

10A – FREEDOM OF INTERSTATE TRADE AND COMMERCE A

s 92: Trade within the Cth to be free

*On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, **shall be absolutely free***

Approaches to interpreting s 92

- **FREE TRADE APPROACH**
 - s 92 is to create a free trade area throughout Aust
 - **TEST:** whether the law in qu discriminates against interstate trade i.e. does it treat interstate trade differently?
- **INDIVIDUAL RIGHTS APPROACH**
 - The individual should be free to trade without interference by government regulation
 - The words ‘absolutely free’ in s 92 suggested a guarantee of individual trading rights, free of regulation
 - *Bank Nationalisation Case* – first time HC endorsed this approach

CURRENT TEST: COLE V WHITFIELD

s 92 prohibits imposition of discriminatory burdens on interstate trade and commerce of a protectionist kind i.e. subjection of interstate trade and commerce to disabilities or disadvantages for purposes of protecting *intrastate* trade and commerce from external competition

Law offends s 92 if it imposes ‘discriminatory burdens of a protectionist kind’

TEST:

1. **Burden: does the legislation burden the freedom of interstate trade?**
2. **Burden discriminatory?** (practically or operationally); may be factual (effect) or legal (clear from the face of the legislation);⁶ if yes, will still be valid unless the discrimination has a ‘protectionist’ purpose or effect
3. **Protectionist: does the discriminatory burden have a protectionist purpose or effect** (i.e. does it give intrastate trade and commerce a competitive market or market advantage over interstate trade and commerce?) if yes = law is prima facie invalid
4. **Permissible: is that protectionist effect pursuant to, or incidental to, some non-protectionist purpose?**

Background

- The guarantee in s 92 was one of the key components in Aust’s move to federation
- But the wording has proved to be highly ambiguous

⁶ In **both** cases, law will be contrary to s 92 if discrimination found to be **protectionist** (leaves open qu of whether protectionism must be primary purpose or mere incidental effect)

“The concept of discrimination in its application to interstate trade and commerce necessarily embraces factual discrimination as well as legal operation. A law will discriminate against interstate trade and commerce if the law on its fact subjects that trade and commerce to a disability or disadvantage or if the factual operation of the law produces such a result.”

- Slogan rather than constitutional principle?
- Ambiguity + its potential to obstruct government regulation of commercial activity = the most litigated section in the Constitution (more than 140 cases by 1988)

Definition of 'trade and commerce'

- 'classic' statement: Knox CJ, Isaacs and Starke JJ in *W & A McArthur Ltd v QLD*:
 - 'the mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, part of trade and commerce'
- Encompasses regulation of e.g.:
 - **The movement of people (as well as goods) for reward** over state or national boundaries: *ANA Case* (1945)
 - **The transfer of intangibles** e.g. money, broadcasting etc.: *Bank Nationalisation Case* (1948)

Individual rights theory as illustrated by the *Bank Nationalisation Case*

Bank of NSW v Cth (Bank Nationalisation Case) (1948)

- First time Court endorsed this approach
- *Banking Act 1947* (Cth) s 46: envisaged the progressive **exclusion of private banks** from the business of banking
- HC held (4:2) that this was incompatible with the 'freedom' to conduct such business interstate = violated s 92 (Latham CJ and McTiernan J dissenting)⁷
- **Majority – individual rights approach to s 92**
 - 'the object of s 92 is to enable individuals to conduct their commercial dealings and their personal intercourse with one another independently of State boundaries'
 - 'a constitutional guarantee of rights, analogous to the guarantee of religious freedom in s 116, or of equal rights of all residents in all states in s 117'
- Rich and Williams JJ: it is a 'personal right attaching to the individual' that enable individuals to conduct their commercial dealings and their personal intercourse with one another independently of State boundaries
- s 92 finding appealed in Privy Council: ***Cth v Bank of NSW [1950] AC 235***
 - Cth argued that the 'individual rights' theory was incorrect and that purpose of s 92 was not to guarantee an individual right to engage in interstate trade
 - **PC:**
 - Agreed with individual rights approach BUT 'freedom' in s 92 is not absolute
 - **s 92 is violated when a law restricts interstate trade 'directly and immediately' and s 92 is violated by *prohibitory* restrictions (as opposed to *regulatory* restrictions)**
 - PC approach = Dixon J's 'criterion of operation' test
- Put a wide range of government controls in jeopardy (any regulation of trade and commerce that amounted to restriction on interstate trade and commerce had the potential to be invalidated)
- Two qualifications on s 92 created increasing uncertainty for the Court about the types of regulations or controls that would breach s 92
- By mid-1980s the law on s 92 was an 'unpredictable mess'

⁷ High point in the 'individual rights' approach to s 92

- HC had to re-examine the issue
 - = *Cole v Whitfield* (1988)

Dixon view

1. Direct and not remote burden on interstate trade and commerce required for s 92 to be infringed
2. Subject to a permissible regulation exception

