Free Trade Federalism in Australia and the European Union:

Judicial Delimitation of Legislative Competence

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Between the time of *viva voce* examination (Trinity Term 2018) and the time of entry into the Bodleian Library (Trinity Term 2019), this thesis has been updated to take account of changes in the details of the United Kingdom's proposed withdrawal from the European Union.

As at the time of entry into the Bodleian Library, withdrawal negotiations are ongoing.

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For Daphne Marion Thorburn

(1922 – 2012)

She dances in the moonlight.

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Abstract

The Commonwealth of Australia and the European Union were each formed, in large part, with the goal of creating an internal market spanning the territory of all the constituent States, but with the intention that those constituent States should continue to enjoy a considerable measure of legislative autonomy to pass diverse laws for their own polities. In each case, this was to be achieved by the establishment of a federal (or federal-like) structure with a constitutional document adopted by the constituent States, which established this internal market of free trade between the States, and entrusted the task of adjudicating the compliance with these provisions to a central, union-level court.

The High Court of Australia and the Court of Justice of the European Union have grappled with this task of how to balance the internal market against State legislative autonomy by evolving a strikingly similar jurisprudence – all the more noteworthy given the relatively limited judicial and scholarly exchange between the two systems. Both courts first ask whether the impugned law is such as to come within the *scope* of the free movement provisions, and then, if the law is within that scope, whether the law is nevertheless *justified* by reference to some legitimate purpose being pursued in a proportionate manner by the legislating State.

Over the decades, both Australia and the EU have seen contention as to the proper definition of the scope of free movement provisions, with discrimination analysis and trade restriction analysis struggling for dominance. In Australia, discrimination analysis now dominates; in the EU, the jurisprudence has been cleft into several parts, some under discrimination analysis, others under trade restriction analysis. On the question of justification, Australia and the EU have evolved a considerable jurisprudential similarity both in form and in content, with this element being less controversial than the question of scope.

In developing their jurisprudence of both scope and justification, the courts have played a significant role in determining the balance between the internal market and the preservation of State legislative autonomy in each system.

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INTRODUCTION

INTRODUCTION

From Canberra to Brussels, across North America, and back down again through the Asia Pacific, two great forces shear away at economic polities: globalism and localism. The first – call it 'globalism', 'internationalism', 'open borders', 'free trade' – attempts to lower or eliminate national barriers between societies and their markets. The second – call it 'localism', 'nativism', 'protectionism' – seeks to preserve the identity and way of life of those living within the designated borders from being drowned out in a grey, homogenous 'citizenship of nowhere'. Each of these forces is an essential part of an individual's and a society's identity, and while one of these forces may tend to hold sway for a period of time, the other soon reasserts itself through political and economic means. We live now at one of those points, when the decades-long movement towards globalism in the economic sphere, which has produced the European Union, the World Trade Organisation, the North American Free Trade Agreement, the Association of South East Asian Nations and a host of other bi- and multi-lateral free trade pacts and organisations is challenged by a protectionist reaction in countries that had been the most vigorous champions of such expanded economic horizons. The United Kingdom has voted to leave the European Union, and across the Continent parties in and out of government advocate a similar halt to the European project, or a national withdrawal. The United States has abandoned the Trans-Pacific Partnership and Transatlantic Trade and Investment Partnership and has indicated a desire to renegotiate downwards NAFTA. In Australia the ratification of the recently-resurrected, US-free TPP is highly politically contentious, with elements of the major Opposition party breaking with decades of free trade orthodoxy to openly question how much Australia really benefits from opening its borders to international markets and international competition. This is a point of inflection, and it exists because the forces of globalism and localism are forever in tension with one another[1].

The federal structure was created for the very purpose of mediating between these two forces, allowing smaller constituent entities to bind themselves together according to an agreed *foedus* or pact, thereby surrendering or pooling a degree of their legislative autonomy in order to achieve the goal of creating a larger entity capable of providing a better defence, larger market and broader horizons for their several peoples. This motivated the federation of three forest cantons of the Helvetian valleys in 1291, this motivated the 13 newly-independent states on the eastern seaboard of North America in 1788, this motivated the six colonies of Australia in the last decade of the 19th Century, this motivated the six countries of Western Europe after the Second World War, and countless other examples from India to Nigeria to Russia where great central powers retreated and the free peoples left in their wake adopted a federal structure to preserve unity in diversity.

This thesis examines a particular aspect of the federal structure in two advanced federal systems: the Commonwealth of Australia, a federation of six States formed in 1901 from the six Australian colonies of the United Kingdom, and the quasi-federal European Union, an intergovernmental and supranational entity comprising 28 Member States formed in 1957 from six Western European nations which had recently been on opposite sides of the Second World War. The Commonwealth of Australia is one of the oldest extant federations in the world –

[1] For the purposes of this thesis, the terms 'globalism' and 'localism' will be used in the manner indicated in this Introduction, with 'globalism' and 'localism' standing in opposition to one another as 'Australianism' and 'State Identity', or 'Europeanism' and 'Member State Nationalism', do. There is some irony in using 'globalism' to refer to the European Project, which in many respects is an attempt to *defend* Europe against the intrusion of global competition from outside its borders! However, in the search for terms apt to cross the divide between Australian and EU terminology, and to refer at a high level of abstraction to the tension between the pan-Australian interest vs a single State's interest, and the European Union interest vs a single Member State's interest, these terms have presented themselves to the author.

indeed one of the oldest countries in the world in terms of its persisting constitutional order (even without mentioning its far older Indigenous history and culture). Although the divergence between the laws of its constituent States has diminished as the Commonwealth has grown together over the century and more of its existence, nevertheless as a matter of historical and contemporary reality there exists a divergence between the laws of the various States which are enacted in pursuance of the divergent political wills of the voters in the various States. While the EU does not conceive of itself as a 'federation' strictly so called, in constitutional, legal and political terms it bears the relevant characteristics for comparative purposes, namely the contracting of several States to form a higher entity with institutions of its own and a division of powers between the central authority and the persisting States[2]. Within the theme of federalism, the particular focus of this thesis is how the judicial decisions of the central court delimit the legislative power of the constituent States. This goes to the heart of the 'shear forces' described above, as the central court's decisions must mediate between the two overarching federal purposes of, on the one hand, creating a federation-wide market in which traders of goods and services can operate and, on the other hand, preserving meaningful legislative autonomy on the part of the constituent States such that States can legislate in diverse ways to satisfy the democratic will of their diverse peoples.

The Commonwealth of Australia and the European Union were deliberately chosen as the subjects of this thesis for their differences as well as their similarities. Coming into existence in different halves of the 20th Century, and with a very different degree of starting diversity, a comparison between the two systems throws light on the fundamental forces at work within the

[2] Many academic commentators would disagree, however, that the EU can be described as 'federal', 'quasi-federal' or 'federal-like', and there is a rich vein of scholarship on the federal-ness (or lack thereof) of the EU. See, for a non-federal interpretation of the EU, Pavlos Eleftheriadis, 'Federalism and Jurisdiction' in Geert de Baere and Elke Cloots (eds), *Federalism and EU Law* (Hart Publishing 2012).

maintenance of the 'federal balance' between internal market building and preservation of State legislative autonomy, as their very difference allows the veneer of contingent, non-fundamental elements of the jurisprudence to be more easily stripped away. At the same time, they enjoy sufficient similarity in their fundamental structure and values as to enable meaningful comparisons to be drawn and lessons to be learnt by one system from looking at the other. Finally, Australia and the EU were chosen in large part because these two systems so seldom 'talk' to each other at a judicial level: in each system, references to comparable federations dealing with similar questions tend to be to the United States of America, with a lesser smattering of references to the federations of Canada (in the Australian jurisprudence) or Germany (in the EU jurisprudence). Two bold, confident, outward-looking, influential socio-political entities like Australia and the EU should not be strangers to one another; and the supreme courts should know and appreciate each other's jurisprudence, especially as relates to an issue as important and delicate as the balance between the building of the federation-wide internal market and the maintenance of State legislative autonomy. It is hoped that this thesis, like the estimable works of comparative literature referenced herein, may play a part in nurturing this overdue judicial acquaintance.

This thesis concentrates on the trade in goods and services, rather than broader aspects of economic freedom such as the free movement of investment capital or the free movement of persons, because it has traditionally been goods and services which have formed the backbone of the growing federation-wide market, and consequently the volume of case law is higher and the potential for analysis is richer, particularly from a comparative point of view. (In Australia, interstate movement of capital and persons simply has not been subject to extensive restriction and consequent judicial challenge.)

This thesis is a doctrinal analysis of a fundamentally legal character, examining judicial decisions of the central courts in Australia and the EU, but it does not shy away from considering political arguments inasmuch as they are relevant to the division of power within a federal structure. This thesis is not, fundamentally, a work of political theory, and it is certainly not a work of sociology – it does not examine the reported motivations of legislators when considering whether or not to pass certain legislation in light of how the central court might eventually adjudicate it. It would be an interesting and worthwhile task to interview current (or the generally much more candid *former*) legislators and judges to determine how judicial decisions affect the law-making process, in subtle ways not apparent on the face of the legislative record, but that has not been the task of this thesis, which is content to draw reasoned conclusions as to how judicial decisions are likely to affect 'the reasonable legislator' (i.e. a rational legislator seasoned with a degree of political *nous*).

In the course of this thesis, it will be seen that the jurisprudence of the free movement provisions in Australia and the European Union can be separated into the question of scope (how wide the protection of free movement is, and what kind of laws are 'caught in the net') and the question of justification (what laws within the scope of the free movement protection will nevertheless be valid because they are justified by some legitimate countervailing interest, that is, they are small enough to 'slip through the net'). On this first question, it will be seen that in both Australia and the EU there has been an ongoing competition between two different ways of defining the scope of the free movement provisions, either with a 'trade restriction analysis' or a 'discrimination analysis' – the former wider, the latter narrower. These two analyses represent two different understandings of the proper functioning of an internal market such as that within a federal (or quasi-federal) entity. On the second question, it will be seen that both Australia and the EU have evolved similar definitions of how *prima facie* laws may be justified, with the impugned law needing to have been passed in pursuance of a legitimate interest and to be proportional to that legitimate interest (in the sense of suitable and necessary for its achievement). Thus, from very different beginnings, it will be seen that the Commonwealth of Australia and the European Union have evolved notably similar jurisprudence, subject as they both are to the need to mediate between the two ‘shear forces’ of globalisation (in the form of federation-wide free trade in goods and services) and localism (in the form of the various constituent States being able to maintain their social and economic diversity through the passage of diverse laws).

The structure of this thesis is as follows. Part 1 considers the question of scope, within which Chapter I considers the historical (pre-1988) Australian jurisprudence on the scope of the free movement of goods and services; Chapter II considers the contemporary Australian jurisprudence; Chapter III considers the EU jurisprudence of scope of free movement of goods; and Chapter IV considers the EU jurisprudence on services. Chapter V then brings the foregoing chapters together to compare the historical and contemporary jurisprudence of Australia and the EU on the question of scope, in respect of goods and services. Part 2 considers the question of justification, within which Chapter VI examines the Australian jurisprudence of justification, both historical and modern; and Chapter VII examines the EU jurisprudence, for both goods and services. Chapter VIII then brings these two previous chapters together to compare the Australian and EU jurisprudence of justification of *prima facie* invalid laws. Overarching conclusions, advice, cautions and areas for further research are contained in the Conclusion.

PART 1:

SCOPE

PART 1: SCOPE

SUBPART 1: AUSTRALIA

CHAPTER I: THE SCOPE OF s 92 ON FREE MOVEMENT OF GOODS AND SERVICES 1901-1988

> Constitution of the Commonwealth of Australia:
>
> **Section 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.[3]

The Constitutional Context:

The Commonwealth of Australia came into existence on 1 January 1901, when the *Commonwealth of Australia Constitution Act* 1900 (Imp) took effect[4], uniting the six Colonies of the Australian continent – New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania – as the six States of a new federal entity, a Dominion of the then-British

[3] Section 88 of the Constitution required uniform duties of customs be instituted within two years of the coming into effect of the Constitution, and they were duly instituted by the Commonwealth at 16:00 Victorian Standard Time on 8 October 1901, retrospectively, pursuant to s 4 of the *Customs Tariff Act* 1902 (Cth). The second paragraph of s 92, containing transitional provisions relating to goods imported into a State (or Colony which becomes a State) before uniform duties of customs are instituted, has been omitted here as it swiftly passed out of relevance.

[4] Formally cited as *Commonwealth of Australia Constitution Act* 1900 63 & 64 Vict c 12, to which royal assent had been granted on 9 July 1900: see *The London Gazette*, July 10 1900 p 4272.

Empire. One of the primary motivations for the federation movement, which had preceded through three conventions in the 1890s which drafted the Constitution and then parliamentary votes and popular referenda in all the Colonies to approve the draft, was the creation of a continent-wide Australian market to match the aspirations of a growing continent-wide population. In bringing all the Colonies together in this federal bond, the drafters of the Constitution and the legislators who secured its democratic ratification aimed to move beyond the narrow parochialism of intercolonial economic rivalry, which manifested itself in customs duties imposed on the movement of products across colonial boundaries and in further legislation designed to protect local products against intercolonial competitors within each Colony. Accordingly, the Constitution contained a prohibition on States imposing duties of customs and excise (s 90), a guarantee that interstate trade should be "absolutely free" (s 92), a provision empowering the new Commonwealth Parliament to legislate with respect to interstate trade (s 51(i)), and a provision for such legislation to prevail over any inconsistent State legislation (s 109). Section 92 was always meant to be the linchpin within this constitutional apparatus for an Australia-wide market, and was intended to be "the chief means by which an internal free trade area was to be achieved"[5]. In the century since the inception of the Australian Commonwealth, s 92, together with these other provisions, has been instrumental in the creation of a national economic space within Australia[6], what may be termed, using language familiar to European ears, "a *common market* of sorts with a common approach to customs, defence, currency, foreign affairs and co-ordinated development of rail, postal, telegraphic and telephonic services"[7]

[5] *Ha v New South Wales* [1997] HCA 34, (1997) 189 CLR 465, 506.

[6] *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* [1993] HCA 67, (1993) 178 CLR 561, 585.

[7] Michael Longo, 'Co-Operative Federalism in Australia and the European Union: Cross-Pollinating the Green Ideal' (1997) 25 Federal Law Review 127, 130.

(emphasis added). However, for all the importance attached to the creation of this Australia-wide market, it must also be noted that the Constitution does not go so far as to completely remove the subject matter of trade from the power of the State Parliaments. Indeed, the very nature of the Commonwealth as a federal entity, in which the Colonies had voluntarily agreed to unite themselves, shows that continued existence and power of the States was fundamental to this new national order. Furthermore, the Constitution explicitly confirmed that, subject to its own provisions, the States' various Constitutions should continue to exist as before (s 106), their legislative powers should continue as before (s 107), and their laws should remain valid (s 108). Just as the Constitution intended to create a national market, so too did it intend that the States should have power to legislate within – and consistently with the existence of – that market.

An awareness of this constitutional context, and of the growth in the financial power of the Commonwealth government as against the State governments during the 20th Century, gives an insight into the significance of s 92 cases for the development of the Australian federation. Every case which rules that a State law is invalid further develops the national market by diminishing the State-by-State fragmentation of it; but from the opposite perspective, every such case equally represents some constriction of the spectrum of legitimate State government action. Together with cases on prohibited State customs and excise duties under s 90 (which may diminish the scope for State governments to raise revenue), such decisions can be seen to play a part not only in the economic, but also the political – and even the social – development of the nation.

For a New Nation, a New Court:

Section 71 of the Constitution vested the judicial power of the Commonwealth in a 'High Court of Australia', which was to function as a federal supreme court adjudging matters under Commonwealth law (including appeals from lower federal courts or single High Court Justices) and matters on appeal from State supreme courts[8]; s 76 (i) specifically empowered the Commonwealth Parliament to confer original jurisdiction on the High Court in respect of matters "arising under this Constitution or pertaining to its operation". It took until 1903[9], however, for the new Commonwealth Parliament to legislate to actually create, and provide resources for, this High Court, which was duly invested with original jurisdiction on constitutional matters[10]. Since its establishment, it has been the High Court of Australia which has been the most important judicial body for interpreting the Constitution, and it will chiefly be cases before the High Court which comprise the Australian jurisprudence examined in this thesis[11]. A handful of decisions of the Judicial Committee of the Privy Council will also be examined, as an avenue of appeal

[8] Note the contrast with the Supreme Court of the United States, which sits at the apex of the US federal law system, but not at the apex of the various State law systems, which generally terminate at their relevant State Supreme Court. (The only exceptions are cases where a State is being sued by another State, by a foreign citizen, or by a citizen of another State – and in the last two cases only where the State has waived its sovereign immunity: *Constitution of the United States of America* Article III Section 2, and Amendment XI thereto.) In this respect, the High Court was modelled on the Supreme Court of Canada, which likewise enjoyed appellate jurisdiction over both federal and State law matters (*British North America Act* (now retitled *Constitution Act*) (Imp) 1867 30 Vict c 3 s 101).

[9] *Judiciary Act* 1903 (Cth). Legislation passed in the 1901 sessions was mostly concerned with establishing the rudiments of the new federation, including budgetary outlays for the Commonwealth government, a telegraph act and beer excise and distillation acts. 1902 legislation was concerned with further budget outlays for celebration of King Edward VII's coronation, the establishment of nationwide customs rates and – unsurprisingly – the reckoning of Parliamentarians' expenses.

[10] *Judiciary Act* 1903 (Cth) s 30.

[11] All constitutional law cases prior to 1976 originated and (subject to appeal to the Privy Council discussed below) terminated in the High Court. After the creation of the Federal Court of Australia in 1976, a court of first instance (single Judge) and appeal (3 Judges) for federal law matters, it became possible for constitutional law matters to originate and have a 'first appeal' in that Court. Nevertheless, significant points of constitutional law tend to merit appeal all the way to the High Court, and so it remains the High Court that provides authoritative interpretation of s 92.

formerly lay from the High Court in Canberra to the Privy Council in Westminster. Owing to the expense of such appeals – to a court sitting on the other side of the earth – they were always few. In the 1960s and 1970s, the Commonwealth Parliament closed this avenue of appeal in relation to matters such as claims under s 92[12], leaving the High Court as the summit of Australian constitutional law[13]. Even during the currency of such Privy Council appeals, though, it will be seen that the High Court has always been the 'engine room' for Australian constitutional jurisprudence.

