Cole v Whitfield

- Endorsed the free trade theory is the dominant view of s92.

Facts:

- Tasmanian law: it prohibits possession of crayfish under a specified size.
- SA has a similar law, but a lower min size.

Whitfield imports crayfish from SA to TAS, they are above the SA min size, but below TAS min size therefore Mr Whitfield violates the minimum catch law. Challenges the CC validity of the Tas law under s92.

Court: Holds that the Tas law is valid. Because not protectionist.

- The case where HCA tells us how to use history in CC Interpretation:
  'Reference to the history of s 92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect - if such could be established - which the founding fathers subjectively intended the section to have, but for the purpose of
  [i] identifying the contemporary meaning of language used, (meaning of the language at the time of Federation)
  [ii] the subject to which that language was directed and (which issue were the Framers trying to address)
  [iii] the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.' (why do we have the CC we do?)
  (789)

- **Application of this, look to history**: The purpose of s92 was to create a free trade area throughout the Cth and to deny both to Cth and the states a power to prevent or obstruct the free movement of people, goods and communications across state boundaries. (391, 790)
  ➔ This is why they arrive at the free trade theory.
- **What exactly this means, the free trade theory:**
  - S92 prohibits the imposition of protectionist burdens
    ➔ Has 2 dimensions: Burden and Protectionist
    - Burden: Any fiscal or non-fiscal burned that discriminates against interstate trade and commerce. (393, 791) (effect of the law is very important here)
    - Protection: The general hallmark of such a measure (i.e. protectionist measure) is one that burdens interstate trade and commerce with effect of conferring protection on intrastate trade and commerce of the same kind. (394, 792) (here whether if law confers some competitive advantage on intrastate commerce and trade, look to the purpose of the law)
  - It does not require equality. Not every departure from equality of treatment infringes s92. Does not require the states to regard the intra and inter state commerce equally. It has to be discrimination of protectionist kind (399, 793)
  - Look to the practical operation of the law to determine whether it discriminates on interstate trade and commerce. Substance over Form! (400, 793)
- **Comments on how we reconcile s92 and 51i:**
  - We do not have to definitely resolve this issue in this case.
  - S92 does not prohibit every burden and restriction on interstate trade and commerce. (398, 793) Hence can regulate some things via 51i.
  - Most conflicts between 51 and 92 will be resolved by applying the more limited restriction that we have imposed.

- Laws which govern interstate trad and commerce will commonly not appear to discriminate if they apply to all transaction of a given kind within the reach of the parliament. (might not have discrimination if the law applies to all transactions with respect to a given topic, if general law probably closer to valid law (407, 796)). But that is not always the case, we are looking at the substance. Just because it appears not to discriminate it can in its operation.

- **Application: (797)**
  - *Discriminatory burden:* On the face of the law, no. B ecause the law applies to Tasmanian crayfisjh and SA crayfish equally. It just says cannot possess crayfish below a certain weight. However, in its effect this is a discriminatory law because it operates in a manner that prevents import crayfish from SA into TAs. Therefore discriminating against trade from SA.
    - ➔ Can be easy to find a burden. This is what we take from this, if it has any differential effect it will be discriminatory.
  - *Is it of a protectionist kind (here look to the purpose/object of the law): The* object of the law is not protectionist. The object is to assist in the conservation and preservation of Tas crayfish. The reason Tas enacted the law is to protect the crayfish. This is not protectionism this is conservation.
    - ➔ This does protect the Tas crayfish industry, it does not give them a competitive or market advantage (it is protecting it in terms of conserving the crayfish). SA can still import just have to meet the size guidelines.
- **Points to a third element:** Even if the law did give Tas crayfish industry a competitive advantage this law is nevertheless a necessary means of enforcing a non-protectionist purposes (so law could have 2 purposes – one protectionist, one not. Then it is still ok as long as it is a necessary way to do it).
  - **Here:** Need to have a blanket ban. Cannot distinguish a crayfish from SA from one from Tas.
  - **The third element:** Castlemain Toothey and Betfairs.

Castlemain Tootheys

Facts: Castlemain T uses non-refillable bottles and SAB and SUB use refillable bottles. In 1975 SA enacts its mandatory deposit law, the law requires a mandatory deposit 5c per bottle. But an exemption for refillable bottles, then you do not have to pay the 5c deposit. Earlier challenge to the 5c deposit law and court said not a competitive advantage to SA, because advantage to using non-refillable bottles that offset the 5c. In 1986 in Castlemain Tootheys makes a big push into the SA market, spend lots on advertising and increase the market share. SA amends the deposit law, it changes it to 15c for non-refillable bottles and introduces a deposit for refillable bottles 4c. (to protect the home industry).

