Bond Law Review

Volume 3 | Issue 2 Article 1

1991

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Abstract
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Keywords
section 92, Commonwealth Constitution, interstate trade, Cole v Whitfield

Cover Page Footnote
The author gratefully acknowledges the critical review given of the draft of this article by Dr Michael Coper.

Articles

THE RE-INTERPRETATION OF SECTION 92: THE DECLINE OF FREE ENTERPRISE & THE RISE OF FREE TRADE

by
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The re-interpretation of section 92 of the Commonwealth Constitution by the High Court in *Cole v Whitfield*[1] has effected a fundamental change in the constitutional power of both the Commonwealth and the States to regulate interstate trade and commerce. Although this change has come about by judicial re-interpretation and not by way of the formal amendment procedure prescribed by section 128 of the Constitution, one can readily discern from the vague terminology of section 92 that its drafters intended its scope to be determined by judicial interpretation.

There are two basic legal processes involved in the operation of section 92:

(1) The **interpretation** of the words of the section which in so far as they are relevant today, are:

> 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*.; and

(2) The **application** of section 92 (as interpreted) to any factual situation.

This same two stage approach arises when determining the constitutional validity of Commonwealth legislation under one or more of its heads of power in ss 51 and 52 of the Constitution. As with these heads of Commonwealth power, the meaning to be attributed to the words of section 92 is capable of definitive declaration. This is the principal achievement of *Cole v Whitfield*. What the decision does not provide nor could it provide, is a comprehensive set of rules by which Commonwealth and State legislation can be judged as infringing or not infringing the guarantee of freedom of

* The author gratefully acknowledges the critical review given of the draft of this article by Dr Michael Coper.

1 (1988) 165 CLR 360.

interstate trade and commerce as defined. Clear rules will hopefully develop over time in future decisions on s 92.

This paper attempts to clarify the High Court's response so far to both stages referred to above in the hope that it will provide a working guide to the operation of s 92 in the multifarious situations in commercial life to which the section may extend.

The Meaning of Section 92

There are two phrases in s 92 which require interpretation: 'trade, commerce and intercourse among the States' and 'shall be absolutely free.' The more difficult of the two phrases is, of course, the latter since of what is the trade, commerce and intercourse among the States to be absolutely free? But s 92 jurisprudence prior to *Cole v Whitfield* also placed significant emphasis on the former phrase requiring the law in issue to directly regulate what the Court recognised as an activity of interstate trade or commerce. This was known as the 'criterion of operation' formula.[2] This formula effectively restricted the operation of s 92, despite later attempts to overthrow the rigours of form and look to the practical substantive effect of the law.[3] Today, however, since the *Cole v Whitfield* re-interpretation of s 92, both phrases are read together. The criterion of operation formula is rejected and no longer does there appear to be the same degree of significance attached to whether the activities affected are strictly of an interstate character. But this is not to say that the nature of the activities involved is an irrelevant consideration. This aspect is further discussed below.

The essential question raised by s 92 is the meaning of 'absolutely free'. The key to resolving this mystery lies in the underlying purpose of the section. Since federation, the High Court has recognised several different purposes but two views have been the most prominent: **the free trade view** and the **individual rights (or laissez-faire) view.**

The notion of 'free trade' involves the absence of protective barriers to trade between the States and is based on the fact that s 92 is one of several sections (ss 90, 99 and 102) designed to eliminate all border customs duties and other measures which restricted the free flow of interstate trade. The first decision on s 92, *Fox v Robbins*[4] held invalid Western Australian legislation which imposed a £ 2 licence fee to sell liquor produced from fruit grown in Western Australia but a £ 50 licence fee to sell other liquor. This discrimination against liquor produced from fruit grown outside Western Australia was held to breach s 92.

In a series of cases after *Fox v Robbins*,[5] the High Court split on the need to establish discrimination against interstate trade in order to establish a breach

2 See eg *Wragg v New South Wales* (1953) 88 CLR 353.

3 See *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559; *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979) 145 CLR 1; but cf *Grannal v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55.

4 (1909) 9 CLR 115.

5 Ibid.

of s 92. Several judgments[6] interpreted s 92 as conferring an individual right to freedom of interstate trade. No element of discrimination was necessary. The fact an individual trader was burdened in carrying on interstate trade was sufficient to attract the protection of s 92. This individual rights view was endorsed by the Privy Council in the *Commonwealth v Bank of New South Wales* (the *Bank Nationalisation* case)[7]. But this wider operation to the guarantee had to be qualified to avoid commercial anarchy arising from an *absolute* freedom. Hence, under the influence of Sir Owen Dixon, the High Court developed the requirement that unless the legislation directly burdened an activity of interstate trade, commerce or intercourse, or an essential attribute thereof, s 92 would not be breached. Further, there developed the exception of *permissible burden or reasonable regulation*. However, during the next forty years, further debate as to the scope of s 92 arose within the High Court. After the retirement of Sir Owen Dixon, Sir Garfield Barwick[8] advocated a practical effects test, whether the legislation in its practical operation interfered with interstate trade. This approach rejected the 'criterion of operation' formula which limited s 92 to laws which only directly burdened such trade. Also, the concept of reasonable regulation was viewed differently by Sir Anthony Mason[9] who emphasised the public interest factor thereby giving s 92 more of a public than a personal individual rights character.

In the light of these diverse views on the role and scope of section 92 within the High Court in previous decisions and the lack of any clear majority view,[10] the opportunity arose in *Cole v Whitfield* for the High Court to re-interpret the section. The unanimous judgment[11] which followed is a significant achievement.

Essentially, *Cole v Whitfield* endorsed the free trade view and rejected the individual rights view. The Court rejected the latter view for several reasons: (i) the criterion of operation formula was too artificial and technical; (ii) the scope of s 51 (i), the interstate trade and commerce power, was unduly restricted by the individual rights view; (iii) it created protectionism in reverse whereby interstate traders avoided liabilities imposed on intrastate traders and (iv) it failed in principle to allow for laws protecting the public interest.[12]

The adoption of the free trade view in *Cole v Whitfield* was justified by reference to the convention debates and the context of s 92 in chapter IV of the Constitution.[13] Colonial politics prior to federation was marked by the

6 See *W A McArthur Ltd v Queensland* (1920) 28 CLR 530 per Knox CJ, Isaacs and Starke JJ at 552; cf *James v Cowan* (1932) 47 CLR 386 and *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30.

7 (1949) 79 CLR 497.

8 See eg *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559 at 588-9.

9 See eg *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979) 145 CLR 1 at 36.

10 See Mason J in *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 571: '..there is now no interpretation of s 92 that commands the acceptance of a majority of the Court'.