Section 1: Early Case Law and Trade Restriction Analysis:

The first task that a court must perform when interpreting s 92 is to determine the *scope* of that section, that is, what kind of measures it prohibits (before any question of exculpatory justification of such measures may be entertained). In other words, the Court must determine what exactly it is from which interstate trade and commerce are to be "absolutely free". The question of the scope of s 92 is what will occupy Chapters I and II of this thesis (followed by the scope of the EU free trade articles in Chapters III and IV, and a comparison between the two systems' jurisprudence in Chapter V). The present chapter covers the historical development of the jurisprudence from the beginning of the Australian federation to the delivery of the decisive

[12] *Privy Council (Limitation of Appeals) Act* 1968 (Cth) and *Privy Council (Appeals from the High Court) Act* 1975 (Cth).

[13] Section 74 of the Constitution, which empowers the Commonwealth Parliament to limit appeals to the Privy Council on constitutional and federal law matters generally, does preserve a right of appeal on a specific kind of constitutional question – "the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States" – but only where the High Court grants leave. The Court only ever granted such leave once, in 1912, and has subsequently confirmed that it will not grant it in future, as "such limited purpose as [the power to grant leave] had has long since been spent": *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* [1985] HCA 27, (1985) 159 CLR 461 at 465. The closing of all appeals on constitutional and federal law matters, combined with the closing of appeals on State law matters effected by the *Australia Act* 1986 (Cth) and *Australia Act* 1986 (Imp), rendered the High Court of Australia the final court for Australian constitutional, federal and State law.

judgment of the Court in *Cole v Whitfield* (1988)[14] which established the beginning of the modern, unified jurisprudence on this question. The first 90 years of the Court's interpretation of this section are important not just as historical background against which to understand the modern Australian jurisprudence in the following chapter, but as a rich source of comparative material for the EU jurisprudence, which deals with similar problems to those which so exercised the Australian Court over most of its history.

From the very beginning of the Court's consideration of s 92, that section's declaration that interstate trade should be "absolutely free" leant itself quite readily to a broad interpretation of the scope of the section, specifically, an interpretation of s 92 which declared that interstate trade *as such* should be free from governmental interference and that *any* restriction on interstate trade as such was obnoxious to that section. This method of defining the scope of s 92 shall be called here 'trade restriction analysis', and it is one of the poles between which the interpretation of the scope of that section has oscillated over time. The other pole, a method of interpretation which declares that it is only a *discriminatory* restriction of interstate trade, as compared to intrastate trade, which is obnoxious to s 92, shall be called 'discrimination analysis'.

It can immediately be seen that any measure which falls foul of the discrimination analysis would likewise fall foul of the trade restriction analysis, since any law discriminating against interstate trade would, *ipso facto,* be restricting such trade in some way. On the other hand, a law captured within the scope of s 92 by the trade restriction analysis is not necessarily so captured by the discrimination analysis, since a law may restrict interstate trade but do so in a non-discriminatory manner by equally restricting intrastate trade. Thus, the question of whether

[14] [1988] HCA 18, (1988) 165 CLR 360.

trade restriction analysis or discrimination analysis is the proper definition of the scope of s 92 only becomes a live issue in court in the second of these cases, when the restriction imposed is not discriminatory. Accordingly, the very first case ever heard by the High Court on the freedom of interstate trade and commerce under s 92, *Fox v Robbins* (1909)[15], does not actually deal with this question of the scope of the section, because the measure in question was clearly a discriminatory one: the *Wine, Beer and Spirit Sale Act* 1880 (WA) established a licensing system for alcohol retailers in Western Australia whereunder a wine retailer's licence would cost UK£2 if the wine was made from grapes grown in Western Australia but UK£50 if the wine was made from grapes grown anywhere else in Australia[16]. Clearly, this Act was discriminatory against interstate trade, and to the extent that it imposed a higher licence fee on interstate wine it was accordingly judged invalid under s 92 of the now-operative Constitution, with the Court not being called on to consider whether a (counter-factual) non-discriminatory restriction of interstate trade would also have been invalid[17]. Of greater significance was the next case on s 92, *New South Wales v Commonwealth ('The Wheat Case')* (1915)[18], which did indeed relate to a non-discriminatory restriction, and rests on the assumption that it was indeed trade restriction

[15] [1909] HCA 81, (1909) 8 CLR 115.

[16] It is worth noting that this Act was passed some two decades before the inception of the Commonwealth and the coming into effect of s 92. This sort of inter-colonial protectionism had been typical of the pre-federation era, and the desire for its extinction was one of the driving forces behind the federation movement, and the insertion of s 92 into the eventual Federal Constitution. (On the use of the British pound and its later displacement by the Australian pound, and subsequently by the Australian dollar, see footnote 172 below.)

[17] All Justices in the case agree on the *sufficiency* of discrimination for bringing a law within the scope of s 92, without explicitly stating its *necessity*. However, Barton J at least seems to indicate that, in his view, it may indeed be discrimination (engendering economic 'protectionism', the opposite of the economic concept of 'free trade') which defines the scope of s 92, rather than the broader notion of interstate trade restriction: "In a word, however the enactment may be phrased, it is inter-state *protection*, not inter-state *free trade*. And we may be allowed to recollect as a matter of history that one of the chief objects of the struggle for federation was to secure that which s 92 ordains, *free trade* among the States..." *Fox v Robbins* (1909) 8 CLR 115, 123 (emphasis added). Given his view expressed half a decade later in *The Wheat Case* below, though, this might be reading too much into the instant case which did not specifically deal with a non-discriminatory restriction of interstate trade.

[18] [1915] HCA 17, (1915) 20 CLR 54.

that defines the scope of the section. In this case, the *Wheat Acquisition Act* 1914 (NSW) expropriated all the wheat grown in NSW and cancelled all existing wheat and flour contracts, with a view to ensuring supplies for the armed forces of the Empire during WWI. The Court held that the Act was valid under s 92 because a change in ownership, such as expropriation, did not restrict interstate trade as such, since the new owner (the NSW government) could still dispose of the product in interstate trade just as freely as the previous owner (the grower or miller)[19]. In the course of this reasoning, it was regularly asserted in the leading judgments that "absolutely free" meant freedom from government control[20], and while glimmers of later disagreements can be retrospectively discovered in other judgments[21], no forthright attempt was made to suggest that "absolutely free" was limited to freedom *only* from laws discriminatory against interstate trade compared to intrastate trade[22].

When the High Court did come to explicitly consider the question of what kind of legislation it was from which trade, commerce and intercourse among the States were to be "absolutely free", the early case law showed a marked preference for the trade restriction analysis, although not a complete unanimity. The persistent presence of minority judgments relying on the discrimination analysis was to prove important in shaping the evolution of s 92 jurisprudence, as it established the contest between these two analyses as the major point of contention – and

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[19] *New South Wales v Commonwealth ('The Wheat Case')* (1915) 20 CLR 54, 67-68 (Griffith CJ), 79-80 (Barton J), 105 (Gavan Duffy J).

[20] *New South Wales v Commonwealth ('The Wheat Case')* (1915) 20 CLR 54, 68 (Griffith CJ), 79 (Barton J).

[21] Gavan Duffy J (with whom Rich J agrees) does suggest that an Act may only be invalid if it specifically treats interstate trade differently, which will later inform his judgment in *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530.

[22] Isaacs J does mention discrimination at 99, but only as an incident of his larger concept of freedom from all government restriction of interstate trade as such.

confusion – in the High Court's interpretation of that section for the first 90 years of the Australian federation[23].

The Early Rise of Trade Restriction Analysis:

The case of *W & A McArthur Ltd v Queensland* (1920)[24] is evidence of the early rise of the trade restriction analysis. In 1920, the Labor government of Queensland Premier Ted Theodore passed the *Profiteering Prevention Act* 1920 (Qld), s 12(1) of which made it unlawful to sell, agree to sell, or offer for sale a commodity at a price higher than that declared in the Queensland Government Gazette. Shortly after the passage of the Act, the Commissioner of Prices duly declared in the Gazette that calico, sheeting and sheets of all descriptions, and men's felt hats, could not be sold by a wholesaler for more than 22.5% on top of the actual cost of the product which had been delivered to the wholesaler (i.e. the wholesaler's profit on these goods was limited to 22.5%). W & A McArthur Ltd was a company incorporated, registered and resident in NSW which sold textiles for use in clothing and other purposes. It had no office, warehouse or stocks in Queensland but it did employ agents (known as 'travellers') in Queensland who were authorised to engage in wholesale contracts on its behalf for delivery of textiles in Queensland. In the course of doing business, four kinds of activity were engaged in which could constitute 'selling, agreeing to sell or offering for sale' under the Act, and since the Court's judgment would end up turning on the distinction between these different kinds of activity, it is necessary to parse them out carefully: 1) travellers in Queensland offered to sell goods to be delivered in Queensland, 2) travellers in Queensland received from persons in Queensland offers to purchase

[23] As will be seen in Chapter II, the High Court unanimously adopted the discrimination analysis in *Cole v Whitfield* (1988) 165 CLR 360, and any subsequent judicial disagreement has pertained to the application of that acknowledged discrimination analysis and to valid justifications for any discrimination identified.

[24] [1920] HCA 77, (1920) 28 CLR 530.

goods and relayed these offers to the company's office in Sydney, NSW, where they were accepted and goods were despatched to be delivered to the buyer in Queensland, 3) travellers in Queensland agreed to sell goods to persons in Queensland, and 4) travellers in Queensland agreed to sell goods to persons in Queensland *with the contract stipulating that the goods were to be despatched from the company's warehouse in Sydney, NSW and delivered to Queensland*. In each of these cases the contract price was in excess of the Queensland maximum wholesaler's profit, and the government of Queensland threatened to prosecute the company for alleged breach of the *Profiteering Prevention Act*. As it wished to continue selling its textiles into Queensland in this manner, the company initiated action in the High Court seeking a declaration that the relevant sections of the *Profiteering Prevention Act* were invalid due to incompatibility with s 92 of the *Constitution*, or at least that they were inapplicable to interstate traders.

The majority of the Court (Knox CJ, Isaacs, Starke, Higgins and Rich JJ) agreed that the *Profiteering Prevention Act* was inapplicable to interstate trade on the grounds that, whatever its further implications, it was at least clear that s 92 was intended to render impossible interstate border duties, and if the Act were to bind interstate traders, this would eviscerate s 92 by effectively allowing such border duties:

> If such a contention [that a NSW merchant contracting in NSW to sell goods into Queensland could be bound by the Queensland Act] could be upheld, it would, in our opinion, render s 92 practically useless. It would be idle in such an event to say that border duties and State bounties are abolished – that would be purely nominal. If the goods themselves can be prohibited, if commercial dealings between the States can be restricted to dealings on the basis of such prices as the State fixes to suit its own special conditions, then there is no practical freedom even from border duties and bounties. It is the old inter-colonial trade war perpetuated in an outwardly different form.[25]

[25] *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 545 (Knox CJ, Isaacs and Starke JJ; Rich J concurring). They make clear at 546 that any protection afforded by s 92 must be to the *whole* of interstate trade ("the whole transaction of exchange and travel between States"), wherever the formal contract is entered into.

In the particular circumstances of the case, it was only the fourth kind of activity described above which was trade of a genuinely interstate character, as the interstate element was a necessary[26] part of the contract in that fourth kind of activity, but in the previous three the interstate movement of goods was only incidental to the impugned activity itself. Thus, the Act was inapplicable to this fourth kind of activity but was still valid for the previous three, although the actual act of interstate movement of goods would still be protected by s 92 even in those three cases[27]. On the broader question of the proper scope of s 92, the majority clearly favoured a trade restriction analysis, declaring that

> The primary meaning of those words ["absolutely free"] used as they are with reference to governmental control, is that the subject matter of which they are predicated is to be "absolutely free" from all governmental control by every governmental authority to whom the command contained in that section is addressed. The expression "absolutely free" naturally means "free" *as* "trade, commerce and intercourse", and does not extend beyond the subject matter spoken of.[28] (emphasis in original)

This emphasis of freedom of interstate trade *as trade* allows Knox CJ, Isaacs and Starke JJ in their joint judgment (with which Rich J concurred) to enunciate a form of justification for restrictions on trade where the restriction is created by a law not *on the subject of interstate trade* but rather on another subject in the public interest, such as the prevention and punishment of crime or the protection of the public from hazardous goods. This will be explored further in Chapter VI of this thesis.

[26] 'Necessary' meaning either that interstate delivery was an express stipulation or necessary implication of the contract: *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 559-560 (Knox CJ, Isaacs and Starke JJ; Rich J concurring).

[27] *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 559-560 (Knox CJ, Isaacs and Starke JJ; Rich J concurring).

[28] *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 550 (Knox CJ, Isaacs and Starke JJ; Rich J concurring).

In furtherance of the trade restriction analysis used to define the scope of s 92, the joint judgment explicitly analogises freedom of trade under s 92 with the concept of freedom of speech under Amendment I to the United States Constitution, explaining that, as for freedom of speech, interstate trade itself cannot be restricted by a law on that subject and that it is no defence for a State to claim that it is equally restricting intrastate trade:

> ...the State cannot enact that prior restraint on inter-State trade, commerce and intercourse, whether it attacks inter-State trade, commerce and intercourse alone, or in company with its own domestic trade and commerce. The subjects are distinct and the State cannot annul the protection given by sec. 92 by mingling the subject matter beyond its control with matter fully under its control.[29]

It is this analogy with freedom of speech and the clear rejection of the discrimination analysis that has caused the trade restriction analysis employed in this and subsequent cases to be labelled the 'individual right' theory of s 92[30], because it views interstate trade as a right of every individual Australian citizen which cannot be abrogated merely because intrastate trade is also restricted.

Higgins J concurred with the joint judgment as to the result and in the adoption of a trade restriction analysis, but his reasons for adopting it, and his formulation of it, are slightly different from the joint judgment. For Higgins J, the practical meaning of trade being 'free' is a simple matter of combining the constitutional context of s 92 (the surrounding sections prohibiting various kinds of interference with trade) with the dictionary definition of the word 'free': " "Free", in the context, means "exempt from restrictions in regard to trade" (*Oxford Dictionary*,

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[29] *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 552 (Knox CJ, Isaacs and Starke JJ; Rich J concurring).

[30] James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 134-135 and generally Chapters 6 and 7.

sub "Free")"[31]. His Honour declines to analogise s 92 with the protection of freedom of speech under the US Constitution as the other Justices in the majority had done.

Gavan Duffy J, however, dissented from the rest of the Court both as to the result of the case and, much more importantly, as to the proper analysis to be employed in defining the scope of s 92. He asserted that s 92 was to be interpreted by reference to a discrimination analysis on two grounds: the meaning of "free" in its context, and the relationship of s 92 to other constitutional provisions. As to the meaning of "free" in its context, Gavan Duffy J argues that the normal meaning of "free" trade, especially where the term is used in a pact between sovereign entities, is freedom from discrimination, not freedom from all regulation on the subject of trade:

> There are few epithets in the English language which extend over a larger area of meaning than the word "free" or vary more with the object qualified. The word "free" is often used to qualify the word "trade", and sometimes, though not so often, to qualify the word "commerce". When used with respect to trade and commerce among Sovereign States it ordinarily means no more than unrestricted by tariff or customs duties; it more rarely means free from all artificial restrictions or restraints conditioned on the international character of the trade or commerce; but freedom of trade and commerce never means freedom from regulation or control, or complete immunity from municipal law with respect to the acts which constitute such trade or commerce...I see no reason for attributing to the word "free" in sec 92 any larger meaning than that which it naturally bears in the collocation in which it is there used[32].

Gavan Duffy J's reasoning as to the meaning of "free" trade under s 92 is evidently quite different from that of the joint judgment and from Higgins J. Unlike Higgins J, when looking to the meaning of the word 'free', Gavan Duffy J does not go to the simple dictionary definition of the word 'free' when used alone, but to the meaning of 'free' when coupled with the words 'trade' or 'commerce'. Unlike the joint judgment, Gavan Duffy J does not analogise freedom of

[31] *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 561.

[32] *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 567-568.

interstate trade to freedom of speech, and rather than conceiving of freedom of trade as an Australian citizen's right to trade free from government interference, he instead conceives of freedom of trade as a *State citizen*'s right not to be treated differently when trading *into another State*. For the joint judgment, s 92 is a mutual agreement between the citizens of what was to become Australia as to the power which they were to cede to government; hence, the joint judgment's invocation of a section of the US Constitution's Bill of Rights which establishes what powers are and are not given by Australian citizens to government [33]. For Gavan Duffy J, on the other hand, s 92 is a mutual agreement between sovereign Colonies as to how those Colonies should exercise their powers in the future (namely, by treating goods from other States as if they were from their own State); hence, Gavan Duffy J's invocation of international treaty law, in which sovereign states, already possessed of their own powers, agree on how to exercise those powers in the future.

Gavan Duffy J bolsters this argument about the meaning of "free" trade by referring to other provisions of the Constitution which are explicitly based on a principle of non-discrimination between the States, such as s 117 prohibiting discrimination on the basis of the State in which a person is resident, s 99 prohibiting the Commonwealth[34] from giving preference to any State or

[33] The first 10 amendments to the US Constitution, all adopted together in 1791, some three years after the adoption of the US Constitution proper (itself as a successor to the Articles of Confederation and Perpetual Union adopted in 1781). As part of the compromise necessary to reach agreement on the drafting of the Constitution at the Philadelphia Convention in 1787, James Madison, the 'Father of the Constitution' and later fourth President (1809-1817), agreed to support the later inclusion of a Bill of Rights as amendments to the Constitution once it had been duly adopted (although he himself initially considered such enumeration of rights to be unnecessary, ineffective and potentially dangerous). He according sponsored 12 amendments in the 1st United States Congress in 1789 from his seat as Member of the House of Representatives for Virginia's 5th District, of which 10 were subsequently ratified by the necessary 3/4 of State legislatures and came into effect together in 1791 as the famous Bill of Rights. (Another of which, having initially failed to gain enough State ratifications to come into effect in 1791, was subject to sporadic ratification over the 19th and 20th Centuries before a concerted spate of ratifications through the 1980s and early 1990s brought it into effect as Amendment XXVII in 1992.)

[34] As shall been seen in Section 2 below, in contrast to the majority, Gavan Duffy J contends that s 92 does indeed bind the Commonwealth and not just the States.

part thereof in its trade, commerce or revenue legislation and s 100 prohibiting the Commonwealth from denying States and persons resident therein the reasonable use of river water for conservation or irrigation. In Gavan Duffy J's view, this establishes a consolidated theme within the Constitution of the prohibition of discrimination on the basis of a person's State of residence.

