5: Section 92 and Section 109

Cole v Whitfield (1988)

Seminal decision for Section 92

- Set down the test for when s92 would be breached.
- "Absolutely free"
    - For the first time, the court allowed reference to the debates around s92 from Constitutional Conventions.
        - Not to understand the individual, subjective meaning of the Framers, but to gain a better understanding of the purpose of the section, and contemporary meaning of the language used. Much more textual originalist approach, than intentionalist approach.
            - *'for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objective of the movement toward federation'..*
            - *.'not for purpose of substituting the meaning of words used, the scope and effect'.*
                - *Cf Engineers Case*[1] No reference that allows to look at the Framers.
- **Held unanimously;** Rejected the individual traders approach to s92 which prohibited any regulation of an individual interstate trader. S92 would allow some regulation of interstate trade. Specifically under s51 (i) *trade and commerce with other countries and among the States.* If s92 prohibited all regulation, s51 (i) is pointless.
    - ***What is the extent of regulation allowed before it breaches s92?***
        - Referred to meaning of 'free trade' in 1890's. When Framers referred to it, they believed it was about **absence of protectionism**
            - ie tariffs that increase price of foreign goods, quotas on imports, differential railway rates, subsidies on goods produced and discriminatory burdens on dealings with imports.
        - **HC Test: S92 will be breached when either the States or Commonwealth create a discriminatory burden of a protectionist kind on interstate trade.**
            1. ***Does it discriminate between interstate trade, or intrastate trade?***
            2. ***Does this discrimination operate in a protectionist sense?***
                - Protect local industry against foreigners?
- **FACTS:** In Tasmania, the Sea Fisheries Regulations (Tas) set minimum size for catching, possessing and selling crayfish at 105 mm (slightly larger than minimum size set in other States ie SA = 98.55mm). This is because in SA, the breeding size of a crayfish was smaller due to warmer waters. Mr. Whitfield had been caught in possession of undersized crayfish in Tasmania – claim that it was purchased in SA at the legal size.

[1] *Interpret the constitution by looking at natural and ordinary meaning of the language, together with the statutory and common law context in which it was drafted.*

- **ISSUE:** Does the *Sea Fisheries Regulation (Tas)* impose a <u>discriminatory burden of a protectionist kind?</u>
- **HELD:**
    - **Discrimination was not just discrimination on the face of the law, but also discrimination in an indirect sense, in its practical operation.**

1. Discrimination? No direct discrimination on the face of the law. The Tasmanian regulation applied to interstate AND intrastate traders alike- did not differentiate between them on its face.
However, it did discriminate in its practical operation because an interstate trader operating in Tasmania, bringing crayfish in from another State, may be caught by the legislation. Whereas a Tasmanian trader, trading local crayfish caught in Tasmania, would not breach law.

- **Conclude:** there was discrimination.

2. Protectionist? The purpose of the legislation was not protection of local industry, but protection of an important marine resource (environment). It was a genuine governmental objective.

- **Conclude:** non-protectionist purposes.

3. Achieved in a protectionist way? Can they achieve the same objective of protecting marine resource without discriminating between interstate traders from local traders?

- **Conclude:** There was no other way to achieve this objective. Cannot have inspectors to determine whether a crayfish is from Tasmania, or elsewhere ie SA.

1. **Conclude:** though it was discriminatory, it was not for protectionist purpose, and it could not achieve its objective in another way, thus it **did not breach 92 and was valid.**

5: Section 92 and Section 109

Betfairs (No. 1 and 2)

Application of Section 92

- *Castlemaine Tooheys v SA* (following shortly after Cole v Whitfield and before Betfair decisions), HC expanded on genuine regulatory test:
    - *"Legislative measures which are appropriate and adapted to the resolution would be consistent with s92 so long as any burden imposed on interstate trade was incidental and not disproportionate."*

FACTS:

- *Betfair Pty Ltd* was Australia's first online betting exchange, established in Tasmania. AQ report revealed that this new way of betting raised issues for the future viability of the Australian Racing Industry, and would affect revenues from States. In response to this report, Tasmania enacted a regulatory licensing system for betting exchanges. Betfair operated out of Hobart, but it had an international reach.
- WA and NSW responded differently to the reports; enacted legislation that either prevented, or made it very difficult for Betfair to continue its operations in that state.

