

This analysis proceeds on the assumption that (law) has been enacted under a valid constitutional head of power.

*Express limitation*

*s 92 Interstate Trade*

Following Cole, s 92 requires domestic trade and commerce to be free of discriminatory protectionist burdens.

Here, (law) is likely invalid under s 92 as state legislation which singles out \_ 'for particular treatment'. (Cole)

Here, (law) is likely valid under s 92 as Commonwealth legislation of general application, 'directed to the regulation of' all \_ in the Commonwealth. (Cole)

Ultimately, the validity of (law) is assessed by considering if it is facially discriminatory, or factually discriminatory, looking at both its practical effect and 'legislative form'. (Cole)

Facial Discrimination?

That (law) is facially discriminatory is uncontentious, as the legislative text clearly singles out (State)'s (trade). Moreover, (law) imposes a \_, which constitutes a discriminatory burden (Cole) by conferring a competitive advantage on (Victorian wholesalers). (Bath)

- tariffs
- non-tariff barrier (quotas/quarantine)
- differential rate
- subsidy on production
- discriminatory burden

While not recognised as a discriminatory burden in Cole, law's inclusion of \_ still establishes facial discrimination as it confers a competitive advantage on (Victorian wholesalers). (Bath)

Is facially discriminatory as it imposes a barrier to interstate trade in \_ at the border of (State). (Cole)

Factual Discrimination

While (Law) appears facially neutral, it will still infringe s 92 if factual discrimination is established, where the law's operation has a discriminatory effect through bringing an economic disadvantage to \_.

Here, factual discrimination appears with (law)'s operation conferring a competitive advantage/disadvantage to (state service) which competes with (state services) in the same market. (Betfair)

Factual discrimination will be assessed with reference to the following three-part test. (Castlemaine)

The likelihood of factual discrimination is reduced if the Cth has a cooperative arrangement with the states (Cole)

Purpose?

(Law) will be saved from invalidity if (State) can establish that the law seeks to achieve a legitimate, non-protectionist policy goal. (Castlemaine; Betfair (No1))

However, the Commonwealth will assert that the legislative purpose of (law) is not protectionist, which instead aims to \_. Here, the state only needs to justify the law according to one of these purposes, and will have the best success with \_ (Castlemaine)

This objective can be evidenced by \_. [law encouraging \_]

Analogous to the impugned reg 31(1)(d) of the Tasmanian Sea Fisheries Regulations 1962 in Cole, which prohibited the possession of undersized crayfish to protect and conserve crayfish, and was held not protectionist in nature by not giving Tasmanian crayfish a competitive market edge in practice. [However, may be distinguished from Cole, as the policing of the regulation was only done through random inspection and measurement, and it was impossible to determine where a crayfish had been caught on inspection.

**Here, the Commonwealth/State cannot assert that the protection state revenue is a legitimate purpose as it defeats the purpose of s 92 to protect the common market. (Betfair (No1))**

### Effect (Castlemaine)

Next, establishment of the extent of the market disadvantage conferred upon \_ through (law's) operation will aid in establishing factual discrimination. (Castlemaine)

\_ may best demonstrate this by evidencing that no change in company practice will allow \_ to avoid the law's likely practical effect in imposing a significant loss of \_'s market share or profit. (Castlemaine; Betfair (No2))

Analogous to Castlemaine where the Bond brewing companies were effectively prevented from obtaining a market share in packaged beer in South Australia in excess of 1%.

Analogous to Castlemaine where the Court recognised that while the affected Bond brewing companies had the alternative to convert existing interstate plants to use refillable bottles, this was 'uneconomic' and 'commercially disadvantageous'.

### Proportionality?

Lastly, law infringes s 92 if the effected discrimination is disproportionate to the pursuit of (objective), such that it 'warrants characterisation' of (law) as protectionist with the real legislative purpose to impose a discriminatory burden. (Cole; Castlemaine)  
[ends are disproportionate to the means]

The existence of a 'reasonable non-discriminatory alternative means' of achieving (object) which involve a lesser discriminatory burden will indicate against proportionality. (Castlemaine, Gaudron, McHugh JJ)

However, the Court will strike down the law if it is insufficiently tailored to the objective. (Castlemaine; Betfair)

Here, no legislative alternatives appear to exist, analogous to the impugned legislation in Cole, where despite burdening interstate trade and commerce in crayfish caught in South Australia and sold in Tasmania, the limitation on crayfish size was found to be a necessary means of enforcing a prohibition against catching undersized crayfish in Tasmanian waters. [no alternative means of protecting Tasmanian crayfish without preventing others from bringing in crayfish from interstate.