Having argued that discrimination is the key to understanding the scope of s 92, Gavan Duffy J specifies how legislation can be identified as practising such discrimination: "because the trade and commerce are to remain free, Parliament must not fetter the acts which constitute such trade and commerce by any restriction or restraint conditioned on the fact that such trade or commerce is carried on between States"[35]. Of importance here is that the kind of discrimination analysis employed by Gavan Duffy J looks for differential *legal operation* of the legislation as between interstate and intrastate trade, not for differential *practical effect* of the legislation on interstate and intrastate trade. It is a test that looks for a discriminatory legislative *purpose* rather than a discriminatory *effect*. Also of importance is that, since it is based on discrimination analysis and so should only invalidate legislation that subjects interstate trade to a competitive disadvantage compared to intrastate trade, the reasoning behind this purposive test must unfold as follows: even though the impugned provision of the Act may restrict interstate trade, it remains *valid and applicable to interstate trade* unless it is proven that the purpose of the Act was to restrict *interstate trade as such* (because it is presumed that singling out interstate trade for such special legislation will subject it to a competitive disadvantage against intrastate trade).

[35] *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 568-569. The Parliament to which Gavan Duffy J is here explicitly referring is the Commonwealth Parliament, but the principle is equally applicable to the State Parliaments as it is subsequently applied to judge the validity of the Queensland Act (at 569).

Having thus argued that discrimination analysis determines the proper scope of s 92, Gavan Duffy J finds that the question of whether or not a legislative restriction discriminates against interstate trade by being conditioned on the fact that the trade is occurring between States is a question of fact, and in the instant case the Queensland Act was not so conditioned, and so was not invalidated or rendered inapplicable to interstate trade by virtue of s 92[36], and so His Honour would have judged the Act applicable to all four kinds of trading activity engaged in by the company.

In sum, then, the majority of the High Court (the joint judgment and Higgins J) in *W & A McArthur Ltd v Queensland* was steadfastly of the opinion that trade restriction analysis was to be used to determine the scope of s 92. A State law which restricted genuinely interstate trade was inapplicable to interstate trade (absent justification on the grounds that it was not 'on the subject of' trade as such, but rather is 'on the subject of' another matter of public interest).

Trade Restriction Analysis Dominates and Develops:

With *W & A McArthur Ltd v Queensland* having established the ideological contest between the trade restriction and discrimination analyses and the early preference for trade restriction analysis, subsequent decisions were not always clear as to which analysis they preferred, especially where the facts of the case were such that the Act complained of satisfied both forms of analysis (i.e. it was in fact discriminatory against interstate trade, which necessarily meant that it was also a restriction on interstate trade). One such case is *James v South Australia* (1927)[37] in which the Court was of the view that the impugned provisions of the South Australian Act were

[36] *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 569.

[37] [1927] HCA 32, (1927) 40 CLR 1.

invalid for incompatibility with s 92, although the reasoning seems to waver – perhaps the result of joint judgments written by judicial minds which were not precisely unanimous on the question!

In *James v South Australia*, the *Dried Fruits Act* 1924 (SA) constituted the Dried Fruits Board of South Australia and s 20 of the Act empowered the Board to determine where and in what quantity the produce of dried fruits in a particular year could be marketed and to enforce that determination as it thought proper; this was intended to allow the Board to establish quotas for the percentage of a grower or producer's dried fruit which he or she could sell within Australia. (As the total output of dried fruit from Australia far exceeded what could be consumed in Australia, the purpose of the Act was to force the surplus off the national market and thereby maintain a higher price in the Australian market for growers and producers than would obtain in an unregulated market. It was also seen as a way of ensuring that all dried fruit producers could share in the Australian market, which at the time was more lucrative than the world market.[38]) In 1926 the Board issued various determinations as to the percentage of a grower/producer's crop of specific kinds of dried fruits which could be marketed within Australia, culminating (for relevant purposes) in the determination that the quota marketable in Australia for each grower/producer was 15% of their currants, 30% of their sultanas and 45% of their lexias[39].

[38] This surplus supply was the result of governmental policies during and after WWI which instituted solider-settler schemes, whereby returned servicemen were sold or leased (for a generous price) plots of Crown land and encouraged to take up agriculture: P A (peter Anthony) Howell, 'James, Frederick Alexander (1884-1957)' in *Australian Dictionary of Biography* vol 9 (Melbourne University Publishing 1983).

[39] A lexia is a white wine grape also known as Muscat of Alexandria, Chasselas Musqué or Muscat Gordo Blanco. In the case law, it seems that lexias are also sometimes described as 'seeded raisins'.

Mr Frederick James, a South Australian fruit grower, processor and wholesaler – and, it would turn out, long-term High Court and Privy Council plaintiff – habitually sold dried fruit to other States. He had been operating in this manner for about 6 years under his 'Trevarno' trade mark which had become well respected as a mark of quality, and, as a result, demand for his produce in Australia was actually increasing, meaning that he was loathe to submit to the Board's limits on how much of his produce he could market in Australia[40]. It also happened that, as a younger man, he had learnt typing and shorthand by repeatedly copying out the Constitution, giving him a familiarity with s 92 and a belief that the South Australian Act might not apply to him in respect of his interstate trade. In late 1926 and early 1927, during the period in which the Board's declaration was on foot, James contracted to sell several shipments of dried fruit to New South Wales, Victoria, Queensland and Western Australia, and these contract amounts well exceeded the percentage of his produce that he was allowed to sell within Australia under the Board's determination. Consequently, in 1927 the Board executed several successive seizures of James's dried fruit to prevent further trade in excess of the limits which it had determined, and James brought an action against the Board for trespass which was heard in the High Court for adjudication of the constitutional question raised.

The joint judgment of Gavan Duffy, Rich and Starke JJ simply found that s 20 of the South Australian Act was incompatible with s 92 under the authority of the majority in *W & A McArthur Ltd v Queensland*, in which, as was seen above, the prohibition of interstate trade or the subjecting of interstate trade to conditions was judged incompatible with s 92[41]. This

[40] P A (Peter Anthony) Howell, 'James, Frederick Alexander (1884-1957)' in *Australian Dictionary of Biography* vol 9 (Melbourne University Publishing 1983).

[41] *James v South Australia* (1927) 40 CLR 1, 39.

therefore seems to represent a silent acceptance of the trade restriction analysis expounded in the joint judgment in *W & A McArthur Ltd v Queensland* from which Gavan Duffy, Rich and Starke JJ were quoting, and by way of furtherance of the 'individual right' theory, they aver that the right is not a positive right, but a negative right to be free from the operation of law incompatible with s 92: "It gives no right to the citizens of the Commonwealth except the right to ignore, and, if necessary, to procure the assistance of the judicial power in resisting, any such [incompatible] legislation"[42]. While Rich and Starke JJ are doing no more than confirming their views in the earlier case, Gavan Duffy J has here acquiesced in the trade restriction analysis which he rejected in the earlier case, although whether he has become convinced of the reasoning or is simply applying the principle of *stare decisis et non quieta movere* is not indicated[43].

Like Gavan Duffy, Rich and Starke JJ, Isaacs ACJ and Powers J concluded that s 20 of the Act was inapplicable to interstate trade pursuant to s 92[44]. That they rely on a trade restriction analysis emerging from individual rights is clear from their judgment, although, like the other joint judgment in the case, they are careful to note that the right under s 92 is a negative right and that it is exercisable by citizens against government rather than other citizens:

> The right to conduct inter-State business "absolutely free" from State interference is at once a right, a protection and a prohibition.[45]
>
> ...

[42] *James v South Australia* (1927) 40 CLR 1, 41.

[43] The same applies to the question of whether s 92 binds the Commonwealth: although Gavan Duffy J had argued in *W & A McArthur Ltd v Queensland* that it did bind the Commonwealth, here the joint judgment in which he partook confirmed the majority's opinion from the earlier case that s 92 did *not* bind the Commonwealth: *James v South Australia* (1927) 40 CLR 1, 41.

[44] *James v South Australia* (1927) 40 CLR 1, 26.

[45] *James v South Australia* (1927) 40 CLR 1, 18.

> No doubt sec. 92 does not direct itself to *individuals* who, on their own authority, obstruct other individuals in inter-State commercial operations, and therefore it cannot be said to establish a universal right of protection. But it does operate to shut off all forms of State obstruction and to confer upon the individual a right to be protected against all forms of *State* action amounting to, or authorizing [*sic*] anyone to commit, such obstruction.[46] (emphasis in original)

Consequently, by the time of *James v South Australia* trade restriction analysis enjoyed the acceptance of all members of the Court, and even Gavan Duffy J, the early proponent of the discrimination analysis, had resigned himself to the fact that the trade restriction analysis was part of precedent. Trade restriction analysis had a strong grounding in individual rights as against (State) government, and a sophisticated purposive formulation which looked to the legal operation of the Act to determine whether or not it was conditioned on the fact of interstate trade.

<u>Section 2: Confusion – Discrimination Analysis Makes a Comeback:</u>

James v Cowan (1930)[47] provides some further elaboration of the trade restriction analysis which the majority of the Court had been developing over the previous decade. Nevertheless, the discrimination analysis was unintentionally revived in the course of a dissenting judgment which came to be influential after it was cited with approval by the Privy Council on appeal.

The factual circumstances of the case are substantially the same as in *James v South Australia*. After that decision was handed down and s 20 of the *Dried Fruits Act* 1924 (establishing quotas for dried fruit marketing in Australia) was declared inapplicable to interstate trade, the government of South Australia attempted to achieve the same end of limiting dried fruit marketing in Australia by reliance on other provisions of the same Act. Sections 28 and 29

[46] *James v South Australia* (1927) 40 CLR 1, 32.

[47] [1930] HCA 48, (1930) 43 CLR 386.

of the Act empowered the South Australian Minister for Agriculture to purchase or compulsorily acquire dried fruits produced within South Australia and to free them from any former mortgage or encumbrance, and the government hoped that if this provision survived challenge (as had the compulsory acquisition provision in *The Wheat Case* above) then the Minister as the new owner of the dried fruit crop could limit the amount which was sold in the Australian market – just as had earlier been attempted by the enforcement of quotas on individual growers. After James's crop was compulsorily acquired, he brought an action for trespass to goods against the Minister, Sir John Cowan, which was initially heard by a sole judge (Starke J) and then on appeal by the Full Bench of the High Court (less the recused Starke J, of course).

On appeal, the majority of the Court (Knox CJ and Gavan Duffy J concurring with Starke J's original judgment, and Rich J delivering a separate judgment) decided that the present case was analogous to *The Wheat Case*, and so the application of the South Australian Act to James's interstate trade was compatible with s 92[48]. Starke J did not engage in discussion about the proper analysis to be used to determine the scope of s 92, since he followed *The Wheat Case* in deciding that compulsory acquisition merely effected a change in ownership and the new owner (the Crown) was in no way legally restricted from engaging in interstate trade, meaning that s 92 (whatever its proper scope) was not involved[49]. Further to this, he added that it was not the role of the Court to sit in judgment on the Legislature in enacting legislation, and so it was immaterial that the legislative purpose behind the NSW Act impugned in *The Wheat Case* was different from that which was argued to have motivated the South Australian Act in the present case: "I

[48] In fact, in their joint judgment in *James v South Australia*, Gavan Duffy, Rich and Starke JJ has already indicated that they considered s 28 of the Act to be valid: *James v South Australia* (1927) 40 CLR 1, 39-40.

[49] *James v Cowan* (1930) 43 CLR 386, 393.

see no distinction in principle between an acquisition by a legislative authority to maintain the Empire in time of war or to feed the people of a State, and an acquisition to maintain the industries of a State"[50]. Thus, where an Act is *prima facie* valid because it is not on the subject of or directly aimed at interstate trade, the Court will not sit in judgment on its legislative purpose so as to render invalid that which is *prima facie* valid. As will be seen in Chapter VI, this line of reasoning – that the Court should not adjudge the validity of legislative purposes – would later be adopted (with some modification) by the Court when dealing with the question of how legislation that was indeed within the scope of s 92 (and so *prima facie* invalid) could nevertheless be justified by reference to some valid purpose, and so escape being struck down.

Isaacs J dissented as to the result in *James v Cowan*, ruling that the Act should be held invalid under s 92, and it was his judgment which was picked up with enthusiasm by the Privy Council on appeal, as will be discussed below. This created confusion because Isaacs J's judgment was seen to give heart to both the trade restriction and the discrimination analyses and was taken as support by judges of both beliefs[51]. The confusion appears to derive from the fact that, although he employs trade restriction analysis to determine the scope of s 92 (as in *James v South Australia* above), he does discuss discrimination in relation to the question of justification (by way of characterising the 'real object' of legislation). As will be seen in Chapter VI, the distinction between the issues of scope and justification was not so sharply and explicitly drawn in the confused and contested case law of this period, and is better able to be comprehended in retrospect. On the one hand, Isaacs J describes s 92 as providing personal, individual rights which may be infringed as such, regardless of similar infringement of an intrastate trader's

50 *James v Cowan* (1930) 43 CLR 386, 393.

51 See James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 137.

rights: "The right of inter-State trade and commerce protected by sec 92 from State interference and regulation is *a personal right attaching to the individual and not attaching to the goods*"[52] (emphasis in original). On the other hand, in distinguishing the instant case from *The Wheat Case* and rejecting the idea that expropriation was never invalid under s 92, Isaacs J adopts the 'real object' test by which an Act otherwise invalid under s 92 could be saved if its real object were something other than to burden interstate trade as such:

> The distinctive feature of the Act in [*The Wheat Case*] was that it authorized [*sic*] expropriation of the property as such *simpliciter*, and did not expressly or implicitly refer to inter-State trade or commerce, either as a criterion of authority or as a description or attribute of the property to be acquired...
>
> Here, ...we have a statute which is the very antithesis of the *Wheat Acquisition Act*. It makes the repression of inter-State trade the *causa causans* of the expropriation, which is only the *means* selected to carry out effectively the attempted control of the inter-State trade.[53] (emphasis in original)

Chapter VI goes into detail about justification by reference to the 'real object' of legislation. In light of his earlier comments in *James v South Australia*, it is tolerably clear that Isaacs J was merely repeating his adherence to the trade restriction test (though with discrimination relevant when it came to justification), but there was enough room for doubt in his words that, as will be seen, they were taken up by proponents of the discrimination analysis as well. Having judged that interstate trade is indeed restricted by s 28 of the *Dried Fruits Act* 1924 (and that restriction of interstate trade is the real object of the Act), Isaacs J judges s 28 of the Act to be invalid under s 92.

[52] *James v Cowan* (1930) 43 CLR 386, 418.

[53] *James v Cowan* (1930) 43 CLR 386, 415.

This dissenting judgment of Isaacs J was to assume a much greater importance when the case was appealed to the Privy Council in 1932[54] and Lord Atkin reversed the High Court's decision, citing Isaacs J's dissent with approval and so giving further cause for contention between the trade restriction and discrimination analyses of the scope of s 92. In arguments before their Lordships, the attorneys for the appellant and respondent had clearly set out opposing views on the proper scope of s 92: the appellant, that discrimination was sufficient but not necessary to breach s 92 (or else s 92 would have used the word 'discrimination')[55]; the respondent, that discrimination is the necessary criterion to engage s 92[56]. Unfortunately, Lord Atkin explicitly declined to make a judgment on these two competing interpretations: "It appears to their Lordships unnecessary to undertake the difficult task of defining the precise boundaries of the absolute freedom granted to inter-State commerce by s 92"[57]. Instead, he repeated the High Court's earlier jurisprudence that s 92 was meant to limit States' power to interfere with interstate trade 'as such'[58], and that it was the 'real object' of legislation which determined its validity under s 92, not merely the legal form of the action it took to achieve that object[59]. As a result of the Privy Council's unwillingness in this case to explicitly determine the meaning of s 92 and to decide between trade restriction and discrimination as the criterion bringing legislation

[54] *James v Cowan* [1932] UKPC 43, [1932] AC 542.

[55] *James v Cowan* [1932] AC 542, 547-548.

[56] *James v Cowan* [1932] AC 542, 546.

[57] *James v Cowan* [1932] AC 542, 555.

[58] *James v Cowan* [1932] AC 542, 555.

[59] *James v Cowan* [1932] AC 542, 558.

within its scope, the confusion between these definitions of the scope of s 92 would continue for many decades to come.

Two Schools of Thought Contend:

As a country which for much of its history relied extensively on agriculture to support its economy, Australia has a long history of single-desk marketing schemes for agricultural products[60], so it was not surprising that s 92 should be invoked to question the constitutionality of such schemes which, by their nature, removed individual growers' rights to trade their goods in commercial freedom. It is worthwhile at this point to set out the legal mechanism by which a single-desk marketing scheme works and to explain how it differs from the schemes already the subject of the decided cases *James v South Australia* and *James v Cowan*. In *James v South Australia*, the government had imposed a limitation on the quantities of product which growers could sell into the Australian market, but had not expropriated that product from the growers and vested ownership in the government (or the government-created Dried Fruits Board); in *James v Cowan* the Minister had issued an individual order to expropriate James's dried fruit product, but this was an order specific to James (motivated, the Privy Council judged, by the Minister's presumption as to how James would sell his product if it weren't expropriated), and it was not part of a general State-wide scheme expropriating all dried fruits and vesting them in the

[60] While single-desk marketing was more popular in the early and mid-20th Century, some prominent examples of it remained until very recently. The most noteworthy of these was the Australian Wheat Board (and its privatised successor AWB Ltd), whose operations in the course of marketing Australian-grown wheat overseas came under scrutiny when it emerged in 2005 that they had been paying 'fees for transportation services' to the deposed Iraqi government of Saddam Hussein through a Jordanian intermediary. (Under the United Nations Oil-for-Food Programme, trade with Hussein's Iraq was broadly forbidden, save for the provision of essential humanitarian supplies such as wheat, payment for which would be rendered in an equivalent value of Iraqi oil products.) These payments were, it turned out, effectively bribes to the Hussein government, and the ensuing scandal so tarnished the name of AWB Ltd and the idea of single-desk marketing that the company was disestablished and the single-desk marketing scheme abolished in 2008.

government. A single-desk marketing scheme, by contrast, is a scheme whereby the government compulsorily acquires all the produce of a specific kind within their jurisdiction, vests it in a Board or Commission, and disposes of the pooled product as a single seller, so as to achieve higher prices in whatever market they choose to sell it[61]; profits from sales are typically returned to the growers from whom the product has been expropriated at a per tonne rate reflecting the selling price which the Board has negotiated, less product processing and transportation costs, the Board's expenses and, depending on the particular scheme, possibly some deduction made for investment in the industry as a whole (infrastructure development, marketing, research, etc.). The economic effect of single-desk marketing, it can be seen, is similar to the scheme in *James v South Australia* inasmuch as it aims to control prices within different markets (here, domestic and international) by limiting supply to those different markets, but it has the additional purpose of controlling prices by removing the possibility of competition between growers at point of sale. Crucially, this elimination of inter-grower competition must operate at a whole-of-industry level for a compulsory single-desk scheme to be effective, rendering it distinct from the piecemeal expropriation carried out in *James v Cowan*. This being so, the striking down of the South Australian government's attempts at market control in both *James v South Australia* and *James v Cowan* led to the question of whether the legal differences between those legislative schemes and a genuine single-desk commodity marketing scheme could allow the latter to escape invalidity under s 92.