Court: The law invalid for violating s92 CC.

Mason, Brennan, Deane, Dawson and Toothey:

- **Discriminatory Burden:** Not on its face, it does not discriminate against interstate commerce on its face (472, 806).
  - ➔ Effect of the law: But because the out of state brewers use non refillable bottles while the state one use refillable bottles there is a discriminatory burden on interstate commerce. (472, 806)

➔ Regarding the argument that Carlton Breweries also using refillable bottles and being from Vic - That is not a conclusive consideration because a law does not discriminate against all interstate trade and commerce, it is sufficient for it to discriminate against some of it.

- **Discrimination of protectionist kind**: Yes. It is very clear this confers a competitive advantage on SUB (the state brewery).
- **But there is this third element:** Is it nevertheless appropriate and adaptive to a legitimate objective?

- *Legitimate objective:* interstate trade can be regulated as may be necessary and appropriate and adaptive to the protection of the community and the advancement of its welfare. (472, 806).
  - ➔ Here: State can say objective to control litter and that it conserves energy resources. (472, 806)
  - ➔ Court says: Cannot adopt any means of reaching that objective. It must be appropriate and adaptive to reaching a legitimate objective (there needs to be a connection between burden and the object)
  - ■ 1. If law imposes a burden that is not incidental. Or that is disproportionate to the attainment of a legitimate objective, that may show that the law's real purpose is not invalid. (472, 805)
  - ■ 2. Existence of reasonable non-discriminatory alternatives to securing that legitimate object suggest that the law is not securing that legitimate object. (472, 805)

- **Application:**

- The discrepancy between the 15c for non-refillable bottles and 4c for refillable bottles that goes beyond what is reasonably necessary to ensure the return of non-refillable bottles at the same rate as refillable bottles.
- if only 6c then would get them to be returned at the same rate 474, 807)
- The deposit is refunded differently, for refillable bottles at state-operated collection depos, for non-refillable bottles it is the retailers which discourage the retailers stocking the beer in non-refillable bottles because it adds work and cost to them.
- Banning the use of non-refillable bottles that produced outside the states, does not conserve the state's energy reserves. They are not using SA energy resources.

Gaudron and McHugh JJ:

- Look here, missed: 478(409)
- By discriminating against non-refillable bottles, that will not help the State's energy resources. (479, 810)
- Discrimnating against non-refillable bottles will not help liotter reduction. No reason to discriminate aginst non-refillable bottles when it comes to litter. Should be treated equally if it is about litter reduction.

Betfair v Western Australia (2008)

Facts: Betfair is a corp running a betting exchange in Tasmania. Betting exchange is a mechanism that brings together people that make opposing bets and takes a small commission. It is a marketplace bringing people together to bet. Different to traditional bookmaker- usually betting that is something about winning. Here can bet on any outcome as long as someone is willing to back the same outcome. Can bet that someone will lose. The concern is that much easier to match fix.

Western Australia makes it an offense to bet using a betting exchange. Betfair is denied the info about the races which is necessary to run its business. Betfair challenges the valid. The HCA says this law is invalid for violation of s92.

Court:

- Strong view in terms of prohibition. It seems like it is broadening. The prohibition in s92, they talk of protection of national economy etc. Harder to rationalise the protection for welfare.
  - ➔ This means third element is harder to make out.
  - ➔ They move away from appropriate and adaptive to reasonably necessary to attain a legitimate objective (477, 817)
- But they still adopt the 3 stage test.
- **Discriminatory burden**: On it face no. It prohibits all betting exchanges wherever they are.
  - ➔ In its effect however it is discriminatory. A national market for betting, this is not done in one state. The ban on using the betting exchanges reduces competition for established state bookmakers in WA, even if it reduces competition for out of state bookmakers.
  - ➔ The requirement to make WA race field operations approval means that the in state operators are advantage. When you get approval from the minister for this information and the minister must take into account the purpose of the law which is the banning of betting exchanges therefore the people who will get approval are bookmakers, yes some out of state but still discriminatory.
- **Protectionist discrimination:** Yes, it confers and advantage for WA bookmakers. Easier for them to do business under this law.
- **Third element:** Legitimate objective – protecting the integrin of the horseracing industry but the response is not appropriately and adaptively connected to the object (479, 817). There is not enough connection.
  - ➔ There are alternatives: Can answer the problem through non-discriminatory laws that regulate rather than prohibit the betting exchanges. Could regulate bets placed on losses etc.
  - ➔ Protecting consumers question mark around that as an end – not ruled out but
  - ■ LOOK OUT FOR ALTERNATIVES THAT ARE NON-DISCRIMINATORY