'Trade, commerce and intercourse among the States is an expression which described the activities of individuals. The object of s 92 is to enable individuals to conduct their commercial dealings and their personal intercourse with one another independently of State boundaries': Dixon J in *O'Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW)* (1935)

Cole v Whitfield (1988)

- Tasmanian law did not violate s 92 (7:0)
 - Tasmania: Fisheries Regulation prohibited taking, buying, selling, offering or exposing for sale or possessing crayfish **less than 110mm** in length
 - SA regulations: **min length 98mm**
- HC supported Tasmanian legislation (unanimously)
 - Purpose is to promote equal trade
 - Departure from individual rights
 - Departure from Dixon J's approach
 - It relies upon artificial distinctions;
 - It looks to the legal operation of the law rather than its practical operation or economic consequences
 - Note: HC on history of s 92 to discern the purpose of this provision – reverted to historical object of 'free trade' relying on **Convention Debates** for the first time
 - **HC conclusion as to the purpose of s 92 = to give 'equality of trade'**
- **There was an unquestionable burden on the interstate trade in crayfish caught in SA (it was discriminatory) but not discriminatory in a protectionist sense**
 - Was not for the purpose of protecting Tas intrastate trade – it was to protect lobsters
 - Wasn't to provide some benefit to the Tasmanian market
- Law offends s 92 if it imposes 'discriminatory burdens of a protectionist kind' or if its effect is 'discriminatory against interstate trade and commerce in that protectionist sense' or 'if its effect is discriminatory and the discrimination is upon protectionist grounds'

'discriminatory burdens of a protectionist kind'

Two understandings

1. See 'discrimination' and 'protectionism' as two separate elements which must both be present to infringe s 92
 - Discrimination would provide threshold criterion
 - If law does not discriminate against interstate trade, it will be valid with no need for further inquiry
 - If it does not discriminate, it will still be valid unless the discrimination has a 'protectionist' purpose or effect
2. One form of infringement (double-barrelled verbal formula to identify it)

- A law would offend s 92 if its purpose or effect is to benefit local traders within one State by placing their interstate competitors at a competitive disadvantage

Discriminatory burden (2)

- Practically or operationally
- May be factual (effect) or legal (clear from face of legislation)
 - In both cases, law will be contrary to s 92 if discrimination found to be protectionist
 - Leaves open question of whether protectionism must be primary purpose or mere incidental effect
- “The concept of discrimination in its application to interstate trade and commerce necessarily embraces factual discrimination as well as legal operation. A law will discriminate against interstate trade and commerce if the law on its face subjects that trade and commerce to a disability or disadvantage or if the factual operation of the law produces such a result.”

Relationship between s 92 and s 51(i)

- s 51(i) gives Cth power to pass laws that s 92 does not forbid i.e. laws that do not discriminate against interstate trade and commerce in a protectionist sense
- s 92 also limits laws enacted under other heads of power
- But main target of s 92 is State laws

Cheryl Saunders and Adrienne Stone

- Constitutional text often considered according to its purpose
 - Includes teleological⁸ textual arguments and teleological historical arguments
- Historical meaning often considered important
 - Includes reference to the records of the framers' debates and well as legal texts written at the time of framing
 - “The use of history in Aust is often a form of purposive argument referring to the purpose of the Constitution-maker.”
- *Cole v Whitfield*
 - “After a long series of cases failed satisfactorily to resolve the meaning of this provision, the HCA, in a rare unanimous judgment, revised the law radically following a careful historical analysis of the framers’ intentions and understandings of the free trade principle.”
 - “particularly prominent example of this historical method but the method is well-established. However, this use of historical method does not amount to a full-blown commitment to ‘originalism’ in constitutional interpretation. Most members of the Court have been clear that the Constitution’s meaning changes over time and that its ‘original meaning’ may not govern the present.”⁹
 - “Moreover, there is some disagreement about the precise uses to which history is put. While historical material may be used as evidence of the intention of its *framers* on some occasions it is used in other ways: to identify the historical understanding of the text at the time of its drafting (a separate idea from the framers’ intention) or to identify historical practices that inform the meaning of the Constitution.”

⁸ Teleology: the explanation of phenomena by the purpose they serve rather than by postulated causes

⁹ *WorkChoices Case*

Keith Mason on s 92 and the background to *Cole v Whitfield*

- *Cole v Whitfield* didn't come entirely out of the blue
- Considered in context:
 - in a constitution
 - In a part dealing with trade and fiscal matters
 - In a constitution where in s 51(i) there is an express grant to Fed Parliament to pass laws with respect to trade and commerce among the States (and overseas)
- One of the issues throughout the history of s 92 jurisprudence was how to deal with s 92 and s 51(i)
 - Early interpretation was that s 92 didn't apply to the Cth at all – easy way to reconcile the two provisions
 - Overturned by PC
- No provision has seen more cases or swings in interpretation (fighting amongst judges)