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[61] Given the dichotomy of prices which can occur between the domestic (Australian) market and the international market (as seen in *James v South Australia*), especially before the globalisation of commodity trading, the government may task the Board with ensuring specific pricing outcomes, whether that be steady pricing year-to-year so as to guard against boom-and-bust income for growers, lower domestic prices in the interests of Australian consumers, or higher prices in specific markets (or markets generally) in the interest of growers.

One such single-desk scheme was the Peanut Board of Queensland. Queensland law provided for the establishment of single-desk commodity marketing boards for farm products on receipt of a petition to do so from 50 growers, and in 1930 the Peanut Board was duly set up, with all present and future Queensland peanut crop for the next 10 years vested in the Peanut Board which was to market those peanuts and pay dues to growers. In May of 1932, a consignment of about 3000 bags of peanuts was sitting at Deepwater Wharf in Rockhampton, Queensland. The Peanut Board requested the Rockhampton Harbour Board to deliver the peanuts to them as the statutory owner. The Harbour Board refused, saying that the growers who had deposited the peanuts there owed unpaid harbour dues, and that they were keeping the peanuts under lien. In *Peanut Board v Rockhampton Harbour Board* (1933)[62], when the Peanut Board initiated legal action to acquire the peanuts, the Harbour Board claimed that the consignment in question was beyond the scope of the single-desk legislation since the peanuts had been intended for export to New South Wales and so the legislation was inapplicable to them due to unconstitutionality under s 92.

Since the Privy Council in *James v Cowan* had declined to define the precise limits of s 92, and so had not explained whether discrimination against interstate trade or mere restriction of interstate trade (whether or not that restriction was equally applied to intrastate trade) was the criterion to define the scope of that section, different members of the High Court read different meanings into the Privy Council's judgment. Gavan Duffy CJ, Rich, Starke, Dixon and McTiernan JJ hewed to the trade restriction test; Evatt J, on the other hand, notionally payed heed to the trade restriction test, but in practice enunciated a discrimination test.

[62] [1933] HCA 11, (1933) 48 CLR 266.

Before examining the difference between the majority's trade restriction test and Evatt J's discrimination test, it is worth noting the common ground across the Court that the s 92 jurisprudence was uncertain and unsatisfactory, and there was a growing sense of frustration at this. Rich, Evatt and McTiernan JJ all lament the confusing jurisprudence around s 92[63], but the unfortunate result is that, rather than enter a single, clear, joint judgment to resolve this lamentable ambiguity, Their Honours try to avoid discussion of the confusing historical jurisprudence without explicitly overruling it[64] or opt to quote previous decisions with approval rather than offer a new comprehensive formulation of the meaning of s 92 for fear of creating yet more confusion for future legislative draughtsmen trying to comply with the law[65]. Their frustration is palpable, but the solutions they adopt only end up making the jurisprudence more fractured.

The majority (Gavan Duffy CJ, Rich, Starke, Dixon and McTiernan JJ) apply a trade restriction test to determine the scope of s 92 and find the peanut marketing scheme unconstitutional insofar as it related to interstate trade. Section 92 is conceived of as protecting an individual person's right to engage in interstate trade and commerce[66] free of government interference (not just State protectionist interference)[67], and so a legislative scheme such as single-desk marketing comes within the scope of s 92 by restricting interstate trade, whether or

[63] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 274 (Rich J), 294 (Evatt J) and 309 (McTiernan J).

[64] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 274.

[65] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 309.

[66] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 287 (Dixon J), 313 (McTiernan J).

[67] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 287 (Dixon J).

not this restriction applies equally to intrastate trade[68]. Thus, the scope question is merely 'Does the legislation restrict interstate trade?'. Applying this question specifically to a single-desk marketing scheme, it is immaterial that the total volume of trade is not decreased by the restriction on an individual's right to trade interstate[69], because s 92 is not a guarantor of trade volume but of individual traders' rights and such a scheme is a "complete destruction of [the producer's] freedom of commercial disposition of his product"[70].

It is clear enough that the majority in *Peanut Board v Rockhampton Harbour Board* had adopted the trade restriction analysis, viewing this as the proper interpretation of the Privy Council's ruling in *James v Cowan*. The position of Evatt J in the instant case is more subtle. Having only joined the High Court in late 1930, this case was his first major opportunity to express his views on the proper effect of s 92, and it would set up the competition between his school of thought, which tended to preserve the validity of socialised and interventionist government programmes by invalidating legislation only where it was discriminatory against interstate trade, and the school of thought led by Dixon J (from 1952, Dixon CJ) which, as seen in the discussion above, interpreted s 92 as a protection of the individual right of a person to engage in interstate trade, and so tended to invalidate socialised government programmes insofar as they applied to interstate traders on the grounds that such legislation constituted a fundamental violation of those individuals' rights[71]. Evatt J was explicitly clear that the significance of

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[68] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 275-277 (Rich J), 284 (Starke J), 286 (Dixon J).

[69] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 285 (Starke J).

[70] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 277 (Rich J).

[71] These were not just abstract legal principles adopted by Evatt J and Dixon J, but were expressions of their broader political beliefs, exacerbated by a personal dislike for one another.

Dr Herbert Vere Evatt, generally known as 'Bert' or 'Doc', was the Labor MP for Balmain in the NSW Legislative single-desk marketing to the Australian agricultural sector and its widespread adoption throughout the Commonwealth meant that the Court should not render them ineffective by

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Assembly for 5 years before his appointment to the High Court by Labor Prime Minister James Scullin in 1930. He retired from the High Court to return to politics in 1940 and was elected MP for Barton in the Commonwealth Parliament. From 1941 to 1949 he was Attorney-General and Minister for External Affairs in the Labor governments of John Curtin and Ben Chifley, and from 1949 was Chifley's Deputy Leader. (He also served as President of the General Assembly of the United Nations and founding president of the Atomic Energy Commission in the post-war period, as well as aiding in the drafting of the Universal Declaration of Human Rights.) He served as Leader of the Australian Labor Party from 1951 to 1960, leading the party to three unsuccessful election contests and causing a decades-long schism by opposing the Liberal government's attempt to ban the Communist Party in Australia and arguing for the withdrawal of official Labor Party support from the Roman Catholic-dominated 'industrial groups' who were trying to wrest control of affiliated trade unions from the Communist Party (these 'Groupers' split off from the Australian Labor Party to form the Democratic Labor Party, which directed preferences away from the ALP and was a decisive factor in Evatt's second and third election defeats). Upon retirement from federal politics, he served as Chief Justice of NSW from 1960 to 1962. A complex political figure, he supported Labor's economic socialisation programmes under Curtin and Chifley, but has also been characterised as a libertarian on matters of personal freedom of association. See G C (Geoffrey Curgenven) Bolton, 'Evatt, Herbert Vere (Bert) (1894–1965)' in *Australian Dictionary of Biography* vol 14 (Melbourne University Publishing 1996).

Sir Owen Dixon, on the other hand, was a conservative common law jurist, eschewing political and other extra-judicial considerations in favour of his famous formulation of 'strict and complete legalism', meaning 'strict logic and high technique' in the expounding of the law. Having risen from humble financial circumstances, Dixon was a hardworking and successful Melbourne barrister for nearly 20 years before his appointment to the High Court by Nationalist Prime Minister Stanley Bruce. At 42 he was the youngest member of the Court – until the appointment of a couple of young NSW Labor Party MPs the following year: 38-year-old Edward McTiernan, and 36-year-old Bert Evatt. Their youth and history as politicians (although both were also barristers of more than a decade's standing) made their appointments controversial and Dixon did not get along well with them, especially Evatt. Dixon considered him to be more a politician than a judge, and a poor judge at that. This caused Dixon to find his early experience as a judge unrewarding, although after the departure of Evatt and the appointment of more legalistically-minded judges he began to feel more comfortable. During WWII, he served on various government administrative boards, managing resources for the war effort, but his most significant service was as Australia's Minister to Washington from 1942 to 1944, appointed by Prime Minister Curtin. This, of course, would have brought him into contact once more with Evatt, who, as mentioned above, was Minister for External Affairs at the time – but for the fact that he secured, as a condition of his appointment, that he would be responsible directly to the Prime Minister. Evatt had opposed Dixon's appointment, and even the limited control that Evatt exercised over Dixon in Washington was enough to prompt Dixon to retire from the post as soon as the outcome of the war was certain in 1944. There was no love lost between these two judicial brethren. Having returned to the High Court, over his years of service he came to be regarded internationally as the leading exponent of the common law method, earning him a seat on the Imperial Privy Council and Honorary Doctorates in Law from Oxford, Harvard, Melbourne and the Australian National University; he also served as a well-respected UN mediator in Jammu and Kashmir between the newly independent states of Pakistan and India, although was unable to bring about a successful resolution to their competing territorial claims. As a jurist he was a strict adherent of the doctrine of precedent, believing it to be the best way to maintain public confidence in the legitimacy of the judiciary, especially when striking down significant government legislation. He served as Chief Justice from 1952 to 1964. See Grant Anderson and Daryl Dawson, 'Dixon, Sir Owen (1886–1972)' in *Australian Dictionary of Biography* vol 14 (Melbourne University Publishing 1996).

Sydney and Melbourne, politician and judge, Labor and conservative: these were two men who saw the world differently and whose differing philosophies – and mutual personal dislike – manifested in two different schools of thought as to the extent of s 92 of the Constitution.

exempting interstate trade from their operations without clear proof that they breached s 92[72]. The actual test which Evatt J used to determine the scope of s 92 is a subtle one, because he felt constrained by authority to declare that express discrimination against interstate trade (that is, discrimination expressed in the words of the legislation) is not necessary to bring impugned legislation within the scope of s 92[73]. This initial statement looks like an acknowledgement of the majority's trade restriction test in declaring that discrimination is not necessary for the scope of s 92, but it is in fact no more than a feint, as Evatt J goes on to cite *James v Cowan* as authority that legislation will still be within the scope of s 92 if, despite not engaging in express discrimination in its wording, it is in reality "directed at inter-State commerce as such"[74]. His Honour then follows this statement with the declaration that "[t]he absence from the State law of differentiation against inter-State trade may tend to indicate that the law, regarded as a whole, bears so little relation to inter-State trade that the prohibition of sec. 92 is not being disobeyed"[75]. What this seems to amount to is the idea that *express* discrimination against interstate trade may not be necessary to bring legislation within the scope of s 92, but in order to come within that scope there would at least need to be some form of discrimination *in effect*, by virtue of a provision which appears neutral on its face in fact being motivated by a desire to restrict interstate trade in a way that doesn't apply generally to intrastate trade. Evatt J here rejects the majority view, championed by Dixon J, that s 92 is designed to protect the right of an individual

[72] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 294.

[73] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 295.

[74] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 295 quoting the Privy Council decision *James v Cowan* [1932] AC 542, 555.

[75] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 297.

to engage in interstate trade free of government regulation[76], justifying this by reference to the historical context of s 92's declaration that trade, commerce and intercourse among the States should be 'absolutely free', namely that that section was directed against the inter-State protectionism that prevailed before federation, rather than directed at exempting interstate trade from otherwise applicable schemes of regulatory control[77]. This appeal to the historical context of s 92 as a way of supplementing its elliptical language would later be used to conclusively settle the 90-year question of this section's true scope in the seminal unanimous judgment of *Cole v Whitfield* (1988), which is the subject of Chapter II.

It is clear, then, that there was a significant difference of interpretation between the majority (of which Dixon J's judgment would end up being the most influential, on account of His Honour's typical lucidity) and Evatt J. The Dixon school of thought prescribed that s 92 was designed to protect an individual's right to engage in interstate trade free from government control (at least where restriction of trade was the real object of the legislation); consequently, the scope of s 92 was determined by whether it restricted interstate trade regardless of whether an equal restriction was placed on intrastate trade (which was not protected by s 92). The Evatt school of thought saw s 92 as designed to prevent State protectionism, and so defined its scope as catching only legislation which on its face or in its effect was aimed at interstate trade, that is, legislation which subjected interstate trade to differential, discriminatory treatment. With each school of thought laying claim to the proper interpretation of the only 'higher authority' available, the Privy Council decision in *James v Cowan*[78], Dixon J and Evatt J would continue to

[76] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 302.

[77] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 298 and 303.

[78] See James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 137-140.

prosecute their separate interpretations –at least until the Privy Council could next rule on the question. On a more practical level, the majority decision that the Queensland peanut marketing scheme was inapplicable to peanuts destined for interstate trade called into question the continued existence of all single-desk marketing schemes operating in Australia: if such a scheme had to exempt any and all products which had been set aside for interstate trade, then it would be deprived of much of its economic viability.

On the heels of *Peanut Board v Rockhampton Harbour Board* came *R v Vizzard; Ex parte Hill* (1933)[79], concerning a State-wide licensing scheme for motor vehicles. New South Wales law required that motor vehicles operated in the State be licensed; Alexander Hill and his son Price Hill conducted a road transport business out of Wodonga in Victoria (just over the border from Albury in NSW, where they also had an office), in the course of which they operated a truck, with a Victorian number plate, that was used solely for road transport between Melbourne in Victoria and Wagga Wagga in NSW. While driving this truck, Price Hill was apprehended in Wagga Wagga by NSW Road Transport and Tramways Commission employee Frederick Vizzard and charged with operating a vehicle which was not licensed under NSW law. Hill's defence was that the NSW licensing law was invalid under s 92 of the Constitution insofar as it purported to apply to his truck, as it was used exclusively in the course of interstate trade.

The Court delivered judgment in this case mere months after doing so in *Peanut Board v Rockhampton Harbour Board*; Dixon J and Evatt J each reiterated their separate positions from the earlier case, but while Rich and Starke JJ persist in adhering to Dixon J's position (trade restriction test), Gavan Duffy CJ and McTiernan J switch to agreeing with Evatt J

[79] [1933] HCA 62, (1933) 50 CLR 30.

(discrimination test). As a result, with three members of the Court in the Dixon school of thought and three in the Evatt school, the tie-breaking effect of the Chief Justice's vote theoretically tipped the Court from judging that trade restriction is the test for s 92 in *Peanut Board v Rockhampton Harbour Board* to judging that discrimination is the test for s 92 in the instant case – although Gavan Duffy CJ recognised the unsatisfactory nature of deciding such complexities by a tie-breaker vote.[80] Again, the one thing on which adherents of both schools of thought could agree was that the drafting of s 92 was unsatisfactory and was the cause of this confused jurisprudence[81].

For Gavan Duffy CJ, Evatt and McTiernan JJ, 'free trade' is an economic idea embedded in the Constitution and s 92 loses its true meaning if the words 'trade, commerce and intercourse' are disjoined from the word 'free'[82]. As such, the scope of s 92 only included legislation which discriminated against interstate trade either on its face or in its effect[83], for which Evatt J again cited the Privy Council's decision in *James v Cowan* as authority[84]. Section 92 did not protect an individual's right to engage in interstate trade free of government control, so if legislation

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[80] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 47.

[81] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 49 (Rich J) and 97 (McTiernan J).

[82] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 87-88 (Evatt J). This endorses the argument of counsel for the Commonwealth (intervening) Sir Robert Garran KC (at 36 and 37 of the case); Garran had been Chair of the Drafting Committee of the 1897-1898 Constitutional Convention and was co-author of the most significant work on the Australian Constitution at the time of the present case, John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson 1901). Later, his posthumously-published memoirs, Robert Garran, *Prosper the Commonwealth* (Angus & Robertson 1958) would also prove informative to constitutional law scholars.

[83] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 47 (Gavan Duffy CJ) and 76-77 (Evatt J). McTiernan J's reasoning was a little less lucid on this point, but it is tolerably clear at 102 that he was adopting the discrimination test put forth by Evatt J in *Peanut Board v Rockhampton Harbour Board* inasmuch as he contends that the 'real object' which offends against s 92 is the restriction of *interstate* trade (not just trade and commerce *generally* as in the Dixon school), with the presumption that the effect of legislation is discriminatory against interstate trade.

[84] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 91.

happened to restrict interstate traders' freedom to some degree, that is not sufficient to invalidate it, provided that neither its purpose nor its effect, on its face or in practice, was "disadvantaging, discriminating against, or even limiting, inter-State trade or commerce in any commodity"[85] but was instead some broader scheme of regulation[86]. In the present case, Gavan Duffy CJ, Evatt and McTiernan JJ all agreed that the impugned NSW law was not discriminatory on its face or in its effect.

Dixon, Starke and Rich JJ all continued to adhere to the Dixon school, conceiving of s 92 as a protection of an individual's right to engage in interstate trade free of government control of that trade as such. The test for the scope of s 92 was whether the legislation restricts interstate trade, regardless of any equal effect on intrastate trade; discrimination against interstate trade is unnecessary[87] – as regards the scope of s 92, "uniformity or absence of discrimination is not a criterion"[88]. Dixon J continued to draw on the Privy Council decision in *James v Cowan* as justification for this trade restriction test[89], and argued that although the discrimination test (based on the free trade, anti-protectionist reading of s 92) had often been advanced in the Court, with one early exception[90], it had consistently failed to command the assent of the Court at

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[85] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 94 (Evatt J).

[86] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 48 (Gavan Duffy CJ).

[87] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 55 (Starke J) and 65 (Dixon J).

[88] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 59 (Dixon J).

[89] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 64.

