation of such goods from another State'.
This approach takes account of the practical effect of a law. The contrary view has no secure base in s. 92 itself and it subtracts significantly from the freedom which the section guarantees. To say that consistently with s. 92 it is permissible to enact laws whose practical effect is to burden interstate trade is to reduce the constitutional prohibition to a legal formulation which may be readily circumvented.
So long as reg. 79 (10) (c) remains in force milk pasteurized in Victoria cannot be sold for human consumption or use by humans in New South Wales. It is the fact that milk once pasteurized cannot be pasteurized again and the defendant does not suggest that it could, or would, issue a certificate of registration under the Dairy Industry Authority Act to pasteurize its milk in Victoria. The practical effect of the regulation is therefore to put an end to the interstate trade in Victorian pasteurized milk and to discriminate against the Victorian product and the Victorian producer. In the conventional language of the cases it imposes a burden on the importer of Victorian pasteurized milk by preventing him from selling his product in the State. This results in my opinion from the direct and immediate operation of the law. It is not a mere economic or social consequence of the regulation (S.O.S. (Mowbray) Pty. Ltd. v. Mead (1972) 124 CLR, at p 594). To say that the prohibition does not directly destroy the importation of pasteurized milk because it leaves the importer free to import it, though unable to sell it, seems to me to desert reality." (at p62)

56. I respectfully agree with what is said in the passages which I have quoted from the judgment of Mason J. (at p62)

57. I am satisfied that neither the reasoning nor the decision in Harper's Case [1966] HCA 26; (1966) 114 CLR 361 can be reconciled with the reasoning and the decision in the North Eastern Dairy Case [1975] HCA 45; (1975) 134 CLR 559 . (at p62)

58. In the end the question is whether the Act and the regulations may be regarded as regulatory. Authoritative and helpful guidance on this aspect of the case is provided by the North Eastern Dairy Case. There are differences between the legislation there in question and that which we have now to consider. The nature of the legislation considered in the North Eastern Dairy Case is summarized in the judgments in that case. I refer in particular to the judgments of the Chief Justice (1975) 134 CLR, at pp 572-574 and Gibbs J. (1975) 134 CLR, at pp 597-598 and generally to what I have said above about that case. (at p63)

59. In the present case there is no provision which vests Permewan's eggs in the Board, but there is a prohibition upon their sale unless and until they

are inspected, graded and packed by the Board. I say that there is a prohibition because it seems to me that that is the effect of s. 47D (1). It directly prohibits retail sales and effectively, though not in express terms, prohibits all sales in Victoria other than for re-export. That is its practical operation, though the theoretical possibility exists that retailers, manufacturers and restaurateurs might buy the eggs and then submit them to the Board before resale or use. To say that Permewan's trade, or for that matter trade in eggs generally, between other States and Victoria is free because the eggs are not divested from their owners at the border is in my opinion to draw a distinction which does not of itself carry the consequence that the trade is free in the relevant sense. (at p63)

60. In the present case I do not think that there is any material difference between saying that the first sale of imported eggs is itself part of interstate trade, and saying that such sale is inseparably connected with that trade or that prohibition on sale would destroy that trade. However cases may arise where that distinction may be of significance. For my own part I would prefer to say that a prohibition on the first sale of goods imported or dispatched from another State will generally be itself part of interstate trade, though it may be possible that circumstances could occur in which that would not be so. It seems to me that to say that goods may freely cross a border but not be sold in the State of destination is drastically to reduce the intended operation of s. 92. To prevent goods which cross State borders from entering into the stream of commerce in the State of destination by prohibiting their sale is to prevent interstate trade from taking place as effectively as would a prohibition on the actual crossing of the border. The identity, or, if it be preferred, the close and intimate relationship, of the first sale of goods imported into, or exported to, one State from another with interstate trade has many times been emphasized, although, in one phase of the continuing elucidation and application of s. 92, it has been wrongly as I think, overlooked or relegated to a place of insignificance. It is worth recalling the words of Isaacs J. in The Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia [1926] HCA 47; (1926) 38 CLR 408, at p 430 where he said: "a sale within a State of goods brought from another State may, not as an exception but as a very common case arising in business, be part of an interState operation of trade and commerce." See also Vacuum Oil Co. Pty. Ltd. v. Queensland [1934] HCA 5; (1934) 51 CLR 108, at pp 128-129 where Dixon J. said that:
"The very essence of commercial intercourse between States is importation into or exportation from a State for purposes of sale. In making one of these acts the substantive ground for imposing the burden of supporting home production, the State strikes at inter-State trade."
On this aspect of the case I think that valuable guidance is to be obtained from the judgment of Walsh J. (dissenting) in the Mowbray Case (1972) 124 CLR, at pp 587-594 where he reviewed many of the cases. I conclude by quoting from the joint judgment of Taylor and Owen JJ. in O'Sullivan v. Miracle Foods (S.A.) Pty. Ltd. (1966) 115 CLR, at p 190 :
"So far as the defendant is concerned it was, it was said, free to import the margarine in question here into South Australia from New South Wales but since, admittedly, it was not possible for it to correct the lack of conformity with s. 23, the effect of the section in the circumstances was, for all practical purposes, to destroy the inter-State trade in the commodity. To our minds it is merely a matter of words to say that the defendant was free to import the margarine into South Australia from New South Wales for the moment it had it in its possession for sale in the former State, or the moment it sold it in that State, it would commit an offence. To our minds it is about as clear as it can be that, in these circumstances, s. 23 operated directly to terminate its inter-State trade in margarine. This being so, to give s. 23 its full effect in relation to intra-State sales would be to give it an operation which infringes s. 92." (at p64)

