

Topic H: Freedom of Interstate Trade and Intercourse (s 92)

s 92: 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

- **Express** prohibition applying to both Cth and States
- ‘Absolutely free’ – meaning there would be no limitation, but read with power under s 51 (i), contemplates some power to regulate interstate trade and commerce
- ‘Trade’ – same meaning as s 51(i)
 - Ordinary commercial usage: ‘the mutual communings, negotiations, verbal and correspondence, bargain, transport, and delivery are all, but not exclusively, parts of the class of relations between mankind which the world calls ‘trade and commerce’ (*WA McArthur v Qld*)

(1) Backdrop

Previous views

- Does ‘absolutely free’ rest on laissez faire approach, detailing freedom from govt regulation? Or, does it rest on an economic theory of free trade?
- *Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1949)
 - Reflects laissez faire approach – while a law can regulate interstate trade in some way, it cannot prevent it; that would impinge on an ‘individual right’ to trade
 - Supported an ‘individual right’ thesis, including potentially preventing regulatory measures incompatible with right to engage in interstate trade

<i>Cole v Whitfield</i> (1988)	
Facts	○ Tas passes law: can only sell crayfish of certain size, in order to maintain breeding stocks (make sure they are fully grown adults) ○ In SA, could lawfully harvest and sell smaller crayfish – SA has competitive advantage as water is warmer, and breeding stock can be maintained easier ○ W got in trouble for selling crayfish from SA in Tas ○ W argued law was contrary to s 92 – i.e. did the law impose a discriminatory burden of a protectionist kind
Decision/ Reasoning	Purpose of s 92 was to create free trade – ‘absolutely free’ historically meant freedom from protectionist measures, not total deregulation, thus only <u>discriminatory burdens of a protectionist kind</u> on interstate trade will violate s 92. *Established <u>two steps</u> for what amounts to discriminatory in a protectionist sense: (1) Subjecting interstate trade or commerce to a disadvantage or disability, or producing this as a result

	▪ i.e. discriminates in favour of intrastate trade; discriminatory in its purpose or effect (effect is ‘the factual operation of the law produces such a result’) (2) Discrimination is <u>upon protectionist grounds</u> ▪ Is a matter of ‘fact and degree’ for judicial assessment – distinguishing from regulations ‘necessary for the conduct of business’ or prescribing ‘a standard for a product or service’ *Note: A protectionist <u>purpose</u> is not allowed, but it is different where the purpose is different (e.g. environmental) but happens to have a protectionist effect – can be pursuing a <u>legitimate objective</u>. HELD: (1) no discriminatory purpose, <u>but</u> had discriminatory effect by removing SA’s competitive advantage, thus was discriminatory against their producers. (2) law was of <u>reasonable standard</u> and did not go too far.
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(2) Applying *Cole*

<i>Bath v Alston Holdings</i> (1988)	
Facts	○ In Vic, wholesaler of tobacco must pay a fee – thus costs increase, which means shop also likely need to increase their prices ○ Vic govt does not like that other states do not have similar laws, as there are less sales in Vic and Vic govt no longer getting income from fees, thus they start taking the actual tobacco shop too ○ BUT, includes condition they will decrease fee payable by shop, if they buy from Vic wholesaler ○ So, Vic govt still able to claim fee at some point no matter where tobacco was purchased – what happens to NSW producers – either: ○ i. Prior to regime they had competitive advantage (since they had no fees), they could sell to Vic and get more profit ○ ii. Do pay equivalent fees, meaning they increase price that Vic shop buys from them to cover fees, and Vic shop still needs to pay their fee since bought outside of Vic ○ Was this discriminatory in a protectionist sense against inter-state wholesalers?
Decision/ Reasoning	HELD: law <u>was</u> discriminatory in a protectionist sense, in breach of s 92. Tobacco purchased from wholesaler in Vic was excluded from retailer’s licence fee, thus on its face, <u>law discriminated</u>. *Laws aimed at ‘equalising competition’ will be discriminatory in protectionist sense if: ▪ State law conferred a competitive advantage on local industry; or ▪ State law removed competitive advantage from interstate industry

<i>Barley Marketing Board (NSW) v Norman</i> (1990)	
Facts	○ Governor empowered to declare that commodity is divests from producers (free of mortgages) and given as property to a marketing board

	○ 1985 proclamation declaring barley produced was to be vested in Barley Marketing Board ○ Argued it was contrary to s 92 as the scheme, being undertaken to ensure a min price for producers, was designed to help small wheat producers
Decision/ Reasoning	HELD: <u>no discrimination against interstate providers</u>. 'In the present case, there is no evidence to suggest the marketing scheme operates in such a way as to restrict the supply of barely to interstate malsters.' *EXCEPTION: the purpose of the legislation is: (i) to secure some legitimate non-protectionist objective; and (ii) the discriminatory burdens on interstate trade are <u>incidental and not disproportionate</u> in achieving the legitimate objective

(3) Applying the exception

<i>Castlemaine Tooheys Ltd v South Australia (1990)</i>	
Facts	○ Backdrop: states only drank beer produced in their own state ○ At this time, other beer companies were trying to break into interstate markets ○ SA passes law to make it <u>disadvantageous</u> to use non-refillable bottles when selling beer – non-refillable bottle refund could be taken to any retailer, refillable bottle refund was limited to depots ○ Higher refund (15c) for non-refillable bottles vs 4c for refillable bottles ○ Retailers wanted to stop non-refillable bottles (i.e. bottles of interstate producers), as they would be giving refunds for bottles they didn't even stock – thus, wanted to encourage refillable bottles ○ Affects BB, out of state brewer attempting to gain market share in SA, who used ○ SA claimed the purpose was environmental, and the effect was a competitive disadvantage for out-of-state producers
Decision/ Reasoning	HELD: breach of s 92 as imposed <u>discriminatory and protectionist burden</u> – burden on interstate trade was disproportionate and protectionist in effect, as law went beyond what was needed to achieve the environmental aim. A law with a legitimate non-protectionist purpose (e.g. environmental) is <u>only valid</u> if the means used are 'appropriate and adapted' – <u>proportionality</u>. Alternatives: 15c refund was <u>excessive and unnecessary</u> – even SA's own parliamentary discussions suggested a lower refund of e.g. 6c would have sufficed. *Note: can only use alternatives readily available, e.g. another state is doing it – cannot just come up with own alternatives.