[90] Curiously, Dixon J suggests that the one exception to this is *Duncan v Queensland* [1916] HCA 67, (1916) 22 CLR 556, although the reasoning of the majority in that case does not explicitly adopt a free trade definition of s 92. The case concerned a Queensland Act (and a declaration thereunder) which reserved all meat and livestock in the State for the Imperial war effort and provided that government approval was necessary to trade in such meat and livestock. The majority found that the declaration was not invalid under s 92 as it merely placed the meat and livestock *in custodia regis* in time of war, and it was not thereby inconsistent with s 92. The decision thus bears some similarity to the earlier judgment in *New South Wales v Commonwealth ('The Wheat Case')* (1915) 20 CLR 54, which expropriated all the wheat in NSW, and was judged consistent with s 92 because it simply changed the

large[91]. Any legislation thus coming within the scope of s 92 by restricting interstate trade will be inapplicable to that interstate trade (unless justified)[92]. While Dixon, Starke and Rich JJ all agreed that the NSW legislation did restrict interstate trade and that this was the measure for the scope of s 92, they disagreed as to its real object and justification, and so as to its ultimate validity as relates to interstate traders such as Hill: Rich J regarded the legislation as being justified on the grounds that it was mere regulation, whereas Dixon and Starke JJ both rejected this idea.

The result in *R v Vizzard; Ex parte Hill* was repeated in the immediately subsequent case of *O Gilpin Ltd v Commissioner for Road Transport & Tramways (NSW)* (1935)[93]. Gavan Duffy CJ, Evatt, McTiernan and Rich JJ all judged constitutionally valid the NSW law which imposed a penalty charge for operating an unlicensed vehicle, which was calculated per ton and per mile from the State border to the most distant shop on the NSW side owned by the defaulting transport company; Dixon and Starke JJ judged it constitutionally inapplicable to interstate traders. The reasoning was effectively a reiteration of Their Honours' various positions in *R v Vizzard; Ex parte Hill*.

The state of the law at this point was, to say the least, confused. The reasoning as to the question of scope which was used by the majority in *Peanut Board v Rockhampton Harbour*

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ownership of the wheat. *The Wheat Case*, as discussed above, proceeded on the assumption of a trade restriction test, and it is not readily apparent that *Duncan v Queensland* does otherwise; the majority confirm the validity of the Queensland legislation not on the basis that it never comes within the scope of s 92, but rather on the basis that it is justified as its purpose was the service of the war effort.

[91] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 63.

[92] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 49 (Rich J).

[93] [1935] HCA 8, (1935) 52 CLR 189.

Board conflicted with that of the (tie-broken) majority in *R v Vizzard; Ex parte Hill*. Although delivered within months of each other, Gavan Duffy DJ and McTiernan J seem in the first case to have subscribed to the Dixon school of thought on the scope of s 92 (trade restriction) but then in the second, seem to have subscribed to the Evatt school of thought (discrimination, whether on the face of the law or in its practical effect). As Prof Leslie Zines explained it:

> The reasoning of the majority in these two cases – the *Peanut Board* case and *Vizzard*'s case – indicated that the Court was confused on fundamental principles. Whatever might be said about the actual decisions, the reasoning in each case was quite different from that in the other. It seems that in this period only Dixon J and Evatt J were consistent and their differences disclosed the inherent ambiguity of the Privy Council's judgment in *James v Cowan*.[94]

It would take another appeal to the Privy Council to provide some clarity on the proper test for the scope of s 92, and to adjudicate on the contention between these two schools of thought.

This appeal was to come three years later, at the instigation of none other than Mr Frederick James, South Australian grape grower, would-be interstate trader, serial litigant and – given the result of his previous suits – presumably Australia's number one fan of s 92. After James's success in invalidating the South Australian legislation in both *James v South Australia* and *James v Cowan*, the Commonwealth attempted to achieve what the South Australian legislation could not: as discussed above in respect of *James v South Australia*, in the late 1920s the States and Commonwealth had agreed on an interlocking scheme of State and federal legislation to structure the dried fruit market and limit the amount of crop which growers could sell into the Australian domestic market and into the international market. The States were to regulate the Australian domestic market – which from the perspective of any one legislating State, was chiefly an interstate market – and the Commonwealth was to regulate the international market.

[94] James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 138.

James v South Australia and *James v Cowan* had confirmed the inability of a State to regulate the Australian domestic market in this way, and as a result the Commonwealth attempted to achieve this domestic market regulation itself by federal legislation, namely the *Dried Fruits Act* 1928-1935 (Cth) and the Dried Fruits (Inter-State Trade) Regulations 1934 (Cth) pursuant thereto. No doubt resting partly on the majority decision in *R v Vizzard; Ex parte Hill* that a licensing scheme of general application was not incompatible with s 92, the Commonwealth Act imposed a requirement that any person engaging in interstate trade in dried fruits hold a Commonwealth license to do so, and this licence could be issued subject to conditions; any dried fruits traded without such a license, or in violation of the conditions of a licence, were forfeited to the Crown. The Commonwealth Regulations provided that licences were granted subject to the condition that the licensee comply with Ministerial determinations from time to time as to the proportion of the licensee's crop which must be consigned to export from Australia (that is, devoted to the international market rather than the interstate market), and in 1935 the responsible Minister determined that 60% to 90% (depending on the crop variety) of licensees' produce must be exported. In effect, this was seeking to ensure the same outcome as the South Australian government in *James v South Australia* in which the South Australian Minister had fixed quotas for domestic Australian marketing and in *James v Cowan* in which, the earlier mechanism having failed, the South Australian government simply expropriated James's goods when they apprehended that he would not comply with their desired quotas for sale into the domestic Australian market. The difference was that this time the legislator was the Commonwealth, which was not believed to be bound by s 92, and the fig leaf of a licensing scheme was used to cover governmental quota setting.

Believing that the Commonwealth legislation was unconstitutional under s 92, James refused to acquire a licence, and when the Commonwealth seized his consignments of seeded raisins[95] which had been shipped from Port Adelaide in South Australia to Sydney in NSW, he sued them for damages. At first instance the High Court felt compelled to dispose of the matter in the Commonwealth's favour purely because *W & A McArthur Ltd v Queensland* had decided that the Commonwealth was not bound by s 92[96], so James appealed to the Privy Council in *James v Commonwealth* (1936)[97].

The question of whether s 92 bound the Commonwealth as well as the States was linked to the breadth of interpretation given to that section, both as to its scope and as to possible justification of *prima facie* invalid legislation. The reason for this is that the breadth of this interpretation would determine how s 92 fit in with other provisions of the Constitution. Section s 51(i) of the Constitution gives power to the Commonwealth Parliament to makes laws with respect to "trade and commerce with other countries, and among the States"; if a broad definition is given to s 92's declaration that "trade, commerce and intercourse among the States…shall be absolutely free" (such as the trade restriction test employed in *W & A McArthur Ltd v Queensland*), it would be difficult to reconcile s 92 with s 51(i) if the Commonwealth were indeed bound by s 92 as James contended. If the Commonwealth were bound by s 92, as

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[95] Referred to in the Ministerial determination as 'lexias', in respect of which 75% were supposed to be exported from Australia.

[96] There had, however, been *obiter dicta* remarks subsequent to *W & A McArthur Ltd v Queensland* that s 92 should be regarded as binding the Commonwealth as well as the States, e.g. *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 84-85 (Evatt J) and 98 (McTiernan J, adopting the argument of Sir Robert Garran KC appearing for the Commonwealth intervening, who argues at 36 that *his own client* should be bound by s 92); *O Gilpin Ltd v Commissioner for Road Transport & Tramways (NSW)* (1935) 52 CLR 189, 212 (Dixon J); and indeed in the High Court hearing in *James v Commonwealth* [1935] HCA 38, (1935) 52 CLR 570, 590 (Dixon J) and 602 (Evatt and McTiernan JJ).

[97] [1936] UKPC 52, [1936] AC 578.

between the two dominant schools of thought on the question of scope, the broader, trade restriction interpretation advocated by Dixon J would tend to diminish the Commonwealth's power in s 51(i), and the narrower, discrimination interpretation advocated by Evatt J would preserve more of the Commonwealth's power (as well as incidentally preserving more State legislative power). Put another way, a decision that s 92 did indeed bind the Commonwealth would tend to argue in favour of the Evatt school of thought on that provision's scope, lest a wide scope of interstate trade be immune from both State and federal legislative control.

Lord Wright MR, in delivering the Privy Council's decision, recognised the interconnexion between the question of whether s 92 bound the Commonwealth, what the proper scope of s 92 was, and what was left of Commonwealth power under s 51(i)[98], and after the now standard judicial observation that the reasoning in s 92 jurisprudence had become confused and unclear[99], endeavoured to resolve this confusion and unclarity by authoritatively determining the proper scope of s 92, and then also whether it bound the Commonwealth.

Examining the historical context of s 92, one of the overriding goals of the Australian federation movement and the Constitution it produced was "to abolish the frontiers between the different States and create one Australia"[100]. Section 92 was a key part of this endeavour, and was intended to ensure

> freedom from customs duties, imports, border prohibitions and restrictions of every kind: the people of Australia were to be free to trade with each other, and to pass to and fro among the States, *without any burden, hindrance or restriction based merely on the fact that they were not members of the same State*. But it has become clear from the various decisions already cited that such burdens and hindrances may take diverse forms, and

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[98] *James v Commonwealth* [1936] AC 578, 609.

[99] *James v Commonwealth* [1936] AC 578, 609-610.

[100] *James v Commonwealth* [1936] AC 578, 630.

> indeed appear under various disguises. One form may be a compulsory acquisition of goods, as in *James v Cowan*, or the *Peanut* case, if in truth the expropriation is directed wholly or partly against inter-State trade in the goods, that is, against selling them out of the State…In every case it must be a question of fact whether there is an interference with this freedom of passage.[101] (emphasis added)

From this passage, it appears that Lord Wright is establishing discrimination against interstate trade as the evil which s 92 forbids, but for the sake of clarity it is worth adverting to his earlier statement about discrimination and s 92:

> Nor does "free" necessarily connote absence of discrimination between inter-State and intra-State trade. No doubt conditions restrictive of freedom of trade among the States will frequently involve a discrimination; but that is not essential or decisive. An Act may contravene s 92 though it operates in restriction both of intra-State and of inter-State trade. A compulsory seizure of goods, such as that in *James v Cowan*, may include indifferently goods intended for intra-State trade and goods intended for trade among the States.[102]

In this earlier passage, Lord Wright appeared to be drawing a distinction between 'discrimination', by which he means differential treatment *on the face of the law*, and other restrictions of interstate trade which are achieved as the deliberate effect of a law which is neutral on its face; in the more general sense, these are both forms of discrimination against interstate trade, one overt, the other covert[103]. Reading both of these passages together, then, Lord Wright's position was as follows: s 92 prohibits the restriction (burdening, hindering, etc.) of interstate trade based merely on it being interstate trade (i.e. discrimination); discrimination on the face of the law will be enough to bring legislation within the scope of s 92, but even a law neutral on its face may be shown to have discrimination against interstate trade as the necessary effect which it was designed to produce, since discrimination can appear in many 'forms and

[101] *James v Commonwealth* [1936] AC 578, 630-631.

[102] *James v Commonwealth* [1936] AC 578, 628.

[103] The same argument as is put forth in James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 139-140.

disguises'; the existence of open or (particularly) disguised discrimination is a question of fact in each case. Lord Wright thus appeared to endorse the Evatt school of thought on the scope s 92, that the test is discrimination (whether on the face of the law or in its practical effect), and this endorsement is corroborated by His Lordship's favourable citing of Evatt J's reasoning in *R v Vizzard; Ex parte Hill* as being an "elaborate judgment…of great importance"[104], from which he quotes approvingly.

Having thus disposed of the question of s 92's proper scope, Lord Wright proceeded to the related question of whether that section does indeed bind the Commonwealth. In His Lordship's view, there was nothing in the actual wording or context of s 92 to indicate that it bound the States only, and in the earliest case law there was no such suggestion[105]. It was only with the decision in *W & A McArthur Ltd v Queensland* in 1920 that the High Court adopted the position that s 92 did not bind the Commonwealth and only as a corollary of the newly widened interpretation they had given to s 92[106]; since that case, there had been numerous judicial comments to the effect that this position was erroneous. That being so, and since he had just established that s 92 had a narrower interpretation than in the 1920 case and that its scope was limited to legislation which discriminated overtly or covertly against interstate trade, Lord Wright decided that there was no longer any impediment to accepting that s 92 did indeed bind

[104] *James v Commonwealth* [1936] AC 578, 621.

[105] *James v Commonwealth* [1936] AC 578, 616-618.

[106] *James v Commonwealth* [1936] AC 578, 619-620.

the Commonwealth[107]. With s 92 having this narrower, discrimination-focused meaning, the Commonwealth's legislative power in s 51(i) was, in the event, not eviscerated by s 92[108].

The disposition of the instant case, then, was quite straightforward. The Commonwealth legislation required that growers hold a licence to engage in interstate trade and that they comply with licence conditions which strictly limited the proportion of their crop which they could dispose of in interstate trade. This legislation clearly breached s 92 because it worked a discrimination against interstate trade by imposing such limitations, and consequently the offending sections of the *Dried Fruits Act* and the whole of the Dried Fruits (Inter-State Trade) Regulations were declared unconstitutional and invalid. Frederick James was again victorious in his quest to sell his Trevarno-brand dried seeded raisins to hungry consumers in other States without government interference, having seen off first his home State government and now the Commonwealth. To paraphrase Vizzini from *The Princess Bride*:

> The Commonwealth had fallen victim to one of the classic blunders, the most famous is 'Never get involved in a land war in Asia', but only slightly less well known is this: 'Never go in against a South Australian, when dried fruit is on the line'![109]

The Privy Council's endorsement tipped the balance of the jurisprudence in favour of the Evatt school of thought on s 92, and by the end of the 1930s, Evatt J's free trade, anti-protectionist discrimination view on the scope of s 92 commanded the assent of the majority of the Court.

[107] *James v Commonwealth* [1936] AC 578, 631.

[108] *James v Commonwealth* [1936] AC 578, 631-633.

[109] *The Princess Bride* (1987) Directed by Rob Reiner. USA: 20th Century Fox.

Section 3: Discrimination Analysis Ascendant:

Following the Privy Council's adoption of Evatt J's view of s 92, the question remained whether collective marketing schemes were now to be regarded as valid under s 92. As seen above, Evatt J (in dissent) would have declared the Queensland peanut marketing scheme valid in *Peanut Board v Rockhampton Harbour Board*, and given the economic and political importance attached to such schemes, it was inevitable that one should soon be brought before the High Court for adjudication. That occurred three years later in *Milk Board (NSW) v Metropolitan Cream Pty Ltd* (1939)[110]. The *Milk Act* 1931-1936 (NSW) provided for the creation of milk-distributing districts across the State, and established a metropolitan milk-distributing district centred on Sydney; all milk and cream entering this metropolitan milk-distributing district for sale or consumption was expropriated by the Act and vested in the Milk Board. Metropolitan Cream Pty Ltd operated a cream wholesaling business in Sydney and regularly received consignments of cream for onward sale which had been sent to them from Melbourne in Victoria. The company refused to acknowledge the Milk Board's ownership of these consignments received from outside NSW, claiming that the *Milk Act* 1931-1936 (NSW) was inapplicable to interstate trade by virtue of s 92 of the Constitution, and the Milk Board approached the Court seeking an injunction to prevent further sale of cream by the company.

In contrast to *Peanut Board v Rockhampton Harbour Board*, in this case the collective marketing scheme was judged by the majority to be valid and constitutional, with only Starke J dissenting (Dixon J was absent). The majority (Latham CJ, Rich, Evatt and McTiernan JJ) interpreted the Privy Council's decision in *James v Commonwealth* as endorsing the Evatt school

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[110] [1939] HCA 28, (1939) 62 CLR 116.

of thought on s 92, namely that it was discrimination on the face of the law or in its intended effect which brought it within the scope of that section[111]. As Evatt J pithily puts it, "Section 92 lays down the rule of inter-State free trade, not the rule of *laissez-faire*"[112]. It was clear that there was no discrimination against interstate trade on the face of the *Milk Act*, since its provisions applied equally to milk entering the Sydney metropolitan milk-producing district from elsewhere in NSW and milk entering from another State. In order to discover any disguised discrimination against interstate trade, it was necessary to determine the true character of the Act and its intended effect[113]. Since this question of intended effect, described as the 'real object' of the legislation, tends to bleed into issues of justification, it shall be examined in detail in Chapter VI[114]. Suffice to say here that the legislation's intended effect was judged to be the regulatory guarantee of a sanitary and reliable milk supply through a system of milk transport and storage rules and inspections, and the stabilisation of the milk industry through preventing profiteering at any stage therein. Having found the Act to be non-discriminatory on its face and in its intended

[111] *Milk Board (NSW) v Metropolitan Cream Pty Ltd* (1939) 62 CLR 116, 132 (Latham CJ), 150 (Evatt J) and 158 (McTiernan J). Evatt J's reasoning is a little unclear at 151 when he speaks of disguised discrimination "directed solely to restrict and prohibit marketing (*including* inter-State marketing). In expropriation cases, the crucial question is: What is the object of the expropriation? If the object is to prohibit or limit trade, *including* trade among the States, s 92 forbids it. If the object is otherwise, s 92 has nothing to say about the matter" (emphasis added). Although this would suggest that he applies a trade restriction test to s 92 (because he would look for restriction of trade *including* interstate trade, rather than a restriction on interstate trade *over and above* intrastate trade, i.e. discrimination), the bulk of his reasoning elsewhere indicates that he is considering legislation which is *motivated by* an attempt to restrict interstate trade *in particular* (which is presumptively discriminatory) – he clearly confirms that marketing schemes which are designed to canalise or even socialise (i.e. restrict) all trade are not as such unconstitutional under s 92 (at 152-153).

[112] *Milk Board (NSW) v Metropolitan Cream Pty Ltd* (1939) 62 CLR 116, 151.

[113] It is the intended effect of the legislation with respect to interstate trade, rather than a merely incidental effect on interstate trade, which is relevant here: *Milk Board (NSW) v Metropolitan Cream Pty Ltd* (1939) 62 CLR 116, 150-151 (Evatt J).

[114] The case law, especially the judgments of Evatt J, does not so clearly distinguish the question of scope and the question of justification at this point; given that these questions do become more clearly distinct in following decades, it is intellectually useful to retrospectively untangled the earlier jurisprudence so as to keep the two questions distinct, and alleviate the much-lamented unclarity of the jurisprudence in this era.

effect, the majority held the *Milk Act* to be valid and applicable to interstate trade under s 92 and issued an injunction to prevent Metropolitan Cream Pty Ltd from any further dealings with the cream contrary to the Milk Board's wishes.

