

13: Freedom of Interstate Trade and Commerce (Section 92)

FREEDOM OF INTERSTATE TRADE AND COMMERCE

- ❖ **Section 92:** “On the imposition of uniform duties of customs, trade, commerce and intercourse among the States... shall be absolutely free”
- ❖ Individual rights theory of this section – laissez-faire approach to economic regulation used in earlier years (individual should be free to trade without governmental regulatory constraint)
- ❖ **Cole v Whitfield** instead used historical analysis and the ‘free trade’ approach
 - Says that this section is included to eliminate discriminatory burdens on trade (not all burdens)
 - Purpose of section was to eliminate interstate tariffs or border duties (historically these caused issues between colonies)
 - Confirmed that this approach has triumphed
 - Discrimination may be direct or indirect
- ❖ Historical reason for this section also being protection of local production and manufacture
- ❖ ‘Trade and commerce’
 - **McArthur v Queensland:** apply ordinary meaning of these terms
 - “mutual communings, negotiations, bargain, transport and delivery are all... parts of that class of relations the whole world calls trade and commerce”
- ❖ Laws prohibited under this section:
 - A law imposing a ‘burden’ on interstate trade and commerce
 - One that discriminates between interstate and intrastate trade
 - Ones that confer protection on intrastate trade and commerce (local goods)
- ❖ 4 step test for identifying a breach per **Cole v Whitfield**
 1. Establish that there is a burden on interstate trade
 2. Establish that burden is discriminatory on its face or in its practical effect
 3. Establish if that discrimination has a protectionist effect
 4. Ascertain whether that effect is pursuant to or incidental to some non-protectionist purpose
- ❖ New test for protectionism in **Bath v Alston Holdings** – may arise where:
 - A State law confers a competitive advantage on local industry
 - A State law removes a competitive advantage from an interstate industry
 - Often relevant if there is an import/export restriction
- ❖ Case of **Betfair 1** may limit the ability of a State to control the entry of new variations in existing industries into the market; may be a challenge to free trade view of **section 92** in **Cole v Whitfield** as no discrimination is required (case instead focused on national economy rather than State economy)

- Indicates that maybe there is no difference between free trade and individual rights views
- ❖ **Betfair 1** confirmed that this section applies to internet trade

Cole v Whitfield (1988) 165 CLR 360

- *Regulation 31 of the Sea Fisheries Regulations 1962 (Tas) prohibited any person from taking, buying, selling, offering or exposing for sale or having possession of any crayfish less than a minimum size*
- *Purpose was to maintain breeding stock for a stable population*
- Disagreed with individual rights theory – section 92 does not immunise traders from all governmental control, but demands that there be an ‘equality of treatment’ between interstate and intrastate trade
- “To construe s92 as requiring that interstate trade and commerce be immune only from discriminatory burdens of a protectionist kind does not involve inconsistency with the words ‘absolutely free’”
- See 4 step test established above
- “A law will discriminate against interstate trade and commerce if the law on its face subjects that trade or commerce to a disability or disadvantage or if the factual operation of the law produces the result”
- “The limitation on the size of crayfish that may be sold or possessed in Tasmania is unquestionably a burden on the interstate trade and commerce in crayfish caught in South Australia and sold in Tasmania”
- But regulations apply to crayfish both from in Tasmania and interstate – “[i]n that respect no discriminatory purpose appears on the face of the law”
- Court saw the regulations as upholding a valid purpose, and whilst it was protectionist in nature it gave no competitive market advantage to Tasmanian production
- Confirmed that this section applies to both State and Commonwealth law

Bath v Alston Holdings (1988) 165 CLR 411

- *Business Franchise (Tobacco) Act 1974 (Vic) prohibited all sales of tobacco without a license; license to cost a small fee plus 25% of the value of the tobacco sold*
- *This 25% fee did not apply to tobacco purchased in Victoria – encouraged retailers to stock Victorian product*
- Court agreed that the above test applies, but was split 4:3 on how to implement it