11 Above n 1 : joint judgment of Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

12 Ibid at 400-5.

13 Ibid at 385-391.

debate between the free traders in New South Wales and the protectionists in Victoria. While s 92 clearly abolishes all border custom duties, no agreement was reached on the exact scope of this 'absolute freedom' which the section guarantees.[14] Both Sir Samuel Griffith and Sir Isaac Isaacs during the Convention debates considered the section to be too widely drafted.[15] In concluding that when drafted, s 92 did not have 'any precise settled contemporary content',[16] the High Court in *Cole v Whitfield* acknowledged that it was their responsibility to elucidate the unexpressed.[17] Accordingly, the Court declared:

> The purpose of the section is clear enough: to create a free trade area throughout the Commonwealth and to deny to Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries.[18]

The Court went on to say:

> That history demonstrates that the principal goals of the movement towards the federation of the Australian colonies included the elimination of intercolonial border duties and discriminatory burdens and preferences in intercolonial trade and the achievement of intercolonial free trade.[19]

The Meaning of 'Free Trade'

Undaunted by the need to define for legal purposes the economic term of 'free trade', the High Court in *Cole v Whitfield* defined it as follows:

> The expression 'free trade' commonly signified in the 19th century, as it does today, an absence of protectionism, that is, the protection of domestic industries against foreign competition.[20]

The judgment goes on to list in two categories examples of protectionist measures which 'make importing and dealings with imports difficult or impossible':[21]

(i) tariffs on foreign goods; and

(ii) non-tariff barriers
- * quotas on imports
- * differential railway rates
- * subsidies on goods produced
- * discriminatory burdens on dealings with imports [22]

It is important to note that the Court recognised the prevention of these protectionist measures is achieved not by s 92 alone but in combination with

14 Ibid at 391.
15 Ibid at 389.
16 Ibid.
17 Ibid at 392.
18 Ibid at 391.
19 Ibid at 392.
20 Ibid at 392-3.
21 Ibid.
22 Ibid at 393.

ss 99 and 102. Section 99 prohibits the Commonwealth by any law of trade, commerce or revenue, giving a preference to one State or any part thereof over another State or any part thereof. Section 102 empowers the Commonwealth to protect the railways from any undue and unreasonable preference or discrimination at the hands of the States which is adjudged to be so by the Inter-State Commission.

The scope of s 92 is described in these three separate passages of the judgment:

> Section 92 precluded the imposition of protectionist burdens: not only interstate border customs duties but also burdens whether fiscal or non-fiscal, which discriminated against inter-State trade and commerce. [23]

> ...s 92 [requires] that inter-State trade and commerce be immune only from discriminatory burdens of a protectionist kind. [24]

> ...the prohibition of measures which burden inter-State trade and commerce and which also have the effect of conferring protection on intra-State trade and commerce of the same kind'. [25]

Only by reading all three passages and in particular, the last of them, does one gain a precise statement of the effect of s 92 today. The reference in the second of the above passages to 'discriminatory burdens of a protectionist kind' needs to be expanded for it to accurately express the new formula for s 92. In attempting this task one might say that *Cole v Whitfield* establishes that **s 92 prohibits the Commonwealth and the States from imposing burdens on interstate trade or commerce which (i) discriminate against that trade or commerce by conferring a competitive or market advantage on intrastate trade or commerce of the same kind and (ii) are protectionist in character.**

Most importantly, the High Court emphasised that discrimination against interstate trade and commerce is to be judged on the practical effect of the law not simply on whether there is formal discrimination appearing on the face of the law.[26] One will naturally examine a law for any formal discrimination appearing on its face but the inquiry does not stop there. The test is whether there is **actual** discrimination in the operation of the law.

The inclusion of non-fiscal burdens which discriminate against interstate trade or commerce, as well as fiscal burdens within the scope of s 92, is essential for its effective operation. Protectionism is clearly effected by quotas and other restrictions on interstate trade. In accepting this, *Cole v Whitfield* rejected the view of Murphy J[27] that s 92 only guaranteed freedom from fiscal imports imposed at the border.[28]

It should be noted at this stage, that this free trade interpretation was not

23 Ibid.
24 Ibid at 394.
25 Ibid.
26 Ibid at 399-400.
27 See *Buck v Bavone* (1976) 135 CLR 110 at 137.
28 Above n 1 at 407.

extended to the guarantee of freedom of intercourse in s 92.[29] This aspect is considered later.

The Facts of *Cole v Whitfield*

The respondent in Tasmania purchased live crayfish from a South Australian supplier and was charged with possessing undersized crayfish contrary to regulations made under the *Fisheries Act* 1959 (Tas). Although the imported crayfish met South Australia's minimum size requirements, they did not meet Tasmania's requirements. The respondent challenged the validity of the Tasmanian regulations under s 92. The High Court's unanimous judgment found no infringement of s 92 on the basis of the agreed statement of facts presented by the parties to the Court.

After examining the history of s 92 and after justifying and explaining the free trade view of s 92, the Court in just over a page of the judgment considered the facts before it.[30] The approach which the Court appears to have adopted is as follows:

> Firstly, whether the regulations imposed a **burden** on interstate trade and commerce? Clearly they did in relation to crayfish imported from South Australia.
>
> Secondly, did this burden bear the **character** of being **discriminatory** against that interstate trade? Here it was not discriminatory because the same minimum requirements applied to Tasmanian crayfish as well as imported crayfish ie no formal discrimination appeared on the face of the regulations nor was there any discrimination in their practical effect because no competitive or market advantage was obtained by the intrastate trade in crayfish.
>
> Thirdly, even if a competitive or market advantage was obtained by the local trade, the regulations still did not bear the character of a protectionist law, rather their object was 'to assist in the protection and conservation of an important and valuable natural resource, the stock of Tasmanian crayfish' and only by prohibiting the possession of all undersized crayfish (not just those taken from Tasmanian waters) could this object be achieved.
>
> The above reasoning of the Court revealed two most important points which were not canvassed earlier in the judgment. The first is that the test for determining whether the law in its practical operation discriminates against interstate trade or commerce is whether or not intrastate trade or commerce of the same kind obtains a **market or competitive advantage** over the interstate trade or commerce. The finding that Tasmania derived no competitive or market advantage from the burden imposed on imported South Australian crayfish was not explained by the Court. The second point is that the protection of the environment is compatible with s 92 by the process of characterisation. The rationale for this view appears the same as that which gave rise to the notion of permissible or reasonable regulation under the individual rights view of s 92. It is an interesting judicial technique to simply rely upon these points in resolving the issues before the Court and to defer their elaboration to future

29 Ibid at 393-4.

elaboration to future decisions on s 92. Fortunately, the second point has been further considered by the High Court in *Castlemaine Tooheys Ltd v South Australia*.[31]

Discriminatory Burdens of a Protectionist Kind

The new test for s 92 which may be inadequately stated as prohibiting discriminatory burdens of a protectionist kind, fundamentally changes the guarantee of interstate trade from a personal right enjoyed by every individual interstate trader to a legally enforceable maxim of economic behaviour, that of free trade. The High Court has in the past tackled other economic maxims especially those encapsulated in ss 51 (ii) and 99 of the Constitution.[32] Section 51 (ii) prohibits the Commonwealth from discriminating between States (or parts of States) in its taxation laws, while s 99 as stated above prohibits the conferral of preferences on States in the areas of revenue (which includes taxation) and of trade and commerce. But the number of decided cases under those provisions is minimal compared with those decided under s 92. It may be the case that the number of challenges brought under s 92 in the future will be less than in the past.

Nevertheless, the concepts of burden, discrimination and protectionism, and the process of characterisation in which they combine, necessitate careful treading in a field where economics and the law overlap. Of the concepts just mentioned, the one least known to constitutional law in Australia is protectionism. The clue to the exact notion of protectionism outlawed by s 92 is in the relationship developed in *Cole v Whitfield* between the elements of burden, discrimination and protectionism. Despite its brevity (or maybe in view of it), the approach adopted in *Cole v Whitfield* provides the best guide to this relationship.