Less restrictive alternative

[Can it be more fine-tuned with greater ministerial discretion]?

(Law) should not 'go beyond the prescription of a reasonable standard' applied generally across trading in () within the Commonwealth to the objective, so as to 'disadvantage interstate trade' and 'raise a protective barrier'. (Cole)

-Consider if the means are necessary or if alternative can be taken. (Cole; Betfair (No 2))

Likely to be incidental, rather than disproportionate. (Castlemaine)

In Castlemaine, whilst the Court acknowledged that legislation to make non-refillable beer bottles commercially unviable had an environmental public policy objective, the measures were not proportionate to this policy because the amount of the refund provided exceeded was necessary to achieve the objective of recycling.

In Cole v Whitfield the only way to prevent small crayfish from being caught in Tas was to place a prohibition on the possession of all small crayfish, regardless of their source. There was an identifiable non-protectionist purpose and there was no reasonable way to make the incidental protectionist effect less burdensome.

### Conclusion

In sum, with close reference to [insert law] it is apparent, on its face and in its operation, that it imposes a burden on interstate trade because...

**Whether X is 'reasonably capable of being appropriate and adapted' or 'reasonably necessary' or proportionate to X objective above is difficult to determine on the facts available.**

**On one view, it would be deemed a reasonably proportionate measure, especially as part of a wider statutory regime that imposes significant burdens on local produces as well. Alternatively...**

Whether X is 'reasonably capable of being appropriate and adapted' or 'reasonably necessary' or proportionate (Cole; Betfair) to X objective above is difficult to determine on the facts we have available. Here the law appears to be/not to be necessary or appropriate and adapted to the purpose of [X] and the impact on interstate trade and commerce is incidental and not/is disproportionate to the achievement of the objects of [X] and [X]. (Castlemaine)

*Legitimate purpose?*

Regard can be had to things identifying government purpose (*Hansard; Betfair*)

*Alternative means to achieve policy goal? (Castlemaine)*

The pursuit of (*law's*) objective warrants a characterisation as protectionist, justifying a decision that it still contravenes s 92. (*Cole*)

*Proportionate?*

'legislative measures which are appropriate and adapted to the resolution of [social, enviro, etc] problems would be consistent with s 92 so long as any burden imposed on interstate trade was incidental and not disproportionate to their achievement.' (*Castlemaine*)

#### Theoretical Thoughts [essay]

DANGERS OF NOT INTERFERING – similar to the 8 decades of litigation and 140 decisions of the High Court and Privy Council over the freedom of interstate trade until *Cole* which hosted many apparent inconsistencies and uncertainties – which only served to encourage opportunistic litigation.

-Increase political appetite for government intervention (reduce public confidence in the judiciary)  
-Cannot just remain silent, especially where the constitutional text remains ambiguous and does not clearly express the limits or scope of its guarantees.

\*Proceduralism – abandonment in *Cole v Whitfield* of the individual freedom approach to understanding s 92, and instead viewing it as preventing the government from proscribing governmental controls or burdens which discriminate against interstate trade and commerce.

Substantial rights also risks judicial opinion being mixed with ideological inclinations – in *Miller v TCN*, both Mason and Deane JJ have highlighted the divergence of views expressed by the members of the Court in *Uebergang*, which have only confused 'rather than elucidate', with Justice Mason observing that the individual rights theory adopted drew 'too heavily on the laissez-fair notions of political economy'. (161 CLR, 571)

By promoting substantial rights – uncertain movement – individual rights theory of s 92 endorsed in *Commonwealth v Bank of NSW*, while enlarging the freedom guaranteed, also significantly increased s 92 litigation, sparking more than 90 High Court cases in 35 years – an 'unacceptable state of affairs'. (*Cole*)

\*Criterion of operation formula– ignored the real or substantive effects of s 92, and by focusing on the formal distinction of trade and commerce, the Court had avoided the practical operation or economic consequences of s 92's operation, and emphasis on the legal operation created concern that legal loopholes could be exploited. (*Cole*)

The High Court has recognised that its elucidation of the scope of s 92 in *Cole* is not an anathema, but departs from an approach requiring the application of a non-legal nexus, and allows for more scope for necessary public interest regulation of trade and commerce.