<i>Betfair Pty Ltd v Western Australia (2008) (Betfair No 1)</i>	
Facts	○ B was internet betting exchange operating out of Tas –gamblers bet against each other using site, B received commission on winnings ○ Was gaining market share – would take revenue away from states, which had fee arrangements with TABs

	○ Different to conventional gambling/TABs as not betting against the house ○ WA passed legislation prohibiting anyone from using a betting exchange and prohibiting person in WA or anywhere to publish information on a WA race anywhere without prior approval (approval was to be sought from a Minister committed to eliminating betting exchanges) ○ Tas for e.g. had introduced a regulatory licensing system for betting exchanges ○ WA argued regulation necessary as: (a) betting exchanges do not contribute financially to racing industry, (b) allows punters to back a contestant to lose, threatening industry's integrity, (c) operation entails a loss of revenue to the state
Decision/ Reasoning	<u>Key Takeaways</u> – court found it necessary to assess both discrimination, as well as the ‘national market’ argument: 1. Identify discrimination (competitive advantage) on interstate trade in a national market – purpose and effect 2. ‘National market’ – cross-elasticity of demand and substitutability of products (to identify competitive disadvantage) – increasing demand for one product will decrease demand for another, which makes them substitutable and thus puts them in the same market HELD: <u>B wins</u>. Re WA's arguments: (a) rejected as there were alternatives in other states (e.g. licensing regimes) that were working; (b) rejected again pointing to other states alternatives of regulating rather than banning; (c) rejected as Court says this is protectionist. Re takeaways: (1) was not discriminating by purpose as was not only directed at interstate exchanges, but effect was too far as it banned internet usage for all interstate providers; (2) use of TABs would go up if no access to online gambling because it becomes the only option, thus it was a national market.

<i>Betfair Pty Ltd v Racing New South Wales (2012) (Betfair No 2)</i>	
Facts	○ B operating in Tas – objects to fees imposed by NSW which incl. 1.5% fee on ‘wagering turnover’ ○ B only takes revenue from winning bet, <u>but</u> wagering turnover fee was charged on <u>every bet</u>, thus B charged on more revenue than they are receiving, meaning they pay higher fee than other gambling establishments (since only profiting from winning bets) ○ B argued it was commercially disadvantaged because of different business model (fee absorbed was higher proportion of turnover)
Decision/ Reasoning	HELD: <u>B loses</u>. B had only established it will lose more of its profit – had not shown there was loss of market share or an impediment to increasing market share or profit. ‘The relevant inquiry is whether there is a denial by the law or measure of a competitive advantage in trade’ – Heydon J said it was possible to show an individual trader's position was typical of interstate traders, but was <u>not</u> established here.

(4) Intercourse among the states

- Refers to movement
- *Nationwide News v Willis*: ‘the movement of people, transport of goods, transmission of communications, passage of signals, and another means by which ‘interchange, converse and dealings between States in the affairs of life’ are carried across State boundaries’ (Brennan J) – i.e. communications, dealings, movement
 - ‘it is essential that something (or some person) be moved’ – must be border crossing

<i>Palmer v Western Australia</i> [2021] – *more about intercourse	
Facts	○ <i>Emergency Management Act 2005</i> (WA) gave power to declare state of emergency (s 56) and power to prohibit entry into/out of emergency area (s 67) ○ Pandemic was state of emergency, applied to whole of WA – P argued this went against two heads of power ○ *Does same test apply to intercourse limb as the trade limb?
Decision/ Reasoning	TEST (refined from <i>Cole</i>) – applied to both interstate trade and intercourse: (1) Is there <u>differential treatment</u> between <u>interstate</u> intercourse and <u>intrastate</u> intercourse (in purpose or effect – intending to discriminate or discriminates in its operation); and (2) Justification (protectionist by effect) – is the law ‘reasonably necessary’ to achieve a legitimate non-discriminatory purpose? For intercourse – <u>structured proportionality test</u> for intercourse limb [*note: if one fails, whole test fails] – is the law reasonably necessary to achieve a legitimate object? The law must be: (a) Suitable – is it rationally connected to the purpose of the provision? *<i>Not assessing whether it is good or best response, just needs to be rational and related to the problem – e.g. fruit plague in Vic so NSW passes law banning importation of fruit from Vic (banning may be excessive, but it is rational and connected to the problem).</i> (b) Necessary – it has <u>no obvious and compelling alternative</u>, no reasonably practicable means of achieving the same purpose with a less restrictive effect on the freedom of interstate intercourse/trade (c) Adequate in its balance – a value judgment between the importance of the purpose being pursued and the extent of the restriction on the freedom of interstate trade/intercourse *<i>Balancing burden and advantage</i> Court’s answer: (a) <u>yes</u> restricting movement is rationally connected to preventing spread of Covid; (b) <u>yes</u> as tailored border controls during pandemic were considered insufficient; (c) <u>yes</u> as protecting life and health justified even severe movement restrictions.