The starting point is to ask the general question whether the legislation imposes a discriminatory burden on interstate trade and commerce? Which in turn requires one to ask: (i) is it a burden? and (ii) is it discriminatory against interstate trade and commerce? The over-riding requirement is (iii) whether it is protectionist in character?

(i) The legislation will impose a **burden** if it has the effect of restricting or prohibiting the ability to import the product or deal with it once imported whether by increasing its price, by imposing a quota, by compulsory acquisition or by other means. It seems some commercial disadvantage must be suffered.[33] Whether a benefit conferred by a State on local producers in order to give them a competitive advantage may be viewed as a practical burden suffered by interstate traders is unclear.

(ii) For the burden to be **discriminatory against interstate trade and commerce**, it must be established that the same burden is not imposed

30 Ibid at 409-10.

31 (1990) 169 CLR 436.

32 See, for instance, the discussion of 'discrimination' in s 51 (ii) in *Conroy v Carter* (1968) 118 CLR 90 and in *Deputy Federal Commissioner of Taxation v W R Moran Pty Ltd* (1939) 61 CLR 735.

33 Above n 1 at 409.

at all or to the same extent on the intrastate trade in that product or a product of a similar kind. Hence, the commercial disadvantage becomes a competitive disadvantage. In determining this, the Court looks at the practical effect of the legislation.

(iii) The third and over-riding element is that the legislation must be characterised as **protectionist**. One might have thought that if the legislation imposes a discriminatory burden against interstate trade and commerce, it is protectionist. But what *Cole v Whitfield* makes clear is that even if the legislation has a protectionist effect, this on its own, is not conclusive of its character.[34] The legislation must still be **characterised** as protectionist. In *Cole v Whitfield* , the regulations were characterised as environmental protection laws even if they imposed a discriminatory burden against interstate trade in crayfish.[35] The very brief discussion of this aspect in *Cole v Whitfield* has been developed further by the High Court in *Castlemaine Tooheys Ltd v South Australia*.[36] Subject to the formula established in that case, a law which is carefully designed to protect a legitimate local interest will not be characterised as a protectionist law even if the other elements of the *Cole v Whitfield* formula are satisfied. This matter is discussed further below.

From all this, one might argue that if a law effects a discriminatory burden against interstate trade and commerce it is prima facie protectionist. The practical onus of proof then passes to the State or to the Commonwealth to convince the Court that it should not be characterised as protectionist. On the other hand, if no discriminatory burden is cast upon interstate trade or commerce, then it appears from *Cole v Whitfield* that there is no basis for arguing it is protectionist and hence, in breach of s 92.

Section 92 and the Commonwealth

The difficulty faced by the Commonwealth in using its power in s 51 (i) to regulate interstate trade and commerce without infringing the freedom of interstate trade in s 92 has, to a large extent, it seems, been alleviated by the *Cole v Whitfield* formula.

One might initially wonder how the Commonwealth's laws enacted pursuant to s 51 (i) can avoid this new interpretation of s 92, when the laws necessarily must discriminate between interstate trade which the Commonwealth can regulate and intrastate trade which it cannot directly regulate. The let-out for the Commonwealth is that even if discriminatory, such Commonwealth laws are unlikely to be protectionist of intrastate trade. Nevertheless, *Cole v Whitfield* recognised that the possibility exists for such laws to be protectionist.[37]

One important comment was made in *Cole v Whitfield* in relation to joint Commonwealth - State arrangements:

34 Ibid at 317.
35 Ibid at 409-410.
36 Above n 31.
37 Ibid at 399.

> ...the possibility of factual discrimination by a s 51 (i) law applying only in respect of inter-State trade or commerce may well be eliminated in the context of a national scheme constituted by complementary Commonwealth and State law applying, by virtue of their combined operation, to all trade or commerce of the relevant kind.[38]

In relation to the other heads of Commonwealth power, *Cole v Whitfield* accepted that s 92 remains an important restriction. [39]

The Application of the *Cole v Whitfield* Formula

Despite the enunciation of what 'absolutely free' means in s 92, the difficult task facing the High Court and the legal profession is the application of the *Cole v Whitfield* formula. As noted earlier, the High Court in that decision gave five examples of protectionism which it later referred to simply as five **traditional** examples of protectionism, for the means by which protectionism may be attempted are legion.[40]

Clearly, the application of the *Cole v Whitfield* formula involves, as the High Court recognised, difficult questions of fact and degree 'on which minds might legitimately differ.'[41] No interpretation of s 92 is likely to avoid this situation. Indeed, the actual decision in *Cole v Whitfield* itself has been criticised[42] principally in relation to the ready acceptance by the Court that there was no method by which undersized Tasmanian crayfish could be distinguished from imported crayfish. Moreover, the next High Court decision on s 92 saw the Court split 4 - 3.[43]

The remainder of this paper considers how *Cole v Whitfield* has been applied by the three subsequent decisions[44] of the High Court on s 92 and the possible repercussions of this newly developed jurisprudence on other forms of Commonwealth and State regulation of interstate trade and commerce.

A. Tobacco Licensing: *Bath v Alston Holdings Pty Ltd*

Although *Bath v Alston Holdings Pty Ltd* [45] was decided only a month after *Cole v Whitfield*, the High Court split 4 - 3 in holding that the *Business Franchise (Tobacco) Act* 1974 (Vic) infringed s 92 for imposing a discriminatory burden of a protectionist kind on interstate trade.

This legislation regulated the sale of tobacco in Victoria by requiring wholesalers and retailers of tobacco to acquire a licence the fee for which was a small flat fee plus an amount equal to 25% of the value of tobacco sold during a previous period. However, excluded from this calculation in the

38 Ibid at 400.
39 Ibid.
40 Ibid at 408.
41 Ibid at 409.
42 See Richard Cullen, 'Section 92: QUO VADIS?' (1989) 19 WAL Review 90 at 127.
43 *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411.
44 Ibid; *Castlemaine Tooheys Ltd v South Australia* above n 31; *Barley Marketing Board (NSW) v Norman* (1990) 65 ALJR 49.
45 (1988) 165 CLR 411.

case of a retailer's licence was the value of sold tobacco originally purchased from a licensed Victorian wholesaler.