While the rest of the Court (in Dixon J's absence, at least) adhered to Evatt J's discrimination test (endorsed, at they saw it, by the Privy Council), Starke J tersely and forcefully dissented, stating that he continued to adhere to his earlier position in *Peanut Board v Rockhampton Harbour Board* to the effect that trade restriction was the proper test for the scope of s 92, since he did not believe that that case had been overruled in *James v Commonwealth*. Starke J clearly saw that the majority of the Court had adopted Evatt J's free trade, anti-discrimination view of the scope of s 92, and that the tide had turned against the Dixonian view of s 92 as guaranteeing a person's right to engage in interstate trade free of government restriction. To those of his judicial brethren who had lately embraced this free trade view, His Honour had only one thing to say: you turn if you want to, this judge is not for turning:

> The Constitution, we have been told, must not be mocked (*James v Cowan*), but judicial decisions are rapidly destroying the effectiveness of the guarantee contained in s 92 of the Constitution that trade and commerce among the States shall be absolutely free. Transport may be licensed; prices may be controlled; trade in goods among the States may be regulated by laws directed towards procuring standards of quality, condition or grade of articles of commerce and now we are called upon to declare that the States may compulsorily acquire commodities for like purposes and thus prevent or hinder all trade in such commodities among the States.[115]

As it happened, Starke J was not destined to have to stand against the tide for long. The Evatt school of thought, having achieved majority acceptance by 1939, was soon to recede, as all tides do when the moon passes out of its zenith. Evatt J was to retire from the High Court the

[115] *Milk Board (NSW) v Metropolitan Cream Pty Ltd* (1939) 62 CLR 116, 143.

following year, and after his gravitational influence had dipped beneath the horizon of the Bench, a new tide was to rise with the ascendance of Dixon J to the Chief Justiceship, drawing with him his preferred trade restriction analysis to once again dominate the High Court's jurisprudence on s 92[116].

Section 4: The Return and Long Reign of Trade Restriction Analysis:

The co-operative marketing schemes for agricultural products which were the subject of litigation in the 1930s were instituted as part of the States' response to the Depression, with industry stabilisation and limitation of profiteering by middle-men being admitted purposes of the *Milk Act* in the above case. The next decade was to see new challenges and new government programmes to address them. In the mid-1940s, Australia was emerging from years lived in a state of total war, in which governmental control of the economy had perforce increased

[116] Ironically, the ascendancy of the Evatt school in *Milk Board (NSW) v Metropolitan Cream Pty Ltd* contained in it one of the seeds of its own downfall. One of the arguments advanced by Metropolitan Cream Pty Ltd was that, in granting licences to engage in the wholesale or retail of milk and cream in the Sydney metropolitan milk-distributing district, the Board could possibly preference intrastate trade over interstate trade and thereby discriminate against the latter. On the facts of the present case, this argument was rejected for lack of any evidence that the Board was actually engaging in such discrimination, but in later cases the issue of covert discrimination *in the discretionary administration of a law* (particularly in the granting of licences) was to swing the Court away from Evatt J's free trade analysis of the scope of s 92 and back to Dixon J's trade restriction analysis. The reason for this was that, in practice, the Court would have a hard job of discovering such discrimination in discretionary administrative action unless it were prepared to do systemic analysis of, say, the relative success of licence applications in respect of intrastate trade as compared to licence applications in respect of interstate trade. Even if it covert discrimination were thereby proven in such a situation, the relatively undeveloped state of administrative law at the time meant that the Court did not have available to it remedies to force the granting of a licence to interstate trade; the only way to prevent such discrimination in administration would be to strike down the validity of the legislation itself which was being unconstitutionally administered. In later cases, this would be part of the reason why the Court was pulled back into adhering to the trade restriction analysis, because it was readier to strike down such legislation without the need to prove discrimination in its discretionary administration. See James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 143-145 and 149-150. The proper legal structuring of administrative discretion is further discussed in Part 2 of this thesis, in the context of how such a discretion which creates a *prima facie* breach of free movement provisions may be justified.

significantly, and, as in many countries around the world, the post-war period saw the significant extension of governmental involvement in economic and social life.

The Labor Commonwealth government (which Evatt J had left the High Court to join as Attorney-General and Minister for External Affairs), embarked on a policy of socialisation of major industries. One of these industries was air transportation. The *Australian National Airlines Act* 1945 (Cth) created the National Airlines Commission, which was empowered to provide commercial interstate air transportation services of passengers and goods[117]. The Commission concerned itself solely with such interstate services, rather than also covering intrastate services, because the Act had been passed pursuant s 51(i) of the Constitution, which, as noted above, empowers the Commonwealth Parliament to legislate with respect to specifically *interstate* trade and commerce. The intention of the Act was that interstate air transport should be, as far as possible, provided by the public sector through the Commission, without private sector competition; accordingly, the Commission was required to maintain services which were 'adequate to meet the needs of the public' for air services on each interstate route, and for all such routes as the Commission provided adequate services, no licences would be granted to private commercial operators. The Act also made it an offence for any person to contract with an unlicensed air service provider. Prior to the passage of the Act, for several years Australian National Airways Pty Ltd had operated air services throughout Australia, including interstate services, and had been duly licensed to do so. When the Act was passed and the Commission monopoly created, the Director-General of Aviation accordingly refused to renew the company's licences, and in *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines*

[117] It also covered air services between a Territory and a State, between Territories, or within a single Territory (pursuant to the Commonwealth's general power to legislate for the Territories), but Territorial trade is not covered by s 92 so this aspect of the case is not material here.

Nationalisation Case') (1945)[118] the company approached the High Court for a declaration that the Act was unconstitutional under s 92.

The Court was unanimously[119] of the opinion that the Act's creation of the National Airlines Commission was valid, but that its attempt to grant the Commission a monopoly on interstate air services was invalid as a contravention of s 92. Examining the reasons offered for this decision, it appears that the Court (bar perhaps Williams J) was sliding back into the use of the trade restriction analysis. The leading judgment was that of Dixon J, which would go on to prove influential in later years in restoring his school of thought on s 92 to prominence, and on all salient points of reasoning his judgment was mirrored by those of Latham CJ[120], Rich and Starke JJ. Dixon J's conception of s 92 was still essentially what it had been over the last two decades of case law, namely that s 92 protected an individual interstate trader's right to trade free of government control[121], and he rejected the notion that s 92 only served as a bulwark preventing discrimination against interstate trade[122]; accordingly, his reasoning in the case proceeded from the question of how interstate trade could be 'absolutely free' if the Commonwealth could

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[118] [1945] HCA 41, (1945) 71 CLR 29.

[119] It is worth noting the composition of this unanimous Court: not only had Evatt J resigned by this point, but McTiernan J, who, as has been seen, consistently hewed to the Evatt school of discrimination analysis, was absent from this case.

[120] Some reservation should be made in ascribing the trade restriction analysis to Latham CJ, in light of his later comments in *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, discussed below. In the event, the adoption of such trade restriction analysis by a majority of members of the Court in the instant case is true however Latham CJ's decision is parsed.

[121] *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945) 71 CLR 29, 91. Starke J clearly continues to adhere to this view too: "The object of s 92 is to maintain freedom of inter-State competition – the open and not the closed door – absolute freedom of inter-State trade and commerce" (at 78).

[122] *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945) 71 CLR 29, 87.

prohibit all such trade save that of the monopoly licence-holder[123]. As to whether the monopoly licensing scheme in the instant case was analogous to the valid licensing scheme in *R v Vizzard; Ex parte Hill,* although Dixon J himself had disagreed as to the characterisation of the licensing scheme in that earlier case, he accepted it as authority that such a (non-monopoly) scheme was "an attempt to make the internal transport of the State a planned structure, a framework within which the freedom guaranteed by s 92 subsisted and even by which that freedom was secured"[124]. The present case was markedly different, however, because it did not merely regulate individuals' practice of interstate trade, it eliminated it[125]. Thus, in the opinion of Dixon J (and Latham CJ, Rich and Starke JJ) the provisions of the Act which granted the monopoly were unconstitutional under s 92 for reason of their restriction – to the point of elimination – of private individuals' right to engage in interstate trade.

It is worth noting that while Williams J concurs as to the invalidity of the Act's attempt to create a monopoly on the part of the Australian National Airlines Commission, he at least seems to still adhere to the old Evatt school of discrimination analysis of s 92. While Williams J does

[123] *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945) 71 CLR 29, 90 (Dixon J). Latham CJ begins his reasoning with the same question (at 59), as does Rich J (at 72).

[124] *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945) 71 CLR 29, 90. Starke J was not as willing to separate himself from his own personal views in the previous cases: he sees *Peanut Board v Rockhampton Harbour Board* as being in conflict with *Milk Board (NSW) v Metropolitan Cream Pty Ltd*, and explicitly prefers the former, which held that that collective market was invalid under s 92 (at 78).

[125] Latham CJ's view was that the Act should be characterised as a prohibition of interstate trade rather than a regulation of it because the legislative decision not to grant licences to private interstate traders "is quite independent of any considerations relating to safety, efficiency, airworthiness &c, which might otherwise have been relied upon as the basis of an argument that the statute regulated such services in the sense of introducing regular and orderly control into what otherwise might be unregulated, disorderly, possibly foolishly competitive, and therefore inefficient services" (at 61). By way of rebuttal of His Honour's argument, might it not be presumed that the government's very decision to establish a public sector monopoly was based on their assessment that the continuation of private operators was 'foolishly competitive and therefore inefficient'? Counsel for the Commonwealth did in fact argue that air transport is "a matter in which competition is not likely to produce satisfactory results" (at 41). As in all cases of fact, the success of such an argument would likely come down to the strength of the evidence presented.

note the Privy Council's approval in *James v Cowan* of Isaacs J's judgment at first instance that s 92 protects a personal right attaching to the individual to engage in interstate trade, he appears to base his own reasoning not on s 92 protecting an individual's right to engage in interstate trade free of government interference (like the rest of the Court), but rather on s 92's prohibition of discrimination against interstate trade. In surveying the road transport licensing scheme cases of which *R v Vizzard; Ex parte Hill* is the exemplar, Williams J interprets them as being "based fundamentally on the right of a State to make laws of a general non-discriminatory character for regulating the care and upkeep and preserving the financial stability of public utilities, particularly railways and roads, established and maintained at the expense of the State"[126]. He distinguishes the monopolisation of air services in the instant case from these road transport licensing schemes on the basis that in the latter, the State had built the roads and the railways, so it could license people to use them (and even monopolise the use of them), providing that it didn't prevent people from building and using their own roads or railways. In the instant case, the Commonwealth could analogously licence airfields which it itself had built (and even monopolise the use of them), but it couldn't prevent private individuals from using their own airfields, and so couldn't monopolise the provision of interstate air services completely as the Act attempted to do. Essential to this argument, though, was that for any such licensing legislation to be valid it must be non-discriminatory:

> If the choice of these persons and vehicles [in a road licensing scheme] has no relation to their passage across the border, but the legislation operates without discrimination with respect to all persons and vehicles desirous of using the roads, such legislation is not aimed or directed at inter-State commerce but at regulating, maintaining, and co-ordinating a number of utilities for trade, commerce, and intercourse, State and inter-State, provided by the State. So a State could, I should think, build a number of

[126] *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945) 71 CLR 29, 108.

> aerodromes, and provide that only aeroplanes which fulfilled certain conditions could use such aerodromes, or it could confine their use to aeroplanes owned by itself. Provided the conditions of use were non-discriminatory and were unrelated to flying across the border, the legislation would not infringe s 92. It would be legislation regulating the use of a further facility for all trade and commerce provided by the State.[127]

On this basis, it seems that Williams J at least is still using discrimination as the test for whether an Act falls within the scope of s 92. Like the rest of the Court, he views the provisions of the Act which grant the Commission a monopoly on interstate trade to be invalid under s 92, but it is interesting that not even he, whose reasoning rests on discrimination, considers the argument that the Commonwealth Act may in fact not be discriminatory at all: as noted above, the Commonwealth's power under s 51(i) of the Constitution is limited to "trade and commerce with other countries, and among the States", so arguably the Commonwealth was not *selecting* interstate trade for discriminatory restriction in the form of a government monopoly on air services, rather it was legislating *to the maximum extent of its constitutional power* to establish such a monopoly. Only Dixon J briefly adverts to this argument, but dismisses it as immaterial to his view of s 92, since to him (and to the rest of the Court save Williams J) discrimination against interstate trade is not necessary, merely the restriction of interstate trade[128].

The position of Williams J notwithstanding, with the departure of Evatt J from the Bench, the rest of the Court seemed to be re-embracing the Dixon school of thought. The trade

[127] *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945) 71 CLR 29, 109.

[128] *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945) 71 CLR 29, 91.

restriction analysis was making a comeback, and it was marking itself out as inimical to government monopolies[129].

This shift continued in *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948)[130]. In terms of its consequences for the political and economic development of Australia, this was one of the most significant cases ever decided by the High Court. In terms of the jurisprudential evolution of s 92, it would also prove highly significant for the re-emergence of the Dixon school of thought on that section, and would set up several decades' worth of trade restriction analysis (although in varying formulations) in the interpretation of it. As in *The Airlines Nationalisation Case*, *The Bank Nationalisation Case* concerned a legislative attempt by the Labor Commonwealth government to socialise a major component of the Australian economy: this time, banking services. The Commonwealth Bank of Australia had been established in 1911[131] as a statutory corporation, publicly owned and publicly controlled, with

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[129] It was noted by both Rich J (at 73) and Dixon J (at 90-91) that there was an apparent contradiction in invalidating a government monopoly of air services when the same situation obtained in respect of postal services: at the time, before the modern day proliferation of private letter delivery services such as FedEx and UPS, a government monopoly letter-carrying service existed in the form of the Federal Postmaster General's Department and other carriers were legally excluded from competing in this field (which covered letters, but not parcels: private companies could operate parcel services). The air services monopoly was distinct from the postal services monopoly, it was argued, because the postal services monopoly covered *all* postal services throughout Australia, not just interstate services, and because it was a long-established practice in Australia and other developed countries that the government operated a postal service monopoly in this manner. Objection may be laid against each of these supposed points of distinctions. As to the first, the federal government postal service monopoly extended to all postal services precisely because the Constitution allowed it to: s 51 (v) empowered the Commonwealth to legislate with respect to "postal, telegraphic, telephonic, and other like services", and was thus not limited to *interstate* services of those kinds. Section 51(i), however, under which the air services monopoly was created, only empowered the Commonwealth to legislate with respect to "trade and commerce with other countries, and among the States". Consequently, the air services monopoly was not a case of the Commonwealth selectively targeting interstate trade, but rather legislating to the maximum extent of its power. Dixon J notes the existence of this objection, but waves it away (at 91). As to the second supposed distinction, it is based on a certain conservatism of legal and economic thought whereby a monopoly is judged to be acceptable today not because of its current legal or economic soundness, but simply because it has been practised for some time in the past. Such conservatism would tend to ossify the economic affairs of the nation if it were used as the basis for declaring unconstitutional any new form of government monopoly in a new sector of the economy.

[130] [1948] HCA 7, (1948) 76 CLR 1.

[131] Under the *Commonwealth Bank Act* 1911 (Cth).

authority to offer commercial banking services to customers and to act as banker to the Commonwealth government. In 1945[132], the powers of the Commonwealth Bank were amplified: while continuing to offer commercial banking services to customers and acting as banker to the Commonwealth government, it was also henceforth to act as the central bank of Australia[133] and accordingly was given regulatory powers in respect of all other banks in Australia[134] (save for the intrastate banking of State-run banks). These powers included the ability to prescribe the conditions on which other banks would offer loans to customers, and accordingly regulations were issued by the Commonwealth Bank relating to commercial banks' loan provision in a wide range of classes, such as loans for building construction, manufacturing, agricultural businesses, resource extraction, wholesaling, retailing, importing, exporting and investments in the stock market[135]. The Commonwealth Bank was also empowered to set the interest rates payable by and to commercial banks, and its recommendation was necessary for the Treasurer to consent to allow one private bank to merge with another.

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[132] Under the *Commonwealth Bank Act* 1945 (Cth) and the *Banking Act* 1945 (Cth).

[133] *Commonwealth Bank Act* 1945 (Cth). The difference between the operation of a commercial bank and a central bank is that a commercial bank provides credit to customers by offering services such as receipt of deposits, operation of savings and current accounts and the provision of loans, whereas a central bank controls the monetary policy and total volume of credit within an economy by managing the money supply (issuing physical banknotes and electronic currency of account) and by determining the conditions on which commercial banks may obtain credit from the central bank and in turn offer credit to their customers. This distinction is often expressed as 'a commercial bank is a bank for customers, and a central bank is a bank for banks'. All advanced economies (technically, all advanced *currency areas*) in the modern era have a central bank in some form: the US Federal Reserve in the USA, the Bank of England in the UK, the European Central Bank in the Eurozone, and, nowadays, the Reserve Bank of Australia in Australia. (The duties of the Reserve Bank of Australia, under s 10 of the *Reserve Bank Act* 1959 (Cth), are identical to those prescribed for the Commonwealth Bank in the 1945 Act, namely, to determine the banking and monetary policy of the Bank in such a manner as to ensure that it is "directed to the greatest advantage of the people of Australia" and to exercise its powers in such a manner as "in the opinion of the [Reserve Bank] Board, will best contribute to (a) the stability of the currency of Australia; (b) the maintenance of full employment in Australia; and (c) the economic prosperity and welfare of the people of Australia".

[134] *Banking Act* 1945 (Cth).

[135] For a more comprehensive list of areas subject to Commonwealth Bank loan regulations, see at *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 160.

The *Banking Act* 1947 (Cth) attempted to take the role of the Commonwealth Bank a step further by introducing a scheme to nationalise all private banks in Australia and place them under the control of the Commonwealth Bank as the monopoly provider of commercial banking services throughout Australia, save for the intrastate banking of State-run banks. The reason why the intrastate banking of State-run banks was exempted from this scheme, as it had been from the Commonwealth Bank's regulatory powers under the 1945 Act, was that such activity was beyond the legislative reach of the Commonwealth: s 51 (xiii) of the Constitution specifically provides that the Commonwealth Parliament can make laws with respect to "banking, *other than State banking*; also State banking extending beyond the limits of the State concerned, the incorporation of banks and the issue of paper money" (emphasis added)[136]. The objects of the 1947 Act were stated in s 3 of the Act to include "(a) the expansion of the banking business of the Commonwealth Bank as a publicly-owned bank conducted in the interests of the people of Australia and not for private profit; (b) the taking over by the Commonwealth Bank of the banking business in Australia of private banks and the acquisition on just terms of property used in that business; (c) the prohibition of the carrying on of banking business in Australia by private banks". The provisions by which the 1947 Act sought to establish this monopoly on the part of the Commonwealth Bank were extensive: the Commonwealth bank was to be able to purchase shares in private banks; if satisfied that the majority of shares in a private bank were held in Australia, the Federal Treasurer could expropriate those Australian shares and vest them in the Commonwealth Bank; such vesting of shares having occurred, the private bank's directors were automatically terminated and the Commonwealth Bank could appoint new directors; the

[136] It had been decided in *The Lord Mayor, Councillors and Citizens of the City of Melbourne v Commonwealth ('The State Banking Case')* [1947] HCA 26, (1947) 74 CLR 31 that the phrase 'State banking' referred only to the operation of a bank by a State itself, and did not extend to the broader field of all the use of banking services by a State (provided by, say, a private bank, the Commonwealth Bank or bank run by another State).

