Opinion:	No. 1601
Subject:	*regulation of therapeutic substances* *therapeutic substances subject of interstate trade or commerce: power of Commonwealth to prescribe conditions as to labelling and compliance with prescribed standards: freedom of interstate trade: 'free'*
Author:	KNOWLES George Shaw
Key Legislation:	*Constitution ss 51(i), 92, 112*
Date:	21 August 1936
Client:	*The Director-General of Health*
Related Opinion:	--

Opinion text:

I refer to your memorandum dated the 14th August, 1936, asking for advice with regard to the power of the Commonwealth Parliament to prescribe, in relation to therapeutic substances the subject of interstate trade or commerce, conditions as to:

a. labelling; and
b. compliance with prescribed standards.

The result of the decision of the Privy Council in James' case[(1)] (not yet reported) is that any legislation of the Commonwealth which prevented or restricted trading interstate in any goods would probably be repugnant to section 92 of the Constitution and therefore ultra vires.

Section 92 provides that trade, commerce, and intercourse among the States, shall be absolutely free.

In James' case, the Judicial Committee said

> As a matter of actual language, freedom in section 92 must be somehow limited, and the only limitation which emerges from the context and which can logically and realistically be applied is freedom at what is the crucial point in interstate trade that is at the State barrier'.[(2)]

At an earlier stage they said

> The true criterion seems to be that what is meant is freedom as at the frontier or to use the words of section 112 in respect of goods passing into or out of a State.[(3)]

After giving instances of the prohibitions or restrictions to which interstate trade might be subject–if section 92 did not exist–they say

> more obvious cases are those of undisguised restrictions on passing from State to State. The actual restraint or burden may operate while the goods are still in the State of origin, as in the case of a compulsory expropriation or a standstill order; or it may operate after they have arrived in the other State as in the Vacuum Oil case (51 C.L.R. 108). In every case, it must be a question of fact whether there is an interference with this freedom of passage.[(4)]

Having expressed their opinion as to the meaning of the word ‘free’ in section 92, their Lordships held that section 92 bound the Commonwealth but that this did not mean that section 51(i) was nullified because

> though trade and commerce mean the same thing in section 92 as in section 51(i), they do not cover the same area because section 92 is limited to a narrower context by the word ‘free’.[(5)]

Free’ for example does not mean free from the operation of ordinary commercial laws. Thus the decision does not affect the Transport cases in which State laws requiring motor vehicles whether used in intrastate or interstate trade and commerce to be registered, licensed etc. have been held by the High Court to be valid. So Commonwealth laws which required goods the subject of interstate trade to be packed in a specified manner would, in my opinion, be valid provided they were not directed to trade and commerce as such. For example, if the Commonwealth Parliament, in order to protect persons or other goods from injury or damage, prescribed a special container for the carriage of certain goods, this would, I think, be ultra vires section 51(i). If, however, the Commonwealth Parliament prescribed a container the cost of which would be prohibitive, this would probably be held to be invalid. It must be remembered, however, that each case must be considered on its merits. A general rule cannot, therefore, be laid down with regard to any area of the field in which the Commonwealth Parliament can legislate.

With regard then to the question of the validity of the proposed requirement that all therapeutic substances the subject of interstate trade should bear labels containing prescribed information or complying with specified details, the answer depends on the nature of the information required to be stated. Assuming that the labels would simply be required to show the actual nature, quality, weight etc. of the goods, I think that the requirement could be validly made. In the Huddart Parker case (44 C.L.R. 492) the High Court held to be valid the Transport Workers Act 1928–1929 which required shipowners to use only men of a particular class for loading and unloading interstate ships. The Privy Council in James’ case appears to think that this decision is not affected by the decision that section 92 binds the Commonwealth. If, then, the Parliament can require goods to be loaded or unloaded by specified persons, it could, I think, require the goods to be marked with a particular label. It would, I think, be otherwise if the particulars to be shown on the label were such as could be complied with only by a limited class of the goods, and the trade in other classes of the same goods were thus penalized.

As to the second question asked, namely ‘whether it would be possible to prescribe that, if articles of food are carried interstate or are the subject of interstate trade, they shall comply with certain specified standards of composition’, the answer to that is, I think, ‘No’.