The purpose of this exemption was to ensure that the tax imposed on tobacco in Victoria was only imposed once. It was administratively more efficient to impose the tax at the wholesale level rather than at the retail level given the smaller number of wholesalers than retailers. But the effect of the exemption, in the view of the joint majority of the Court (Mason CJ, Brennan, Deane and Gaudron JJ) was to discriminate against the interstate sale of tobacco to Victorian retailers by subjecting them to a tax which was not payable if they purchased from Victorian rather than out of State wholesalers. This discrimination was, according to the majority, protectionist because Victorian wholesalers obtained a competitive advantage whether the out of State wholesalers were subjected to a tax in their own State or not. If their own State tax was less than that imposed in Victoria, they were still losing whatever competitive advantage they had over Victorian wholesalers.[46]

The approach of the joint minority (Wilson, Dawson and Toohey JJ) was to view the general scheme of the licencing requirements as one designed to impose a single tax on the sale of tobacco in Victoria whether it was produced in that State or elsewhere.[47] The minority perceived no protectionist object in the practical operation of the legislation:

> The consequences which are relevant are economic consequences for it is largely the ultimate economic effect which will determine whether or not legislation has been enacted in pursuit of a protectionist object.[48]

The difference between the majority and minority approaches in characterising the Victorian legislation as protectionist or not seems to be that the majority concentrated on the position of the out of State wholesalers who clearly suffered discrimination in terms of their competitive advantage, whereas the minority discounted this effect in searching for the ultimate economic effect. One could argue that the minority concentrated on the position of the Victorian consumer on whom the burden of the tax was ultimately to rest rather than on the position of the interstate supplier. Yet a weakness in the majority view is that they accepted the validity of the Victorian tax as not infringing s 92 had it been imposed on all retailers in Victoria rather than at the wholesale level. If the *Cole v Whitfield* formula is concerned only with commercial reality ie whether in substance there is discrimination against interstate trade or commerce, why should the result be any different if the tax is imposed at the retail level rather than at the wholesale level? This case amply illustrates the importance of judicial impression in the process of characterising a law as protectionist.

B. Legitimate State Interests: *Castlemaine Tooheys Ltd v South Australia*

The freedom guaranteed by s 92, although described as 'absolute', has always

46 Ibid at 425-6.
47 Ibid at 431-2.
48 Ibid at 433.

been recognised as a qualified freedom so as to permit reasonable regulation of interstate trade and commerce. Under the individual rights view, it had to be established that the measures were non-discriminatory and reasonable in regulating the trade concerned so as to protect the public interest, whether that be in the areas of public health or safety, consumer protection and so on.[49] This was, of course, an important qualification to the individual rights view of s 92.

Cole v Whitfield also recognised that the guarantee against protectionism was not absolute; there is a need at times for State regulation. The Court expressed this point in terms not unlike the test which was applied before s 92's re-interpretation:

> A law which has as its real object the prescription of a standard for a product or a service or a norm of commercial conduct will not ordinarily be grounded in protectionism and will not be prohibited by s 92. But if a law, which may be otherwise justified by reference to an object which is not protectionist, discriminates against inter-State trade or commerce in pursuit of that object in a way or to an extent which warrants characterisation of the law as protectionist, a court will be justified in concluding that it none the less offends s 92. [50]

Reference has already been made to the Court's recognition of the environmental protection objective of the Tasmanian regulations in that case.[51]

Scope is therefore given to State and Commonwealth laws which may appear protectionist, to be characterised as not protectionist if they serve to protect some legitimate local interest. This process of characterisation, while being a neat solution to the difficulty of reconciling the public interest in regulating certain aspects of interstate trade and commerce with the freedom from protectionism guaranteed by s 92, nonetheless injects considerable flexibility and uncertainty into the situation.

Further guidance in this area is given by the High Court in *Castlemaine Tooheys Ltd v South Australia*.[52] At issue there was the validity of the *Beverage Container Act* 1975 (SA) and its *Amendment Act* 1986 (SA) and regulations which the plaintiffs claimed were in breach of s 92. The first three plaintiffs comprised the Bond Brewing Group and they respectively produced beer in Queensland, New South Wales and Western Australia. They claimed that the practical effect of the South Australian legislation since 1986 was to discriminate against them in the marketing of their beer in South Australia and thereby protect South Australian brewers.

The *Beverage Container Act* 1975 impacted upon interstate trade in beer by introducing a deposit system whereby a deposit of five cents was included in the price of glass containers and was refundable upon their return to a

49 See *Hughes and Vale Pty Ltd v New South Wales* (No 2) (1955) 93 CLR 127 at 217-219; *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559 at 614-5, 621-2.

50 Above n 1 at 408.

51 Ibid at 409-410.

52 (1990) 169 CLR 436.

retailer. This deposit requirement applied to the plaintiffs' beer which was sold in non-refillable bottles. However, refillable bottles were exempted from the deposit system which benefited the local brewers whose beer was sold in non-refillable bottles. Nevertheless despite the burden of a five cent deposit, the plaintiffs were not disadvantaged in view of the lower costs associated with non-refillable bottles.

Early in 1986, after an aggressive advertising campaign, the plaintiffs increased their market share in South Australia for packaged beer from 0.1 per cent to 4 per cent in less than two months. In response to this, the *Beverage Container Act* 1975 (SA) was amended in October 1986, the effect of which was to alter the previous position in two respects:

(1) Refillable beer bottles now became subject to a deposit of four cents while the deposit for non-refillable beer bottles was increased from five cents to fifteen cents; and

(2) Retailers of beer were only obliged to accept returns and refund the deposit in the case of non-refillable bottles. They were not obliged to accept returns of refillable bottles which could instead be delivered to collection depots for a refund.

It was accepted before the High Court that the practical effect of these changes was to subject the plaintiffs' marketing of interstate beer to a commercial disadvantage. South Australia argued, however, that this discrimination against non-refillable bottles was not protectionist of local brewers because it was designed to protect the environment of South Australia by discouraging the use of non-refillable bottles and thereby (1) reduce the litter problem and (2) conserve the State's finite natural gas reserves used in the production of glass bottles.

While accepting that the environment is a legitimate local or State interest, the High Court was unanimous[53] in characterising the South Australian legislation as protectionist and in breach of s 92. In the joint judgment of Mason CJ, Brennan, Deane, Dawson and Toohey JJ the notion of the legitimate local or state interest was explained:

> In determining what is relevantly discriminatory in the context of s 92, we must take account of the fundamental consideration that, subject to the Constitution, the legislature of a State has power to enact legislation for the well-being of the people of that State. In that context, the freedom from discriminatory burdens of a protectionist kind postulated by s 92 does not deny to the legislature of a State power to enact legislation for the well-being of the people of that State unless the legislation is relevantly discriminatory. Accordingly, interstate trade, as well as intrastate trade, **must submit to such regulation as may be necessary or appropriate and adapted either to the protection of the community from a real danger or threat to its welfare or to the enhancement of its welfare** (emphasis added). [54]

53 Mason CJ, Brennan, Deane, Dawson and Toohey JJ delivered a joint judgment and Gaudron and McHugh JJ delivered a joint judgment.

54 Above n 52 at 472.

In formulating this test, the Court made reference[55] to several United States Supreme Court decisions[56] on the commerce clause, in particular, *Pike v Bruce Church Inc*,[57] which attempt to balance the legitimate local interest with the protection accorded to interstate trade by the commerce clause. This balancing process was adopted by the High Court to assist in the characterisation of impugned laws as protectionist or not.[58] The Court went on to apply the test extracted above to the facts before them:

> If we accept as we must that the legislature had rational and legitimate grounds for apprehending that the sale of beer in non-refillable bottles generates or contributes to the litter problem and decreases the State's finite energy resources, legislative measures which are appropriate and adapted to the resolution of those problems would be consistent with s 92 so long as any burden imposed on interstate trade was incidental and not disproportionate to their achievement. **Accordingly, the validity of the 1986 legislation rests on the proposition that the legislative regime is appropriate and adapted to the protection of the environment in South Australia from the litter problem and to the conservation of the State's finite energy resources and that its impact on interstate trade is incidental and not disproportionate to the achievement of those objects.** (emphasis added).[59]