Commonwealth Bank could acquire the assets and liabilities of any private bank in Australia, either consensually or, failing that, compulsorily; and the Treasurer could at any time require that a private bank cease trading in Australia[137].

Any compulsory acquisition, whether of shares or of assets, was subject to the requirement that compensation be paid by the Commonwealth to the former owner, in line with the power of the Commonwealth Parliament in s 51 (xxxi) of the Constitution to makes laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws"[138] (the purpose in question here being the banking power referred to above). The Bank of NSW argued that the laws were unconstitutional for a number of reasons: firstly, that they were not genuinely laws with respect to banking, and so were beyond the Commonwealth's power in s 51 (xiii); secondly, that the compensation provided was not 'on just terms', so the laws were beyond the Commonwealth's power in s 51

[137] Curiously, s 46 of the Act actually provides that any private bank in operation in Australia at the time of the Act coming into force *must continue to provide banking services*, unless and until taken over by another entity or required to cease trading by the Treasurer. Presumably, this provision was intended to prevent flight of private banks from Australia before the Commonwealth Bank was ready to take over their business.

[138] The Commonwealth's power to acquire property 'on just terms' is the subject of the classic Australian film *The Castle* (1997) Directed by Rob Sitch. Australia: Village Roadshow. This film has the singular distinction of being, at time of writing, the highest-grossing film based on a sub-section of Part II of the Australian Constitution. The plot involves the Commonwealth government's attempted compulsory acquisition of the real estate of a number of homeowners: modest houses with shoddy, owner-built extensions, situated on land underneath power lines, on a former toxic waste dump, directly abutting an airport runway in Melbourne. The Commonwealth is attempting to make way for the expansion of the airport, and offers meagre compensation for the houses and land owing to their low commercial value. The property owners, led by tow-truck driver and greyhound breeder Darryl Kerrigan, at first retain the services of shambolic solicitor Dennis 'Mostly Wills and Conveyancing' Denuto, who is unsuccessful in arguing in the Federal Court that although the compulsory acquisition is not contrary to any specific section of the Constitution, it is against "the vibe of the thing". Sympathising with Kerrigan after having met him at the Federal Court hearing, retired barrister Lawrence Hammill QC takes on the case *pro bono publico*, and argues before the High Court that the attempted compulsory acquisition is indeed against the Constitution, specifically s 51 (xxxi)'s requirement that such acquisition be 'on just terms'. While the Commonwealth had offered Kerrigan the monetary value of his house and land, these were not 'just terms' because (Hammill here quotes Kerrigan) "It's not a house, it's a *home*. It's got everything: people who love each other, people who care for each other, it's got memories. It's a place for the family to turn to, to come back to". The High Court is convinced that the Commonwealth's paltry compensation offer had failed to take account of the sentimental value of the Kerrigan family home and the case is determined in Kerrigan's favour.

(xxxi); thirdly, that they sought to oust the High Court's jurisdiction to hear cases on the adequateness of the compensation, and so were contrary to s 75[139]; fourthly, that they undermined the continued functioning of the State governments (by confining their choice of banks to ones which they themselves ran, or to the Commonwealth Bank) and so were contrary to s 107[140]; and fifthly, that even if the laws were otherwise valid exercises of Commonwealth power, they were contrary to s 92. For present purposes, the relevance of these first four arguments is that they were the grounds on which the validity of most of the impugned provisions of the 1947 Act was actually decided; the fifth argument, that based on s 92, was relevant specifically to the provisions allowing the Treasurer to require that private banks cease trading. At a more general level, the judicial opinions expressed on the proper scope of s 92 confirmed the shift back towards a trade restriction test for that section.

In the result, the Commonwealth Bank's power to purchase shares and acquire assets *consensually* was upheld, but the provisions of the 1947 Act which enabled *compulsory acquisition* of shares and assets were held invalid[141], as were the provisions terminating

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[139] Section 75 provides for the High Court to have original jurisdiction on a number of matters, including those in which "the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party". The was argument in the instant case about whether the Commonwealth Bank qualified as legal person which might be sued 'on behalf of the Commonwealth', and whether the 1947 Act's provisions which gave exclusive jurisdiction to a court other than the High Court in claims against the Commonwealth Bank relating to compensation for compulsory acquisition of shares or assets were valid. The answers, by majority, were yes and no respectively.

[140] Section 107 provides for the continuation of every power which a State held prior to the coming into operation of the Constitution, save for those powers which the Constitution itself withdrew from the State or exclusively vested in the Commonwealth. This was the subject of *The Lord Mayor, Councillors and Citizens of the City of Melbourne v Commonwealth ('The State Banking Case')* (1947) 74 CLR 31, which took s 107 and the federal structure prescribed by the Constitution as a protection of the existence and self-governing ability of the States. The argument was rejected by the Court in the present case.

[141] Either because they were beyond the banking power in s 51 (xiii), because they failed to provide compensation 'on just terms' for such compulsory acquisition under s 51 (xxxi), or because this compulsory acquisition was not for purposes for which the Commonwealth could legislate; Rich, Starke, Dixon and Williams JJ subscribed to each of the various positions in different combinations.

directorships and allowing the Commonwealth Bank to appoint new directors upon such compulsory acquisition[142], and – most significantly here – the Treasurer's power to require private banks to cease trading (s 46 of the 1947 Act).

Section 46 of the 1947 Act was held, by majority, to be invalid for contravention of s 92. The difference between the decisions of the majority (Rich, Starke, Dixon and Williams JJ) and the minority (Latham CJ and McTiernan J) on this point was due to their different interpretations of the proper scope of s 92: the majority swelled the rising tide of the trade restriction analysis, whereas the minority were drawn away into the slackening waters of the now receding discrimination analysis.

In the judgment of Latham CJ, with which McTiernan J concurred, banking itself was not in fact 'trade, commerce or intercourse' for the purposes of s 92, because the addition of the phrase 'whether by means of internal carriage or ocean navigation' in that section indicated that it contemplated the physical movement of goods or persons across a border, and *James v Commonwealth* confirmed that it is this passage of something across the State border that was the concern of s 92[143]. However, he did acknowledge that banking was an instrument of genuine trade and commerce, and a necessity for it in the modern day[144], so legislation on banking might enliven s 92 concerns in that manner. It then became necessary for His Honour to define the scope of s 92, and curiously, given his position in *The Airlines Nationalisation Case* just three years earlier, he surveyed the case law and drew from it a rejection of the trade restriction test[145]

[142] Because they were beyond the banking power in s 51 (xiii).

[143] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 234.

[144] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 235. See also McTiernan J at 398.

[145] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 237.

and an endorsement of the discrimination test as Evatt J had advocated in cases past[146], that s 92 prohibited legislation which has discrimination against interstate trade as its intended purpose, appearing either on the face of the law or in its necessary effect[147]. Recognising the apparent conflict between the Court's opinions in *Peanut Board v Rockhampton Harbour Board* and *Milk Board (NSW) v Metropolitan Cream Pty Ltd*, Latham CJ interpreted the Privy Council as having endorsed *Peanut Board v Rockhampton Harbour Board* only inasmuch as the legislation in that case was 'directed against' interstate trade, not as a general proposition that any restriction of interstate trade, even absent discrimination, was automatically within the scope of s 92[148]. The presence or absence of discrimination against interstate trade, then, marked the line between legislation obnoxious to s 92 and legitimate regulation permissible under that section and still consistent with interstate trade being 'absolutely free'. As the legislation in the present case did not discriminate against interstate trade (since it applied as fully as Commonwealth power could to banking services across Australia), s 46 did not, in his opinion, offend s 92 and should have been held valid.

The majority (Rich, Starke, Dixon and Williams JJ) were of a very different opinion. Again, it was the judgment of Dixon J which would prove to be most influential, owing to his

[146] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 232 and 238-240. In fact, Bert Evatt was not far away: as federal Attorney-General he was counsel for the Commonwealth in this case, and reiterated the interpretation of s 92 which he had employed on the Bench, rejecting the idea that s 92 protects an individual's right to engage in interstate trade free of government control (at 86) and arguing that it merely prohibited legislation discriminatory against interstate trade on its face or in its effect (at 88). Incidentally, the record of the Attorney-General's argument contains one of the more humorous examples of *lapsus oculi editoris*: an accidental line repetition inserts into Evatt's argument that 'Commonwealth or State could stop smallpox patients from travelling. Obscene literature could be excluded by State or Commonwealth from inter-State intercourse' the more questionable suggestion that 'Obscene literature could stop smallpox patients from travelling' (at 91).

[147] On this basis, rather than assume a complete change of opinion by Latham CJ in a mere three years since *The Airlines Nationalisation Case*, it is better to interpret his decision in the earlier case as having turned not so much on a trade restriction test (despite his language and individual right-based reasoning) as on a characterisation of the *Australian National Airlines Act* as being discriminatory because it exclusive applied to interstate air transportation.

[148] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 239.

characteristic lucidity of writing, his approving citation by the Privy Council on appeal and the fact that he was to become Chief Justice four years later – although all of Their Honours' opinions are worth noting for the evidence they provide that the Court as a whole had swung back towards trade restriction analysis, and in particular for how they severally treated the question of 'legitimate regulation'. For one thing, the majority are all clear that, in the modern world, banking in and of itself constitutes trade and commerce within the meaning of s 92, regardless of the fact that there is no physical entity crossing State boundaries: "in a modern community it is clear, we think, that traffic in intangibles is just as much trade and commerce as traffic in tangibles"[149], and "[t]o place among the essential attributes the requirement that there should be goods for sale or delivery or a man upon a journey, is to mistake the particular for the general, the concrete example for the abstract definition, and to yield to habits of thought inherited from a more primitive organization [*sic*] of society"[150]. The references in s 92 to 'internal carriage or ocean navigation' were merely inclusive, not exclusive, of how interstate trade might be effected[151]. Moreover, the majority was clearly of the opinion that s 92 granted a right to an individual to engage in interstate trade free of government restriction, and consequently that trade restriction was the proper test for s 92[152]. Dixon J was forceful, as always, in his interpretation of that section: "freedom as at State boundaries has no narrower

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[149] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 284 (Rich and Williams JJ). See also 306 (Starke J) and 380 (Dixon J). There is explicitly no need for physical coins and banknotes to cross State borders for interstate financial transactions (including banking) to qualify as interstate trade for s 92 (Rich and Williams JJ at 287).

[150] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 382 (Dixon J).

[151] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 287 (Rich and Williams JJ).

[152] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 283 (Rich and Williams JJ). Rich and Williams JJ argue that it is this right created by s 92 which gives an individual standing to challenge a law under s 92 (at 294), although that seems to conflate two separate issues, since the adoption of a discrimination test for s 92 would in no way preclude a person who had been subject to such discrimination against interstate trade from having standing to bring suit to the Court.

meaning than that there shall not be imposed prohibitions, restrictions and burdens preventing, impeding or prejudicing the passing from State to State of what amounts to trade, commerce and intercourse"[153]. Nor did such obnoxious restrictions need to be tied specifically to the very act of crossing a border: "[t]o say figuratively that the purpose [of s 92] was to enable Australians to disregard State boundaries and not simply to give an immunity from interference to buying, selling and journeying makes clear the point"[154]. Section 92 invalidated legislation which restricted interstate trade; discrimination against interstate trade was not necessary. In fact, Dixon J surveyed the case law – omitting *R v Vizzard; Ex parte Hill* and other similarly decided road transport licensing cases[155] – and concluded that the discrimination analysis was long defunct and repugnant to the words of s 92: "That cause was lost at an early stage of the struggle which expediency has so long sustained with such varying fortune against the apparently inflexible terms in which the framers of the Constitution chose to express a policy regarded, it is said, as basal to the federation. It now seems to be rejected of all men"[156]. With respect, this overview of the case law is inaccurate and biased towards His Honour's preferred resolution to the much-contested question of the scope of s 92, as it relies on totally ignoring *R v Vizzard; Ex parte Hill* and *Milk Board (NSW) v Metropolitan Cream Pty Ltd* in which general, non-discriminatory restrictions which extended to interstate trade were held valid (i.e. in which

[153] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 385.

[154] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 381.

[155] See James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 145.

[156] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 386. Starke J does not deny the existence of the discrimination analysis, but his disdain for it is clear: after reciting the words of s 92, he comments "So s 92 of the Constitution prescribes but judicial decisions have much weakened its operation" (at 305).

discrimination analysis held sway)[157]. Nevertheless, Rich, Williams and Starke JJ also surveyed the case law – including *R v Vizzard; Ex parte Hill* – and similarly rejected the discrimination analysis in favour of the trade restriction analysis, preferring *Peanut Board v Rockhampton Harbour Board* over *Milk Board (NSW) v Metropolitan Cream Pty Ltd*[158], so the omission in Dixon J's analysis is immaterial to the Court's favouring of the trade restriction analysis. On the basis of this re-adopted trade restriction analysis, the majority declared that s 46 was clearly unconstitutional inasmuch as it applied to interstate banking, since a provision empowering the Treasurer to direct private banks to cease trading was clearly a restriction of the interstate banking trade. Furthermore, the majority declared that s 46 was also invalid in relation to intrastate banking (which constituted 90% of the private banks' trade). Since the intrastate and interstate elements of banking were so deeply interwoven in practice, s 46 could not just be declared invalid in respect of interstate banking activities without fundamentally changing the Act's intended purpose of nationalising *all* private banking in Australia under the Commonwealth Bank. As such, s 46 was to be declared totally invalid and inapplicable[159].

At the heart of the difference between the majority and the minority in *The Bank Nationalisation Case* was a fundamental difference of understanding as to what s 92 intended to achieve, and, pursuant to that difference of understanding, a different reading of the accumulated, confused, and seemingly contradictory case law. Given the legal and political

[157] On a more human note, Dixon J's summary dismissal of Evatt J's school of thought as out-of-date, merely maintained by expediency and now "rejected of all men" after Evatt J had left the Bench – but was in fact appearing before the Court as federal Attorney-General and counsel for the Commonwealth *in this very case* – seems to betray a sliver of the personal dislike that Dixon J held for Evatt J (see footnote 71 above).

[158] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 290 (Rich and Williams JJ) and 311 (Starke J).

[159] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 325 (Starke J) and 390 (Dixon J).

significance of s 92 (which had just been used to invalidate two broad-reaching legislative schemes of the Commonwealth), and the fact that the ambiguity in the case law was the result of the Privy Council being unclear as to which line of reasoning it had actually endorsed in previous appeals, it was inevitable that the Commonwealth would wish to appeal the bank nationalisation question to the Privy Council, and it did so the following year in *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949)[160].

The Commonwealth appealed solely on the question of whether s 46 of the 1947 Act was contrary to s 92 of the Constitution (declining to challenge the High Court's ruling on the invalidity of the other provisions of that Act). Although the Privy Council actually decided that the appeal itself was unconstitutional on a technicality[161], to obviate the need for another, duly constitutional, appeal and to clarify the accumulated case law the Privy Council delivered its opinion on the question of the proper interpretation of s 92[162]. In contrast to previous Privy Council appeals, which, as has been seen, seemed to give heart to the advocates of both trade restriction analysis and discrimination analysis by approving of cases decided under both schools of thought, in *The Bank Nationalisation Appeal* the Privy Council was careful to lay down one

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[160] [1949] UKPC 37, (1949) 79 CLR 497, [1950] AC 235. This Privy Council appeal is also sometimes referred to as *The Bank Nationalisation Case*, but for the sake of clarity, *The Bank Nationalisation Case* shall herein refer to the High Court judgment at first instance and *The Bank Nationalisation Appeal* shall refer to the Privy Council judgment on appeal.

[161] Section 74 of the Constitution bars appeals to the Privy Council "from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States" unless the High Court provides a certificate of leave to appeal. The Commonwealth had not obtained such a certificate in the instant case, believing that the appeal solely as to the validity of s 46 did not concern any questions as to these *inter se* powers. In the event, the Privy Council decided that because *inter se* questions had indeed been raised in the course of the High Court judgment, any adjudication of the validity of s 46 of the 1947 Act under s 92 of the Constitution would necessarily have ramifications for such *inter se* questions: even if s 46 were not obnoxious to s 92 as such, the Privy Council could still not declare s 46 wholly valid without considering such *inter se* questions, and it was not duly certified to do so: *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 626-628.

[162] *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 629.

definite line of reasoning on the issues at hand. On all the salient issues, the Privy Council effectively endorsed the majority judgments in the High Court below. First off, Lord Porter (writing for the Privy Council) agreed with the majority below that banking was indeed trade and commerce for the purposes of s 92, explicitly citing Dixon J's reasoning on this point[163]. Likewise, Lord Porter agreed that s 46 must stand completely or fall completely, as it was not severable into discrete interstate and intrastate applicability without changing its fundamental purpose[164]. Lord Porter also appeared to support the 'individual right' reading of s 92, arguing that any protection of the freedom of interstate trade must necessarily manifest itself in an individual's ability to vindicate that right by having a law declared invalid[165], and accordingly rejected the idea that s 92 concerned itself with interstate trade as an economic phenomenon, viewing any such volumetric assessment as impractical and inconsistent with the true line of reasoning in the case law[166]. Most crucially, Lord Porter explicitly rejected discrimination analysis for determining the scope of s 92[167], and drew from the preceding, ambiguous Privy Council case law a trade restriction test: since it had on previous occasions cited the judgments of both Isaacs J in *James v Cowan* (employing trade restriction analysis) and Evatt J in *R v*

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[163] *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 632-633.

[164] *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 631-632.