There is no doubt that goods the subject of intrastate commerce can by State laws be required to comply with a certain standard. And if Nelson’s case (No. 1) (42 C.L.R. 209) is to be regarded as authority, any such State law which is directed to the safeguarding of the health of the community would be validly applicable to goods ‘passing into the State from another State’. It is very doubtful, however, whether a State could prevent the entry from another State of goods not complying with a prescribed standard. As Rich J. said in R v. Vizzard, ex parte Hill (50 C.L.R. 30) at p. 49

> What section 92 forbids is Government action … in respect of trade, commerce, and intercourse when it operates to restrict, regulate, fetter or control it, and to do this immediately and directly as distinct from giving rise to some consequential impediment …

He was there speaking of State action but since James’ case, his words are applicable in addition to Commonwealth action.

Then in Tasmania v. Victoria (52 C.L.R. 157), at page 173, Rich J. in deciding that a Victorian

proclamation was bad which prohibited the entry into Victoria of potatoes from Tasmania said

> The law hits directly at the act of interstate importation. It operates at the border upon the act of entering and takes the origin of the goods of another State as its criterion and it does nothing else. To be consequential a thing must be a consequence of something else, but there is nothing in this proclamation except the consequence it prescribes to interstate commerce.

This case was, in James' case (supra), contrasted by the Privy Council with Nelson's case (supra). With regard to the latter case, their Lordships said

> in Nelson's case, the Act authorised the proclamation prohibiting or more correctly restricting the introduction into the State of cattle from a district in another State in which there was reason to believe infectious or contagious disease in stock existed. The High Court was equally divided; the view which prevailed that the Act was valid seems to have been based on the ground that the true nature of the legislation was not to restrict freedom of interstate commerce, but to protect the flocks and herds of New South Wales against contagious and infectious diseases. This view was disputed by the three Judges who dissented. In Tasmania v Victoria, some of the Judges in that case also questioned the correctness of that view while upholding the actual decision on other grounds. It is certainly difficult to read into the express words of section 92 an implied limitation based on public policy. It is true that once the cattle or goods have crossed the border, they become liable to inspection under section 112 and also to the State laws of health and sanitation; that circumstance may render the difficulty of principle less important practically. But the question whether in proper cases the maximum 'salus populi est suprema lex' could be taken to override section 92 is one of great complexity. Their Lordships in this case will accordingly follow the example set by this Board in James v Cowan[(6)] and treat the question as reserved until it arises, if it ever does.[(7)]

So while a State law might, in the interests of public health, prohibit the sale of a commodity (whether produced in the State or brought from another State) unless it complied with certain standards, I do not think that a State law directed primarily to prohibiting the sale of a particular commodity unless it complied with a prescribed standard (and directed, therefore, to the restriction of trade and commerce and not to the maintenance of public health) would be a valid enactment so far as it purported to prevent the sale of any such commodity brought from another State. And if such a State law would be invalid, equally so would be a Commonwealth law.

Further, any such Commonwealth law would depend for its validity on its being within the trade and commerce power. Any restriction on interstate trade or commerce would not, therefore, be merely 'consequential'. It would not be a mere incident of legislation flowing from another power and directed to another end. The Commonwealth, not having an independent power to prescribe standards for foods etc., the validity of its legislation could not be judged by any criterion of public health or by any other criterion than that of the regulation of trade and commerce. In considering whether any such legislation was valid, the Court would look at the substance (Barger's case, 6 C.L.R. 41) and would, I think, hold that under the guise of regulating trade and commerce the Commonwealth was in fact attempting to control the manufacture of certain commodities and was thus trespassing on the field reserved to the States.

I think, therefore, that any attempt by the Commonwealth to restrict interstate trade in therapeutic substances to those complying with certain standards would be bad. It would, in effect, be not only a prohibition of trade in such substances not complying with the standards, but would also be an invasion of a field of legislation reserved to the States.

I may add that, apart from the question of validity, great difficulty would be experienced in policing a law prescribing standards to be observed in respect of goods the subject of interstate

trade. In the case of exports and imports, the machinery of the Customs Department is available for the inspection of goods and the number of points at which goods may enter or leave is limited. In the case of interstate trade, there is no existing machinery for the inspection of such goods and the points at which goods might enter one State from another are, in most cases, innumerable. The same difficulty, of course, would exist with regard to the enforcement of labelling conditions.

[Vol. 29, p. 311]

(1) (1936) 55 CLR 1.

(2) (1936) 55 CLR 1 at 59.

(3) (1936) 55 CLR 1 at 58.

(4) (1936) 55 CLR 1 at 59.

(5) (1936) 55 CLR 1 at 60.

(6) (1932) 47 CLR 386.

(7) (1936) 55 CLR 1 at 53.