The requirement that the legislation be 'appropriate and adapted' is intended to indicate that the Court is not concerned with whether the legislative measures are *necessary* for achieving their purpose; according to the joint judgment this is a political question.[60] Nor would the Court decide whether the chosen measures were 'a desirable solution.'[61] In other words, the Court needs to be satisfied that the measures are capable of achieving their purpose, not whether they in fact achieve their purpose. Yet, it was accepted that if alternative measures having less of an impact on interstate trade and commerce were available, this would indicate that the chosen measures were inappropriate.[62] It could be argued that the Court is entering the policy making arena in deciding which of the alternatives could have been selected in order to comply with s 92. No doubt this will require the submission of complex evidence in some cases to establish what are the alternatives and what their practical or economic impact on interstate trade or commerce is likely to be. However, one should not forget that what the Court must decide in the end, is whether the impugned legislation is protectionist in character. The fact that an alternative approach could have been adopted with less of a discriminatory effect on interstate trade or commerce, is not conclusive of it being characterised as protectionist. Other factors may exist which deny it that character; but in the absence of such factors, the failure to adopt an alternative, non-discriminatory approach is likely to indicate a protectionist object.

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55 Ibid at 468-471.

56 *Dean Milk Co v Madison* (1951) 340 US 349; *Minnesota v Clover Leaf Creamery Co* (1981) 449 US 456; *Hood and Sons v Du Mond* (1949) 336 US 525.

57 (1970) 397 US 137.

58 Above n 52 at 470.

59 Ibid at 473-4.

60 Ibid at 473.

61 Ibid.

62 Ibid.

After a thorough examination of the South Australian legislation and of its precise requirements and effect in terms of protecting the environment, the Court concluded that the measures adopted were not appropriate nor adapted to achieving their purpose.[63] The discrimination against the interstate trade in non-refillable beer bottles carried on by the Bond Brewing Group in South Australia was not justified on either ground, namely, the control of litter or the conservation of energy. In terms of controlling litter, the object of the legislation was to encourage the return and collection of containers, and the 15 cent deposit for non-refillable beer bottles compared with the 4 cent deposit for refillable beer bottles was disproportionate in terms of encouraging the return of the former, given South Australia's admission that a 6 cent deposit for the first twelve months of the scheme and a 4 cent deposit thereafter was sufficient to ensure the return of non-refillable beer bottles.[64] Nor was there any justification in the difference in the return system between non-refillable beer bottles, returns of which had to be accepted by retailers, and refillable beer bottles in respect of which no similar obligation existed. There was simply no connection at all between this form of discrimination and the object of controlling litter.[65]

As regards conserving South Australia's finite reserves of natural gas, the Court concluded that no significant saving was made by discouraging the use of non-refillable bottles by the Bond Brewing Group since all their bottles were manufactured outside South Australia.[66]

One further significant point made by the joint judgment was that it is not necessary to establish that all interstate traders are discriminated against. One of the plaintiffs' competitors in South Australia was Carlton and United Breweries Ltd (CUB) whose beer was brewed and packaged in Victoria in refillable bottles. By marketing refillable beer bottles, CUB suffered no commercial disadvantage, rather it benefited from the protectionist nature of the legislation. Despite CUB's position, in order to protect the efficacy of the guarantee against protectionism, the joint judgment accorded a flexible operation to s 92:

> Discrimination in the relevant sense against interstate trade is inconsistent with s 92, regardless of whether the discrimination is directed at, or sustained by, all, some or only one of the relevant interstate traders.[67]

The other joint judgment of Gaudron and McHugh JJ, while agreeing with the conclusion of the other joint judgment, seems to apply the *Cole v Whitfield* formula in reverse. At the beginning of their judgment, after noting the competitive advantage obtained by local South Australian brewers over the Plaintiffs, they stated:

> The regime is therefore protectionist and, if also discriminatory, it infringes s 92 of the Constitution: *Cole v Whitfield* (1988) 165 CLR 360.[68]

63 Ibid at 474-477.
64 Ibid at 474.
65 Ibid at 476.
66 Ibid at 477.
67 Ibid at 475.
68 Ibid at 478.

The approach submitted above from *Cole v Whitfield* requires a law to be discriminatory in order for it to be characterised as protectionist, whereas Gaudron and McHugh JJ appear to regard the element of discrimination as the over-riding requirement for an infringement of s 92. In the end, however, they arrived at the same conclusion as the joint judgment of Mason CJ, Brennan, Deane, Dawson and Toohey JJ, on the basis that the distinction in the legislative treatment of non-refillable and refillable beer bottles bore no relevance to the objects of litter control and conservation of energy resources.[69]

A good deal of s 92 litigation in the future will concern claims by the States that their regulatory schemes which discriminate against interstate trade are not protectionist measures on the basis of the *Castlemaine Tooheys* formula. This formula requires the Court to weigh up the public interest in protecting some local interest with the guarantee of free trade. Here also a diversity of opinions may emerge. But as *Castlemaine Tooheys* illustrates, the process of weighing up these competing interests requires the submission of much evidence, particularly of an economic nature.

The *Castlemaine Tooheys* formula may be described as follows:

(1) Is there a legitimate local interest in need of protection?

The State must be subjected to a 'real danger or threat to its well-being'[70] or at least there are 'rational and legitimate grounds'[71] for thinking that it is. Examples cited so far are:
(i) standards for products and services;
(ii) rules of commercial conduct;[72]
(iii) conservation of natural resources;[73]
(iv) control of waste/litter.[74]

(2) Are the measures necessary or appropriate and adapted to protecting the local interest?

Requiring the measures to be 'appropriate and adapted', means that no proof is required that the measures actually achieve their objective, or that the particular measures adopted provide the best solution. These are political issues. However, if reasonable non-discriminatory alternative measures are available, this may indicate protectionism.[75]

(3) Is the impact on interstate trade and commerce incidental and not disproportionate to the achievement of the objective of protecting the public interest?

This inquiry overlaps that in (2) above, for if the measures operate

69 Ibid at 480.
70 Ibid at 473.
71 Ibid.
72 Ibid.
73 Ibid at 409-10; *Castlemaine Tooheys* above n 52.
74 *Castlemaine Tooheys* ibid.
75 Ibid at 473.

disproportionately against interstate trade and commerce, then they are unlikely to be 'appropriate'.

C. Marketing Schemes: *Barley Marketing Board (NSW) v Norman*

Commonwealth and State commodity marketing schemes provided a fertile area for s 92 litigation from the time of federation right up to *Cole v Whitfield* in 1988. Under the individual rights view of s 92, legal debate usually concerned whether the marketing schemes directly applied to an activity of interstate trade or commerce (ie the criterion of operation principle) and if they did, whether the marketing scheme amounted to reasonable regulation?

The important issue at present is, what is the impact of *Cole v Whitfield* on those marketing schemes which in the past either survived a s 92 challenge or were invalidated under s 92? The two most likely issues will be: is there discrimination against interstate trade or commerce, and if so, is the *Castlemaine Tooheys* formula satisfied?