Judicial deference in *Castlemaine* to the legislature, by holding that a decision on the necessity or desirability of a law is non-justiciable and best left to the political process as a political question. [will not deny the validity of a legislative objective, but rather whether it has been achieved proportionately]

[Dialogue] – Court's obiter which highlighted an acceptable legislative alternative to the impugned law in *Castlemaine*, and concurrently stating the reasons for its validity – mainly that a law whose object and effect was to simply discourage the sale of beer in non-refillable bottles.

Helps parliament to rethink the effects

-Unlike the concern that the intense judicial scrutiny of public regulatory controls from the post-*Cole* approach would present a greater threat to governmental control of economic activity than the 'individual right' approach.

## INDIVIDUAL RIGHTS?

- Zines: the fact that an individual wins a case, and is protected from the enforcement of legislation, does not evidence a judicial characterisation of individual rights but ultimately is still a protection of broader rights (*Befair (No 2)* citing *The High Court and the Constitution*)

Moreover decision making does not necessarily 'vindicate a right in individuals'.

Until *Cole, s 92* was a serious impediment to government regulation of commercial activity in Australia, as the conventional approach to *s 92* could threaten a vast range of government programs, irrespective of whether they aimed to regulate commerce.

For example, the Privy Council declared Commonwealth programs for collective marketing of dried fruit in *James v Cth* (1936) and for nationalising the banking industry in the *Bank Nationalisation Case*.

Likewise, the High Court has struck down requirements for local pasteurisation of milk, (*North Eastern Dairy Co*), a state registration fee on motor vehicles used for interstate transport, (*Finemores Transport*) and a state registration system for travel agents. (*Boyd*)

*s 92* and its precedent became a maze through which governments were obliged to find a way if regulatory attempts were to survive. (With many inconsistencies and uncertainties which only encouraged opportunistic litigation.

The conventional view of *s 92* prior to 1988 as creating a zone of freedom for traders was in conflict with a widespread political appetite for increased government intervention. (*Uebergang, Gibbs and Wilson JJ*)

-Absolute freedom of interstate trade: the development and strengthening of this framework often comes at the cost of individual liberty, and ultimately the Court must 'preserve a balance between competing interests', which favours individual freedom where no compelling considerations to the contrary exist. (*Uebergang, Gibbs and Wilson JJ*)

The individual freedom approach was abandoned in *Cole* where the Court declared that *s 92* did not immunise interstate traders from government controls, but demanded 'equality of treatment' as between local and interstate trade.

A settled approach to *s 92* has been difficult to achieve given that it has been expressed in the form of an incomplete proposition, failing to identify what burdens or restrictions interstate trade is supposed to be free from.

*S 92's* placement in Ch suggests that it was to protect interstate trade, commerce and intercourse from taxes from taxes and other fiscal charges which placed discriminatory burdens on interstate trading and movement.

Historical reasons to view *s 92* as conferring a broader freedom, from laws which absolutely prohibited or discriminated against the movement of goods and persons across State borders, like discriminatory taxes or more subtle forms of protectionism.

This view of *s 92* as proscribing government controls or burdens that discriminate against interstate and commerce was endorsed by the High Court in *Cole*.

Significant weakness of construing *s 92's* language as demanding freedom for individuals to trade without government interference, is if the provision was intended to protect against government control, its coverage would have extended to intrastate trade.

In *Uebergang*, Deane J has highlighted that *s 92* was intended to reinforce Australia's economic and social unity through 'removing the barriers to commerce, trade and intercourse'.

"The difficulties in *s 92* flow from its origin as a rallying call for federationists who wanted to be rid of discriminatory burdens and benefits in trade and who would not suffer that call to be muffled by nice qualifications." (*Cole*) [Court has a capacity to use the convention debates and historical material only with ambiguity in the constitutional text – rejected the individual rights theory under *s 92*]

-Outcome of previous precedent was 'unable to give authoritative guidance' on the interpretation of *s 92*, resulting in an 'unacceptable state of affairs'. (*Cole*)