

Section 92 and 109 limitations

1. Is this section valid?

- States have plenary power
- It may be supported by section (head of power).

2. Limitations?

➤ S92 prohibits discriminatory burdens of a protectionist kind on interstate trade *Cole v Whitfield.*

- S92 does not prohibit discrimination against **an** interstate trader, but burdens on interstate trade as a collective *Betfair No 2*¹
- NOT individual rights theory → *Cole*
- This limitation restricts Commonwealth Parliament as well as State parliaments *James v Commonwealth*, thus greatly affecting Parliament's authority under s51.

➤ *Cole* imposed the invalidity test.

1. DISCRIMINATORY BURDEN?

Does it discriminate between interstate trade, or intrastate trade? Does it impose a burden?

- i. Burden on the face of the law? *Bath v Alston Holdings*²
- ii. Burden on practical effect in operation?³ *Castlemaine Tooheys/ Cole v Whitfield.*
 - Common circumstances of interstate trade *Betfair No 2 or 1*⁴.

Conclude: There is/is not a discriminatory burden on interstate trade.

2. PROTECTIONIST KIND?

Is the law reasonably necessary⁵ to achieve a non-protectionist

¹ Betfair made fundamental mistake by arguing that **it** was being discriminated against, and because **it** was an interstate trader, interstate trade was being discriminated against.

² Victorian legislation required retail tobacconists to pay licences of \$50 plus 25% of value of tobacco sold, "other than tobacco purchase in Victoria from the holder of a wholesale tobacco merchant's licence". Intended to prevent duplication of licence fee, ensuring each lot of tobacco incurred only a single ad valorem charge. **Held: breach of s92** because it is 'undeniably protectionist in form and substance' because it discriminates against interstate purchases of tobacco in favour of purchases in Victoria. If the act did not exempt Victorian wholesalers from calculation of fee, there would be no discrimination = no breach.

³ Different notion of discrimination from s51 (ii) Taxation Power. There, the question was is one state being treated different from another, and looking at discrimination on the face of the law. Here, can look at its practical effect.

⁴ Only one betting exchange which was located in Tasmania. WA law outlawed betting exchanges. In effect, it discriminated against interstate trade.

⁵ *Betfair 1 and 2*. Proportionality is no longer the relevant test in determining if s92 has been infringed, as it was in *Castlemaine Tooheys* which held that though the regulation was legitimate and for non-protectionist purposes, it was not appropriate and adapted.

purpose?

Betfair No 1/No 2 imposed the savings test.

i. Does the law have legitimate non-protectionist purpose?

- Look at object of the Act
- Look at substance of why Act was enacted

ii. Does the law achieve its purpose? (Low threshold)

- Look at law and say that it plausibly will achieve what it says it is going to achieve.
- If SA argued that the legitimate non-protectionist aim of this law is to replenish crayfish stocks, **then** the law does not achieve its purpose.

iii. Is the law reasonably necessary to achieve this purpose?

- Is it an outright prohibition? *Betfair v WA (No 1)*
 - Or a burden? i.e making it difficult to continue operations in that State
- Another way to achieve purpose?
 - Address given facts. Have any other states imposed other less burdensome means?
 - I.e. *Cole v Whitfield*: This law was reasonably necessary because “cannot undertake inspections other than random inspections and the local crayfish are indistinguishable from those imported from South Australia”.
- **Substitutability: *Betfair No 1*⁶**
 - A law will be discriminatory if it imposes a competitive disadvantage on an interstate trader as compared with intrastate suppliers of substitutable goods/services.

Conclude:

- Though the law is discriminatory in practical operation, it is for non-protectionist purposes and could not achieve its objective in another way, thus does not breach s92 and is valid.
- Probably not reasonably necessary = breach s92= invalid

➤ **S109** *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

- Only applies to States, Territories = s122, s28⁷

⁶ HC accepted that Betfair was operating in a common market with TABs and bookmakers. Thus, Betfair had been discriminated against in practice, in this common market. Betfair was the only betting exchange to be caught by this provision.

⁷ S28 ACT Self-Government Act 1988 (Cth)

- **INCONSISTENT?** 3 section 109 tests of inconsistency *Momcilovic*

- i. Impossible to obey both laws (direct)**

- Where two conflicting duties are imposed by legislation.

- ii. Conflict of rights/ privileges or entitlements**

- Where there is something in the nature of a right or privilege conferred by the paramounts legislature, and the other legislature seeks to impose some additional restrictions on the exercise of that right or privilege
 - Does it alter, impair or detract from operation of Commonwealth law? *Dixon J in Victoria v Commonwealth (Kakariki Case)*
 - Are extra disciplinary measures supplementary or exhaustive/exclusive? *Dixon J in Ex Parte McLean*

- iii. Covering the field**

- Where the Court forms the view from the language of the paramount legislature that they intended their law to be the only law upon the particular point.
 - i. i.e. Cth law trying to balance competing interests, State law could breach this compromise.
 - If state law does not intrude in same area of regulation, no inconsistency *Dixon J in Ex Parte McLean*
 - A) Identify the field the Cth law deals with
 - B) Decide whether the State law overlaps with it.
 - C) Determine whether Cth intended to cover the field.
 - Treaty implementation *Viskauskas* / Defence suggestive of this intent.
 - Construe law to determine its **true construction**, having regard to **subject, scope and purpose**. *Gummow J in Momcilovic*
 - a. Does it advance towards purpose or take away from it?
 - GMAC Clauses⁸ *R v Credit Tribunal, Dickson v Queen*⁹

- **TO THE EXTENT OF INCONSISTENCY**

- i. If inconsistent, advise to follow Cth law
 - ii. State law will be inoperative = do not have to comply whilst Cth law in operation
 - iii. Advise to 'keep eye out' for when Cth law is repealed because State law will revive and client may be in breach.

⁸ GMAC clauses show the Cth did not intend to cover the field so there can be no inconsistency under third test. There can still be inconsistency under the first 2 tests. T.b page 321-322

⁹ Cth law provided certain conduct was allowable but would be criminalised under State legislation = inconsistency. If State and Cth law prohibit same conduct, distinguish Dickson.

➤ **Application Cases**

- *Ansett v Wardley* (1980)¹⁰, *Commercial Radio Coffs Harbour* (1986)¹¹, *AMP v Goulden*¹² *Commonwealth v ACT*¹³

¹⁰ Cth law conferred no absolute right **No inconsistency.**

¹¹ Cth provision did not confer an absolute duty or privilege. Rather, conferred a duty subject to compliance with other legislation. Cth Act intended to operate within setting of other laws. **No inconsistency.**

¹² State legislation undermined the ability of life insurers to do exactly what the Act wanted and required them to do= **Inconsistent**

¹³ The Marriage Act (Cth) makes provisions about marriage as a comprehensive and exhaustive statement of law with respect to creation and recognition of legal status of marriage. Operation of the territory law altered, impaired and detracted from operation of the Federal Law = **Inconsistent.**