The only direct comment made in *Cole v Whitfield* in relation to marketing schemes was this brief comment: '... acquisition of a commodity may still involve the potential for conflict with s 92'.[76] The Court also indicated, as noted earlier, that Commonwealth laws and even joint Commonwealth and State schemes are less likely to be characterised as protectionist than State schemes, on the assumption that the former are unlikely to be concerned with protecting intrastate trade or commerce.[77]

Obviously, the mechanics of each marketing scheme need to be considered before any opinion can be given as to the scheme's compatibility with s 92. But a number of different marketing schemes are considered below, beginning with the Barley Marketing Scheme in New South Wales which was held in the most recent High Court decision on s 92, *Barley Marketing Board (NSW) v Norman*,[78] not to infringe s 92.

(i) Compulsory Acquisition of a Commodity Produced within the State

In *Barley Marketing Board (NSW) v Norman*,[79] a challenge was brought to the *Marketing of Primary Products Act* 1983 (NSW), pursuant to which barley became a declared commodity and the Barley Marketing Board was established in which all barley produced in New South Wales was vested. In return, the barley New South Wales producers were entitled to claim for payment from the Board. Until 1988, malting grade barley was exempted but in that year the exemption was lifted. This change affected the first and second defendants who, as producers, had agreed to sell 400 tonnes of malting grade barley to the third defendant, a Victorian maltster. They challenged the validity of s 56 of the *Marketing of Primary Products Act* 1983 pursuant to which the Governor had proclaimed that all malting grade

76 Above n 1 at 409.
77 Ibid at 399-400.
78 (1990) 65 ALJR 49.
79 (1990) 65 ALJR 49.

barley produced in New South Wales be divested from the producers and vested in the Board. Section 58 was also challenged in purporting to avoid any contract of sale in respect of such barley.

Predictably, the joint judgment[80] of the High Court rejected those marketing authorities[81] decided upon the individual rights view of s 92 and instead, applied the *Cole v Whitfield* formula to determine whether the marketing scheme imposed a discriminatory burden of a protectionist kind against interstate trade or commerce. In this case, the Court found there was no discrimination of interstate trade in barley either formally or in substance. All purchasers of malting grade barley whether they were in-State or out-of-State purchasers had to buy from the New South Wales Board. There was no inequality of treatment between interstate and intrastate trade.[82]

The defendants argued that the scheme was discriminatory and protectionist in two ways.[83] First, the fixing of a minimum price by the Board, resulted in Victorian maltsters paying more for malting grade barley than they had previously paid to New South Wales producers, especially those near the border with Victoria. Although this may appear protectionist, the High Court found no discrimination **against interstate trade** since all maltsters in and outside New South Wales were treated equally. Secondly, the defendants argued that Victorian maltsters were unable to buy from New South Wales border growers but New South Wales maltsters were able to buy from Victorian border growers. Here, the High Court in rejecting this difference as irrelevant, emphasised that in applying the *Cole v Whitfield* formula, one must be careful to compare the position of interstate traders with the position of local or intrastate traders in the same kind of trade. In other words, the scope of the guarantee of free trade in s 92 is limited. It is not a general guarantee against protectionism as such. Only protectionism arising from measures which discriminate against interstate trade and commerce and which confer a competitive or market advantage on intrastate trade and commerce of the same kind, is prohibited by s 92.[84]

The High Court therefore distinguished a number of decisions[85] from the United States Supreme Court which were relied upon during argument as illustrating various measures which were invalidated under the commerce clause for restricting free trade. These decisions were distinguishable because the effect of the commerce clause is wider than that of s 92. The commerce clause prohibits all measures which prevent interstate competition and hinder free trade whereas s 92 only prohibits discriminatory burdens of a protectionist kind.[86]

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80 Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

81 See *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266; *North Eastern Dairy* above n 3; and *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board* (1985) 157 CLR 605.

82 Above n 80 at 56.

83 Ibid at 55-6.

84 Ibid.

85 *Hood and Sons v Du Mond* (1949) 336 US 525; *Philadelphia v New Jersey* (1978) 437 US 617.

86 Above n 80 at 56.

So it appears that State marketing schemes which compulsorily acquire a commodity produced within the State and vest the commodity in a marketing board to which intrastate and interstate buyers have equal access, may not infringe s 92 if no discrimination against interstate trade or commerce arises in the course of administering the scheme.

The *Barley Board* case also contains some useful obiter dicta. First, the Court acknowledged that restrictions upon the export of commodities from a State may infringe s 92:

> ....a prohibition or restriction upon the export of a commodity from a State with a view to conferring an advantage or benefit on producers within the State over out-of-State producers would amount to discrimination in a protectionist sense. If a State having a scarce resource or the most inexpensive supplies of a raw material needed for a manufacturing operation prohibited the export of material from that resource or those supplies in order to confer a benefit on its domestic manufacturers as against their out-of-State competitors, that prohibition would discriminate against interstate trade and commerce in a protectionist sense.[87]

There was no evidence in the *Barley Board* case of any restrictions on the supply of barley interstate.

The second obiter point is hinted at by the example given in the above extract from the judgment and was obviously made to avoid any overly restrictive interpretation being given to the comment in *Cole v Whitfield* that the law must discriminate against interstate trade and commerce and thereby protect intrastate trade and commerce 'of the same kind'.[88] The Court recognised that s 92 may be infringed by legislation which imposes restrictions on a commodity or service even though the discrimination against interstate trade does not occur in relation to that **particular** commodity or service.[89] The example given in the above extract involved a restriction on a raw material which resulted in discrimination against out-of-State producers of what must be some other commodity derived from that raw material. The Court, however, illustrated this second point by reference to the *Castlemaine Tooheys* case[90] where the restrictions on the use of non-refillable containers resulted in discrimination against interstate trade in bottled beer.[91] A further application of this obiter point could arise in relation to competing products, such as butter and margarine, where restrictions imposed on interstate trade in one product may protect not the intra-state trade in that particular product but in its competing product.

The acceptance of what may be termed 'consequential discrimination' for the purposes of s 92 derives from the adoption of the practical effects approach. The Court will not be persuaded by fine distinctions if the facts establish effective discrimination against interstate trade.

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87 Ibid.
88 Above n 1 at 394 and 407.
89 Ibid at 56-7.
90 Above n 31.
91 Above n 80 at 57.

(ii) Compulsory Acquisition of a Commodity: whether produced inside or outside the State.

The High Court in the *Barley Board* case distinguished the barley marketing scheme in that case from the type of marketing scheme which arose in *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales*[92] where milk imported into New South Wales as well as all milk produced in that State was deemed by s 23 of the *Dairy Industry Authority Act* 1970 (NSW) to be vested in the New South Wales authority. Further, the imported milk could not be sold in New South Wales unless it had been pasteurised there. The practical effect of the scheme was to prevent the importation of milk into New South Wales because milk cannot be pasteurised twice. Today, this would most likely infringe s 92 as a protectionist scheme which discriminated against interstate trade in milk.

But if a marketing board simply acquires a commodity as it is imported into the State, along with local production of that commodity, in what way is the interstate trade in that commodity discriminated against? The interstate producers and distributors lose the right to sell to anyone other than the Board in that State but the producers in that State also lose that right.

One might conclude that marketing schemes which provide for the compulsory acquisition of commodities wherever produced are unlikely to discriminate against interstate trade in those commodities unless some other factor exists as in *North Eastern Dairy*. Yet, it is not entirely clear whether the High Court distinguished *North Eastern Dairy* from the facts in the *Barley Board* case solely on the ground that compulsory acquisition was of all milk in New South Wales including imported milk or whether the Court also relied upon the effect of the quality control measures in preventing the importation of milk. The latter basis is clearly justified and so more likely to have been the actual basis for the distinction being drawn.