61. In this respect I am satisfied that the decision and the reasons of the majority in the Mowbray Case cannot be sustained in the light of the North Eastern Dairy Case. Indeed I regard the Mowbray Case as not capable of being reconciled with Fish Board v. Paradiso and O'Sullivan's Case. (at p64)

62. The present Act however does not impose an absolute prohibition on the sale of eggs other than those which are vested in the Board, but it does impose a qualified prohibition, relaxed only upon the submission of the imported eggs to the Board for inspection, grading and stamping and payment therefor. The question is whether the Act and regulations may be sustained as "regulatory" in the sense in which that word is used in relation to s. 92. (at p65)

63. I respectfully agree with the observation of the Chief Justice in the North Eastern Dairy Case as to the proper application of s. 92 in this respect and for the present purpose would quote only the following short passage (1975) 134 CLR, at pp 581-582 :
"The freedom of the individual to engage in interstate trade and commerce is included in the freedom of interstate trade and commerce which the Constitution guarantees. Thus laws to ensure public health and honesty and fairness in commercial dealings form examples of laws which the concept of freedom of trade and commerce does not deny. Consequently, laws, e.g., to secure public health, must have no impact which is reasonably unnecessary upon the activites of the individual in interstate trade and commerce. The protection of the individual is not merely incidental or peripheral to the enforcement of the constitutional guarantee. Indeed, whilst not exhausting the operation of s. 92, it is central to it." (at p65)

64. I would add that it is clearly established that the onus rests upon those who seek to uphold a qualified prohibition to show that is is manifestly reasonable and just. (at p65)

65. It was argued that this case differs from the North Eastern Dairy Case in that it was there conceded in argument that the pasteurization process could not be repeated without damage to the milk, a fact however not regarded by the parties as sufficiently significant for inclusion in the case stated. I observe that this fact was adverted to only by Barwick C.J. and Mason J. As I read the judgment of Barwick C.J. he did not regard this as an essential factor in the process of arriving at the conclusion that the legislation there in question was invalid. It is perhaps given more significance by Mason J. but it cannot be regarded as part of the ratio of the majority. In so far as it may be material it is to be remembered that the evidence in the present case shows that the process of unpacking, inspection, grading and repacking of eggs involves an inevitable loss of some eggs through breakage, the figure being put at as an average of five per cent. (at p65)

66. However the legislation in the North Eastern Dairy Case did produce the result that the Authority could prevent the sale in New South Wales of any milk pasteurized in Victoria however free from any defect it might have been. (at p66)

67. The present Act provides in s. 41C (1) that "any person who owns or is entitled to sell eggs" (a phrase which as I have said above applies only to importers of eggs from other States and, should it ever occur, from overseas) may present them to the Board. By s. 41C (3) it is provided that the Board "shall cause all eggs so presented to be graded etc. and shall re-deliver such eggs to the person who presented them". No doubt a mandamus would go to compel the Board to perform that function if it failed to do so, or threatened not to do so, within a reasonable time. (at p66)

68. The question is whether the prohibition on the sales of eggs brought into Victoria from another State for sale in Victoria, unless they are inspected, graded and stamped in Victoria by the Board, has been shown to constitute regulation reasonably necessary for the purposes of ensuring that such imported eggs do not present a danger to the health of the consumers in Victoria. With due respect to those who think otherwise I am satisfied that proposition has not been established. (at p66)

69. There is nothing to show that the methods of handling eggs in registered premises in New South Wales are so inferior to those used by the Board in Victoria or that those employed by the Board to operate its system are so much more skilful than those in New South Wales, that only the Board is capable of such handling as is necessary to protect the health of Victorian consumers. In argument much was made of the absence of the Board's mark or stamp on the eggs. That mark however signifies to the consumer no more than that each egg has passed through the Board's inspection, grading and packing processes. A regulation that required all eggs to be graded into various sizes, and inspected for inperfections according to specified standards, and to bear a stamp conveying to the consumer the place at which they had been so graded and inspected might well be regulatory, as would be a requirement that all eggs should be stamped in a manner which would convey to the consumer the date upon which that process had been carried out. To provide that such grading and inspecting can be done only by the Board goes much further than can be regarded as reasonably necessary. (at p66)

70. The requirement that these processes can be performed only in Victoria bears no relation to wholesomeness, purity or quality. This is not to say that no means for ensuring wholesomeness, purity and quality may be imposed by Victorian law. There appears no basis for thinking that reasonable regulations as to the premises in which, and the manner in which, eggs should be graded before sale should not be introduced, including if thought fit, inspection of the premises by the Board. There is no reason why inspectors from Victoria should not inspect premises in New South Wales. The absence of compulsory powers there could be met by a requirement that registration was dependent upon the owners consenting to such inspection. It is not enough that the Victorian legislature or the Board prefers the present method; it must be shown that the method selected is a reasonable regulation for, in this case, protection of public health. If, as plainly is the case, such protection can be obtained without compelling admittedly wholesome and good quality eggs to be inspected and graded by the Board's employees when they have already been inspected and graded in New South Wales and comply with the Board's standards save that they do not bear the Board's mark, then the legislation cannot be sustained. (at p67)

71. It is in effect a legislative means of ensuring that eggs from other States are effectively excluded from Victoria, and in my opinion the fact that the means adopted may be described as an economic consequence of the legislation is no basis for saying that s. 92 does not apply so as to invalidate the legislation in its application to interstate trade. (at p67)

72. I am therefore satisfied that the Act and the regulations in their application to the eggs in question are contrary to s. 92 and that, in accordance with s. 3 of the **Acts Interpretation Act 1958** (Vict.), as amended, they must be read down so as not to apply to such eggs. Accordingly the order nisi should be made absolute with costs and the informations should be dismissed with costs. (at p67)

ORDER

Order nisi to review the convictions discharged with costs.