➢ ***Betfair v WA (No 1)***
  - **FACTS:** Enacted outright prohibition on the operation and use of betting exchanges.
    - S27B(1): *A person who establishes or operates a betting exchange commits an offence. Penalty: $10,000, or 24 months imprisonment, or both*
    - S24(1aa): *A person who bets through the use of a betting exchange commits an offence. Penalty: $10,000, or 24 months imprisonment, or both*.
    - S27D(1): A person to whom this section applies who, in this State or elsewhere, publishes or otherwise makes available a WA race field in the course of business commits the offence unless the person is
      (a) authorised to do so by approval
      (b) complies with any condition to which the approval is subject.
  - Betfair applied for this approval, but it was denied. Betfair's main competitor, *Betting and Wagering WA* was exempted from the requirement to even gain approval in the Betting Control Act.
  - Betfair argued that both provisions discriminated against it and breached s92.
➢ **HELD:**
  - *Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ* clarified the regulatory exception for s92.
    - ***"REASONABLE NECESSITY"*** test preferred over the "appropriate and adapted" in *Castlemaine Tooheys* because it involved less of a balancing exercise.
      - Consistent with explanation given in *Cole v Whitfield,* as it was a *'necessary means of enforcing the prohibition against the catching of undersized crayfish in Tasmanian waters*", the State '*cannot undertake inspections other than random inspections and the local crayfish are indistinguishable from those imported from South Australia".*
    - ***SUBSTITUTABILITY:*** Ambit of a common market exists where there is 'substitutability' between products. A law will be discriminatory if it imposes a competitive disadvantage on an interstate supplier of goods and services as compared with intrastate suppliers of substitutable goods or services.
      - 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.
        ➔ Was this of a protectionist kind?
        ➔ Did this discrimination fall within the regulatory excpetion?

- Applied 'appropriate and adapted' test, despite overruling this test. Found that is was not appropriate and adapted to achieving the objectives.
    - Considered how other states responded to the concerns made by the reports. Because there were alternative ways of achieving the objective that did not burden on interstate trade, court rejected that it was appropriate and adapted.

➢ ***Betfair v Racing NSW (No 2)***

- **FACTS:**
    - *A person must not whether in NSW or elsewhere publish a NSW race field unless the person (a) is authorised to do so by a race field publication approval and complies with the conditions (if any) to which the approval is subject, or (b) is authorised to do so by or under regulations.*
    - In this Betfairs Case, there is no outright prohibition on operating a betting exchange. However similar to WA, they can't publish race field information without necessary approval.
    - Betfair argued that it was competitively disadvantaged (as an interstate trader) by the fee structure and thus breach of s92.
- **ISSUES:**

  (i) Did the practical operation of the fee structure show an objective intention to treat interstate and intrastate trader in wagering transactions alike, notwithstanding a relevant different between them, and if so
  (ii) Whether the fee structure burdens interstate trade to its competitive disadvantage, and if so
  (iii) Whether that burden nonetheless is reasonably necessary for NSW to achieve a legitimate non-protectionist purpose.
- **HELD:**
    - HC didn't need to apply reasonable necessity test, because Betfair made fundamental mistake in its argument by arguing that **it** was being discriminated against, and because **it** was an interstate trader, interstate trade was being discriminated against.
      ***NOTE: s92 does not prohibit discrimination against **an** interstate trader, but rather the burdens on interstate trade (as a collective).

Betfair relied upon "individual rights" theory s92, which was left behind in *Cole v Whitfield.*