Perhaps there is another way one can look at these marketing schemes which compulsorily acquire the imported commodity along with the locally produced commodity. The effect of such a scheme is to create a State monopoly in the sale of that commodity and so protect the State from interstate competition. Out of State producers must now sell to the Board at the Board's price. Although there is unlikely to be any discrimination on the face of the law if the Board's purchase price is the same whether the commodity is produced inside or outside the State, the difficulty is to work out how far the High Court will go in determining whether there is discrimination in substance or effect. If the purchase price set by the Board is less than that for which the out of State producer previously sold the commodity within the State, then a clear burden is imposed on that interstate trade. Is a competitive or market advantage enjoyed by the local producers over out of State producers? It appears so but only in comparison with their position before the creation of the State monopoly. Are we permitted to make such a comparison? Or should this comparison be confined to the respective positions of the local and interstate producers upon the creation of the State monopoly? If the *Barley Board* case seems to require the latter

92 Above n 3.

comparison only to be made, then as both receive the same price from the Board, no discrimination in substance occurs. Yet the effect is still protectionist. Discrimination is then judged by comparing the trading positions of local and interstate traders under the impugned law and not their previous positions.

On the other hand, one could argue that a wider perspective needs to be taken. Instead of concentrating on the rights of those engaged in interstate trade and those in intrastate trade, like the maltsters in the *Barley Board* case, one should examine the overall economic impact of a State monopoly scheme and see to what extent the intrastate trade obtains a competitive or market advantage over interstate trade. Since the essence of discrimination for s 92 purposes is that the intrastate trade must derive a competitive or market advantage over interstate trade, a State monopoly scheme may discriminate against interstate trade.

The difficulty in taking this wider perspective of the overall economic impact on the comparable market share or competitiveness of interstate and intrastate trade is that such an approach was implicitly rejected in the *Barley Board* case. Indeed, a warning was given that the guarantee in s 92 is not so wide as that implied in the commerce clause of the United States Constitution which clearly outlaws measures which stifle interstate competition.[93] Yet in the Barley Board case there was no attempt to stifle interstate competition.

It is evident that in determining whether a commodity marketing scheme which acquires both the locally produced and out of State commodity infringes s 92, much will depend upon the economic evidence presented to the Court. Further judicial clarification of the elements of discrimination and protectionism will also be necessary. At the same time, one must not forget that the *Castlemaine Tooheys* formula might characterise a State monopoly as non-protectionist.

(iii) Quality Control in Marketing Schemes

The notion of a permissible burden or reasonable regulation under the individual rights theory of s 92 allowed the States and the Commonwealth to regulate interstate trade in commodities to ensure, in the interests of public health and safety, their wholesomeness and their fitness for public consumption and use. The measures adopted to protect the public interest in this way had to be non-discriminatory and reasonable.[94]

The similarity between the notion of reasonable regulation and the *Castlemaine Tooheys* formula has already been noted.[95] But before applying the *Castlemaine Tooheys* formula, it is necessary to determine whether the scheme imposes a discriminatory burden on interstate trade or commerce. If the same quality control measures are applied to the imported and local product, further evidence will be necessary to establish a practical restriction

93 Above n 80 at 56.
94 See above n 49.
95 See above n 50.

being imposed on the former. Unless this point is reached, no occasion arises for the Court to consider whether the measures are necessary or appropriate and adapted in protecting the local interest, in this case, public health.

If the facts of *North Eastern Dairy* arose today, the New South Wales legislation would most likely breach s 92 because of the practical discrimination against imported milk (which could no longer be imported since it cannot be pasteurised twice) and because the measures would be disproportionate in their impact on interstate trade in protecting public health.

D. Transport Legislation

As a result of the re-interpretation of s 92, the States are now in a position to revise their transport legislation and subject the interstate transport industry to the same controls and liabilities by which intrastate transport operators are bound. The reverse discrimination effected by the individual rights view of s 92 benefited particularly the interstate transport industry.

A classic example of this reverse discrimination and protectionism is *Finemores Transport Pty Ltd v New South Wales*[96] which concerned a tax imposed by s 84G of the *Stamp Duties Act* 1920 (NSW) on certificates of registration issued to new vehicles calculated by reference to the vehicle's value. A majority of the Court held that the tax in relation to vehicles engaged in interstate trade infringed s 92 because unless the tax was paid the vehicle could not be driven on New South Wales roads. Today, such a tax is likely to be valid.

However, permissible regulation of the interstate transport industry was recognised under the individual rights view of s 92. For instance, compulsory registration of vehicles, speed and weight limits, road rules and other safety measures were consistent with s 92.[97] Even road maintenance charges were allowed but levies to cover capital costs of road construction were not.[98]

Since *Cole v Whitfield*, all of these examples of 'permissible regulation' are likely to continue to be valid simply on the ground that they do not discriminate against interstate trade and hence are not protectionist. It will only be necessary to consider the *Castlemaine Tooheys* formula if some discrimination is found which favours the intrastate transport industry over interstate operators. Further, the capital cost of road construction is now recoverable from intrastate and interstate transport operators provided no discrimination arises.

There is, however, one area of potential difficulty in the field of transport regulation, closely related to the question discussed above in relation to State monopoly marketing boards. The Interstate Commission in its *1990 Report*

96 (1978) 139 CLR 338.

97 See *Hughes and Vale Pty Ltd v New South Wales* (No 1) (1954) 93 CLR 1.

98 See *Armstrong v Victoria* (No 2) (1957) 99 CLR 29.

on Road Use Charges and Vehicle Registration[99] refers to the fact that in some Australian jurisdictions, vehicles registered outside that jurisdiction are prohibited from engaging in intrastate trade. To prohibit interstate operators from the local trade is clearly protectionist: by protecting the local trade from interstate competition. But to satisfy the *Cole v Whitfield* formula, there must be discrimination against interstate trade and this is not readily apparent. There maybe discrimination against interstate carriers who wish to operate intrastate services, but it is difficult to argue that any activity of interstate trade, as such, is discriminated against. The same difficulty, we saw above,[100] arises with State monopoly boards.

The Interstate Commission's report suggests that s 92 may still apply, either:(1) by acknowledging that it prohibits laws which protect local trade from interstate competition; or (2) by giving a wide interpretation to 'interstate trade' to cover interstate competition for local trade, relying on the free trade theory and the phrase 'among the States' in s 92.[101] The comment made in the *Barley Board* case[102] that s 92 is not as wide a guarantee of free trade as that provided by the United States commerce clause indicates that both of those arguments may not succeed before the High Court.

Another matter which remains to be settled concerns legislation which confers an executive discretion on a public officer or body the exercise of which may result in a discriminatory burden of a protectionist kind against interstate trade or commerce.

Prior to *Cole v Whitfield*, legislation which delegated to some person or body the power to regulate transport operations by issuing licences on such conditions as they thought fit, was held to breach s 92 for it amounted to a prohibition on interstate trade and commerce *(Hughes and Vale Pty Ltd v NSW (No 1)*[103] *and (No 2))*[104]. In order to comply with s 92, the conferral of such a discretion had to be subject to conditions and limitations which protected the individual interstate trader. The granting of an uncontrolled discretion, rendered not just an exercise of the discretion but also the legislation conferring the discretion, open to challenge under s 92.

Now with the demise of the individual rights view, the preferable approach would seem to be only for the actual exercise of the discretion to be challenged under s 92 on the basis that the legislation conferring the discretion contemplates its exercise only in accordance with s 92.

The impact on transport legislation of the freedom of intercourse in s 92 is another unresolved issue, if an individual rights view of that freedom is maintained by the High Court, as it indicated in *Cole v Whitfield*.

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99 Commonwealth Parliamentary Papers 1990 No 26 at 53.
100 See above section C (ii) at n 93.
101 Above n 100 at 53-4.
102 Above n 80 at 56.
103 Above n 98.
104 Above n 49.

Interstate Trade and Commerce

Much of the ultra-technical analysis associated with the individual rights view of s 92 was attributable to the 'criterion of operation' formula. Unless the direct legal effect of the impugned law was to restrict an interstate activity of trade or commerce, no infringement of s 92 occurred. A restricted view was adopted of those activities which amounted to interstate trade and commerce; for example, in the *Marrickville Margarine* cases,[105] the production of margarine for interstate trade was held not to constitute interstate trade or commerce.

Such a restricted view inevitably narrowed the scope of the Commonwealth's legislative power in s 51 (i) to regulate interstate trade and commerce. In contrast, the ability to legislate with respect to overseas trade and commerce enjoyed considerable scope,[106] while the incidental power enabled some regulation of interstate trade and commerce.[107]

A significant spin-off for the Commonwealth from the re-interpretation of s 92 is indicated by the view expressed in *Cole v Whitfield* that s 51 (i), must be recognised as 'a plenary power on a topic of fundamental importance'.[108] While declining to comment on the inter-relationship between s 51 (i) and s 92, the Court saw fewer difficulties arising from its free trade interpretation of s 92 than those which arose under the individual rights view of s 92.

What is striking about the new jurisprudence on s 92 is that, so far, all four decisions of the High Court have involved activities which have been accepted as part of interstate trade or commerce. This may simply follow from the *Cole v Whitfield* formula and its concern with the **practical** effect of the legislation on interstate trade and commerce. But there remains the requirement that the activity being discriminated against must satisfy the twin components of trade or commerce and of interstateness.

The High Court has always been prepared to give a wide interpretation to what constitutes 'trade and commerce' for the purposes of s 51 (i) and s 92. The wide ranging scope given to those words by Dixon J in the *Bank Nationalisation* case[109] and endorsed on appeal by the Privy Council[110] covers in the case of 'trade', not just the buying and selling of goods but 'the pursuit of a calling or handicraft', while 'commerce' covers 'intangibles as well as the movement of goods and persons'. Intangibles include the supply of gas and electricity, all forms of communication and the transmission of credit by banks.[111]

105 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55; and *Beal v Marrickville Margarine Pty Ltd* (1966) 114 CLR 283.

106 See *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1.

107 See *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565.

108 Above n 1 at 398-9.

109 (1948) 76 CLR 1 at 381-2.

110 (1949) 79 CLR 497 at 632-3.

111 A distinction may need to be drawn between a trade and a profession. Hence, the practice of a barrister was regarded as not within the scope of s 92 as 'trade or commerce' by Dawson J in *Street v Queensland Bar Association* (1989) 168 CLR 461 at 536-540.

Provided any of those activities are of an interstate nature the protection of s 92 applies. In the *Barley Board* case, reference[112] is made to 'commodities and services' being the subject of interstate trade or commerce, no doubt in recognition of the wide meaning attributed to 'trade and commerce' in s 92.

Interstate Intercourse

The other component of s 92, freedom of intercourse among the States, has been deliberately left out of the discussion on the scope of the freedom of interstate trade and commerce, for *Cole v Whitfield* clearly accepted that the scope and basis of each freedom must necessarily differ.[113] The free trade basis of s 92 must, by definition, be confined to the freedom of interstate trade and commerce. Although the Court in *Cole v Whitfield* refused to discuss the content of the freedom of interstate intercourse, it did accept as a starting point the already established interpretation given in *Gratwick v Johnson*:[114]

> A constitutional guarantee of freedom of inter-State intercourse, if it is to have substantial content, extends to a guarantee of personal freedom 'to pass to and fro among the States without burden, hindrance or restriction' (*Gratwick v Johnson*.....).[115]

Even such an individual freedom as this freedom of interstate intercourse cannot be absolute and so the Court in *Cole v Whitfield* went on to recognise as permissible, laws 'to restrict a pedestrian's use of a highway for the purpose of his crossing or to authorise the arrest of a fugitive offender from one State at the moment of his departure into another State'.[116]

In adopting the *Gratwick v Johnson* view of the freedom of intercourse guaranteed by s 92, the Court in *Cole v Whitfield* clearly accorded that freedom a scope wider than that given to the freedom of interstate trade and commerce. What the precise relationship between these two freedoms is has yet to be settled.

One view which could be taken is that activities of interstate trade and commerce will only attract the wider protection of freedom of intercourse where a *personal* right of movement between States is prohibited or inhibited by Commonwealth or State law. Hence restrictions on the passage of goods and services across State borders as distinct from individuals travelling across State borders, are judged on the basis of the *Cole v Whitfield* formula. Only where the activity of interstate trade involves the movement of a person across State borders, as in the case of an interstate haulier or courier, will it be necessary to decide which freedom prevails.

Another view of freedom of intercourse is that it confers a freedom of communication between States and hence, extends beyond a personal right.[117]

112 Above n 80 at 56.
113 Above n 1 at 393.
114 (1945) 70 CLR 1 at 17.
115 Above n 1 at 393.
116 Ibid.
117 See *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 per Murphy J.

Such a view will more easily produce a collision between the freedom of interstate trade and the freedom of intercourse, in certain industries, such as, the television industry.

Conclusion

As the title of this article indicates, the re-interpretation of s 92 in terms of the free trade view has removed from the Constitution any guarantee of free enterprise for interstate trade and commerce previously provided by the individual rights view of s 92. This is not to say that the High Court is anti-laissez-faire. The decision whether or not to regulate trade and commerce is a political and economic one, more appropriately undertaken by Parliament and the Executive. Moreover, the rejection of the individual rights view overcomes the obvious inconsistency which such a view created whereby a laissez-faire right to trade interstate was guaranteed by the Constitution but no similar right was enjoyed by intrastate trade.

The challenge facing the High Court is the rational application of the *Cole v Whitfield* formula in future decisions on s 92 so that a coherent body of law can develop which will hopefully avoid the uncertainty which characterised much of s 92 litigation in the past. Crucial in any litigation involving s 92 will be the provision of expert evidence and advice in order to equip the Court with the capacity to assess the practical economic effect of the impugned law.

For those engaged in interstate trade and commerce, the negative effect of *Cole v Whitfield* is that they are likely to face a range of different State regulations. This is inevitable in a federal system. Section 92 has proven to be not the remedy for this situation. The remedy lies in co-operative federalism or in reliance upon the superior position of the Commonwealth to introduce uniform national standards pursuant to its power in s 51 (i) over interstate trade and commerce, in conjunction with its other powers, such as those over taxation s 51 (ii) and corporations s 51 (xx).