[165] *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 635. Zines was dismissive of the Privy Council's analysis on this point, arguing that it misinterprets the reasoning in the various *James* cases by artificially confining it to a question of individual rights: "On any view s 92 will invalidate some forms of legislation and thus give an individual the right to ignore it and in appropriate cases to seek judicial remedies if it is attempted to enforce the void legislation against him or her. In that sense the individual is protected, but the fact that James won his case does not mean that the Privy Council decided it on the basis that s 92 guaranteed a right to each individual to engage in interstate trade free from governmental control or even free from governmental control that does not constitute a "regulation" of his or her trade. He might have won it (and it is thought he did) because the Commonwealth Act was aimed at restricting interstate trade in dried fruits": James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 145-146.

[166] *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 635.

[167] *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 636-637.

Vizzard; Ex parte Hill (employing discrimination analysis), by way of resolution to this ambiguity, the Privy Council was henceforth to be regarded as supporting the trade restriction test as such, and merely endorsing *other elements* (not related to this very issue) of Evatt J's judgment[168]. On the face of it, the Privy Council's judgment seemed to have sounded the death knell for government monopolisation of sectors of the Australian economy, and indeed 1949 marked the end of the federal government's grand attempts to take over entire hitherto-private industries and operate them as a public provider[169]. Nevertheless, despite the Privy Council's attempt to settle the question of s 92's proper scope, the historical and economic significance of single-desk marketing schemes in Australia, particularly for agricultural products, meant that the question of their compatibility with the Constitution remained one of very great importance, and, as will be seen, it would be the subject of litigation on several further occasions in the following decades.

By the end of the 1940s, then, with the conclusion of the Privy Council's judgment in *The Bank Nationalisation Appeal*, trade restriction analysis was well and truly established at the proper test for the scope of s 92. This reasoning was based on the belief that s 92 intended to protect an individual's right to engage in interstate trade free of government restriction, and that s 92 did not intend merely to guarantee free trade in the sense of preventing legislative

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[168] *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 638. The accuracy of this reading of the Privy Council's previous endorsement of Evatt J in *James v Commonwealth* is a bit suspect, but the main thrust of the instant case was to settle the law for the future.

[169] This change of policy was also driven by a change in the political complexion of the federal government, when in 1949 the Labor government which had instituted the attempts at airline and bank nationalisation gave way to a Liberal government which prized private industry and the small business endeavours of Australia's growing middle class. This government would be in office for the next 23 straight years. Even when Labor was returned to government, the hugely ambitious social and economic programmes of the Whitlam Labor government (1972-1975) did not attempt to *nationalise* industry and thereby exclude private traders, but to provide a *publicly-operated alternative* within that industry (for example, instituting the publicly-funded national health insurance scheme 'Medibank', without prohibiting the continued operation of private health insurers within that market).

discrimination against interstate trade. The long reign of such trade restriction analysis was to continue for many decades, but the precise formulation of the test and some of its components were to vary, particularly as Dixon J's legalistic view gave way to the more pragmatic view of Barwick J.

The Bank Nationalisation Case and *The Bank Nationalisation Appeal* were notable not only for confirming trade restriction analysis as the proper test for the scope of s 92, but also for confirming the extension of s 92 to cover trade in services, as well as goods. While it was not explicitly contended at any point in the early decades of the s 92 jurisprudence that that section only covered trade in goods, the factual reality was that the vast bulk of the case law did concern trade in goods, and even in cases concerning transportation (such as *R v Vizzard; Ex parte Hill*), such transportation services were examined as an incident of the interstate trade in the goods which were being transported. *The Airlines Nationalisation Case*, of course, is an example of air transportation being examined as a service in its own right, but it was really only in *The Bank Nationalisation Case* that serious judicial consideration was given to the question of what constituted 'trade' for the purposes of s 92. As was seen above, Latham CJ and McTiernan J were both of the view that banking services were not in fact trade under s 92, but that such services were merely an instrument *enabling trade to be carried out by others*; nevertheless, the majority in that case, and the Privy Council on appeal, did adjudge banking services to constitute 'trade' under s 92. That being so, one of the difficulties associated with acknowledging that service provision – the so-called 'trade in intangibles' – did indeed constitute 'trade' under s 92 was deciding what kind of service provision qualified as specifically *interstate* trade under that section. It is easier to identify when tangible things cross a State border than when intangible things do. The case of *W & A McArthur Ltd v Queensland* discussed above concerned a similar question in relation to the trade in goods, and it was decided therein that it was only where interstate movement of goods constituted a 'necessary' part of the contract of sale that the sale would qualify as 'interstate' trade under s 92; where the interstate movement of goods was merely incidental to the sale, the sale did not constitute interstate trade (even though the actual movement of the goods across the border did qualify as interstate trade). It will be recalled that in the circumstances of that case, contracts for sale of calico cloth between a NSW seller (represented by its agent in Queensland) and a Queensland buyer only qualified as interstate trade under s 92 where the contract *expressly stipulated or necessarily implied* that the calico was to be delivered from NSW to Queensland; all contracts without such express stipulation or necessary implication, whether concluded in Queensland by the agent or relayed by the agent to company headquarters in NSW and concluded there, did not qualify as interstate trade, even though they all did in fact involve the interstate shipment of calico to Queensland from storehouses in NSW. Against that background, it remained to be seen how the Court would deal with the issue of service provision which involved some interstate element, and whether its earlier reasoning in *W & A McArthur Ltd v Queensland* would still be upheld – would 'interstateness' still depend on the interstate movement of a certain thing being expressly stipulated or necessarily implied in the trading contract? After all, the question of what constituted 'interstate' trade is just as much a part of determining the scope of s 92 as is the question of from what kind of restrictions such trade is to be 'absolutely free'. The case of *Hospital Provident Fund Pty Ltd v Victoria* (1953)[170] was to raise just such a question.

[170] [1953] HCA 8, (1953) 87 CLR 1.

The 'Interstate' Element of s 92 and the Provision of Services:

Hospital Provident Fund Pty Ltd was a company incorporated in Victoria, and it had for years provided hospital insurance to persons throughout Australia. In return for regular contributions (or a one-off lump-sum contribution) from an insured party, the company would pay for the person's accommodation in hospital and any surgical operations carried out in hospital, and would do the same for any of the contributor's dependants. The provision of such hospital insurance (and other types of insurance such as sickness, medical and funeral) by trade unions and friendly societies[171] had for some time been subject to regulation under various Victorian Acts, but the provision of insurance by other entities, whether persons, corporations (such as Hospital Provident Fund Pty Ltd) or unincorporated associations, was not so regulated. Accordingly, the *Benefit Associations Act* 1951 (Vic) was passed to extend the regulatory scheme to these other insurance-providing entities as well. The Act required that, as from six months after it came into force, insurance providers must be registered with the government-appointed Registrar; an insurance provider not duly registered at the end of that period would be compulsorily wound up, its debts settled and its remaining assets distributed to its contributors. The Act set out certain conditions on which registration would be granted (relating to an insurance provider having in place the necessary trusteeship structure and accounting procedures) and if these conditions were satisfied, the Registrar must grant registration;

[171] A friendly society, also known as a mutual society or a benevolent society, is a legal entity operated by its membership for the benefit of its membership, in which members contribute to a common fund to be used for their common welfare (often including the welfare of their dependants and survivors). Historically, friendly societies were unincorporated associations (without legal personality, their assets being held by trustees with the members as beneficiaries), although in some jurisdictions they may nowadays take the form of incorporated associations (with legal personality). Friendly societies were an early form of insurance provider, but have mostly been replaced by insurance corporations in developed economies such as Australia (and for that matter, the European Union). Other forms of friendly societies, such as credit unions and banking co-operatives, also persist, but likewise with a limited market share.

Regulations further set maximum payouts for various kinds of insurance, including A£5 5s 0d per person per week for hospital accommodation and A£21 per person per year for surgical operations[172]. Additionally, the Regulations provided that the Registrar must refuse registration if, after consulting with the government statistician, he or she was of the opinion that the payouts offered under the scheme of a certain fund were "excessive" in light of the contributions made thereto. By these Regulations, the government was attempting to exercise some degree of control over the insurance market and prevent malingering by contributors (feigning illness to collect undeserved payouts) and financially unsustainable conduct by overly generous insurance providers. The Act also provided for a right of appeal to the Minister where the Registrar refused regulation. Hospital Provident Fund Pty Ltd duly applied for registration, but their registration was refused and their appeal not allowed[173], and since the six month grace period had elapsed, the Registrar purported to confiscate their assets and wind up the company. The company initiated action in the High Court on the grounds that s 92 rendered the registration requirements invalid or at least inapplicable to interstate trade by insurance providers. They

[172] Australia at the time was still on Lsd. The Australian pound was introduced in 1910 as a currency distinct from the previously used British pound (the pound sterling) but likewise attached to the gold standard; it originally had the same value as the British pound and used the same pounds-shillings-pence structure (£1=20s=240d). The British pound's departure from the gold standard between 1914 and 1925 and the Australian pound's subsequent departure from the gold standard in 1929 caused the value of the two currencies to diverge; after its departure from the gold standard the Australian pound was pegged to the British pound at various levels until settling on a rate of A£1 5s = B£1 in 1931.

During the 1960s, Australia, like many others, decided that it was time to give up using Lsd, and converted to the present Australian dollar, a decimal currency (A$1=100¢), on 14 February 1966. The Australian dollar was for some time pegged to the British pound, then to the US dollar, then to a basket of currencies, before finally being floated on 12 December 1983. Since 2013 the Australian dollar, the world's seventh most traded currency (below the Canadian dollar and above the South African rand) has been an official reserve currency of the International Monetary Fund.

[173] The application for registration was refused by the Registrar on 6 May 1952 and on 7 May 1952 the Minister notified Hospital Provident Fund Pty Ltd that since the six month grace period has already elapsed (the Act having come into force on 7 November 1951), he wouldn't hear any appeal. This seemingly unjust result – in which the right of appeal under the Act was in practice merely illusory – was commented on by several Justices in the case and attributed to hasty drafting of the Act. In the event, however, nothing in the result of the case turned on this point.

claimed that they engaged in such interstate trade in respect of both their internal management and their contractual relations with contributors. As to their internal management, they maintained offices and staff in a number of States, and frequently sent employees, company directors, documents and funds between these different State offices. As to their contractual relations, as a Victorian-incorporated company they regularly entered into contracts with an interstate element, such as (a) contracts entered into in Victoria with Victorian-resident contributors in which contributions were payable in Victoria for which hospital accommodation payouts were claimable from the Victorian office to be paid anywhere throughout Australia, (b) contracts entered into in NSW with NSW residents with contributions payable in NSW and payouts claimable from the NSW office to be paid anywhere throughout Australia, (c) contracts entered into either in or outside Victoria with non-Victorian residents with contributions payable in Victoria and payouts claimable from the Victorian office to be paid throughout Australia, and (d) contracts entered into either in or outside Victoria with Victorian residents with contributions payable outside Victoria with payouts claimable from a non-Victorian office throughout Australia. (From the foregoing business arrangements, it can be seen that the insurance company was evidently familiar with the decision in *W & A McArthur Ltd v Queensland*, inasmuch as the contracts all expressly stipulated, as much as they could, the relevant interstate element which the insurance transaction entailed.)

Thus, there were a number of questions at issue: was the provision of insurance 'trade' under s 92? If so, was Hospital Provident Fund Pty Ltd engaged in trade 'among the States'? Was any restriction imposed by the Victorian regulations a direct and immediate restriction on interstate trade, or was it merely indirect and remote? Could a direct restriction on interstate trade nevertheless escape invalidity if it were 'regulatory' in character? For present purposes, it is the first two questions (the nature of trade and the nature of interstate-ness) which are relevant to the High Court's evolving definition of the scope of s 92; the latter two questions (directness and regulatory character) function as justifications for a law found to be within the scope of that provision, and so will be examined in more detail in Chapter VI of this thesis.

The majority (Dixon CJ, Williams, Webb, Fullagar, Kitto and Taylor JJ) were firmly of the opinion that insurance provision does indeed qualify as 'trade and commerce' within the meaning of s 92. This is significant inasmuch as it confirms the trend observed in the transport cases, *The Airlines Nationalisation Case* and *The Bank Nationalisation Case* (and *The Bank Nationalisation Appeal*) to regard trade in services as well as trade in goods as constituting 'trade' within s 92; as in the case of banking, it was not necessary for anything to physically move between a buyer and a seller for 'trade' to be occurring[174]. However, a majority, although a smaller one on this point (Dixon CJ, Fullagar, Kitto and Taylor JJ), were of the view that the trade in which Hospital Provident Fund Pty Ltd was engaging was not trade 'among the States'. It was agreed that the movement of employees, directors and documents across State boundaries in the course of Hospital Provident Fund Pty Ltd's internal management were individual acts of interstate commerce within the scope of s 92, and likewise that the transfer of funds from and to insured parties across State boundaries were individual acts of interstate commerce within the scope of s 92[175]. Nevertheless, this did not mean that the whole business of the insurance company took on an interstate character under s 92:

[174] Only McTiernan J argued that insurance provision did not constitute 'trade and commerce' under s 92, and for reasons not particularly convincing: because s 92 did not contain an explicit reference to insurance in the same way as s 51 had (wherein the Commonwealth is separately granted legislative power over interstate trade and over insurance provision), and because in the US Commerce Clause jurisprudence a sale and delivery of some physical good was required to enliven that clause; see *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 21-24.

[175] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 15 (Dixon CJ), 37-38 (Fullagar J).

> ...neither the character of the contingencies [an insured party needing to stay in hospital and/or have surgery] nor the character of the monetary side of the contract could bring the transaction within the conception of inter-State trade, commerce or intercourse. For a company to contract with a man that, in consideration of the latter making payments to it at any given place, the company will in a specified contingency make a payment to him at some other place is not to engage in inter-State commerce. Neither the making of the contract nor the performance of the contract by either side involved any step or dealing which of itself forms part of inter-State commerce even if a State line runs between the two places[176].

The reason why the individual instances of interstate trade did not invest the business of Hospital Provident Fund Pty Ltd as a whole with the character of interstate trade was because these individual interstate movements were not "essential"[177], "necessary"[178], "integral"[179] or "indispensable"[180] to the company's business – they were merely accidental, peripheral transactions going on around the core business of contracting to provide hospital insurance on the occurrence of the specified contingencies. These contingencies, as Dixon CJ explained[181], were not themselves acts of interstate trade, commerce or intercourse: falling sick, needing to stay in hospital and needing surgery while staying there were not 'interstate' in character. This does seem to mark a difference between the way in which goods, on the one hand, and services, on the other hand, are dealt with under s 92: in *W & A McArthur Ltd v Queensland*, a contractual stipulation that goods should be delivered from NSW to Queensland was enough to invest that transaction with an interstate character, whereas in the instant case a contractual stipulation that

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[176] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 14 (Dixon CJ); see also 37 (Fullagar J).

[177] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 39 (Fullagar J).

[178] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 18 (Dixon CJ).

[179] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 44 (Taylor J).

[180] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 38 (Fullagar J).

[181] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 15.

payments should be made by an insured person from one State to an office in another State, and that payouts should be made by the company from an office in one State to a person resident anywhere else in Australia, were not sufficient to invest the transaction with an interstate character. Furthermore, on the subject of how trade in services is regarded under s 92, the decision that insurance does not qualify as interstate trade naturally leads to a comparison with the way that banking was regarded in *The Bank Nationalisation Case* and *The Bank Nationalisation Appeal*: why should commercial banking services as provided by the Bank of New South Wales be regarded as interstate in character whereas commercial insurance services as provided by Hospital Provident Fund Pty Ltd not be regarded as interstate? The answer offered was that banking services in Australia were, by their nature, highly integrated such that intrastate and interstate banking was deeply interconnected; thus, the essential credit-offering function of commercial banking (which was affected by the impugned Commonwealth Act in that case) was interstate in character[182]. Fullagar J also argued that this characterisation was bolstered by the fact that banking was not only interstate in character, but that it enabled the interstate trading of others[183]. This attempt to distinguish insurance provision from banking provision is, with respect, not very convincing: if banking as a whole can be regarded as interstate in character because 10-15% of it occurred across State lines, then shouldn't the same be true of insurance as a whole, a percentage of which must presumably involve interstate funds transfer (the interstate-ness of which is not disputed)? Similarly, if the core business of banking can be regarded as credit-offering (capital transfer) rather than just the occurrence of certain events relevant thereto stipulated in the loan contract, shouldn't the core business of insurance be

[182] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 18-19 (Dixon CJ), 38 (Fullagar J).

[183] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 38.

regarded as the making of payments from and to the insured party (capital transfer) rather than just the occurrence of certain events relevant thereto stipulated in the insurance contract (i.e. the contingencies insured against)? It seems that the real difference between the way in which banking and insurance are regarded in these cases may owe less to the interstate-ness of the two businesses than to the fact that commercial banking was to be completely prohibited in the banking cases whereas commercial insurance was only to be subject to a registration requirement and some market regulation in the instant case. Nevertheless, the majority in the instant case was clear that they did not regard Hospital Provident Fund Pty Ltd as engaging in interstate trade within the meaning of s 92[184].

In the result, the Victorian legislation was held valid by the majority in *Hospital Provident Fund Pty Ltd v Victoria* and accordingly the unregistered insurance company was wound up. The majority decision, then, continued the line of reasoning from *The Bank Nationalisation Case* and *The Bank Nationalisation Appeal* that provision of services did indeed constitute 'trade and commerce' under s 92 even though no physical entity changed hands between a buyer and a seller. More significantly, though, it established that the interstate-ness of such trade (which brought it within the scope of s 92's protection) was made out where the movement of persons, documents or capital across State lines was essential to the practice of the business; any such movements which were not essential to the practice of the business may constitute protected instances of interstate trade themselves, but would not invest the business as a whole with an interstate character and enliven the protection of s 92. By shifting away from the clarity of the

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[184] Both Williams J and Webb J are of the opinion that insurance *does* qualify as interstate trade, although they do not engage in detailed argument on this point, much less a rebuttal of the majority's argument. Williams J would have found the Act wholly invalid under s 92, whereas Webb J would have read it down to apply solely to intrastate aspects of the insurance trade (although with consequential effects on interstate trade, such as if an unregistered company had its intrastate trade wound up and its interstate trade was obliterated as a consequence).

Court's earlier position in *W & A McArthur Ltd v Queensland* that contractual stipulation of an interstate element rendered a transaction 'interstate trade' under s 92, it also seemed that it might be more difficult to prove this interstate-ness for trade in services rather than goods, especially if the 'essential' elements of trade in services were read narrowly, as they had been in respect of insurance services in the instant case.

The Court had an opportunity to consider how this definition of 'interstateness' was to be applied to the interstate trade in goods a couple of months later, in the case of *Wragg v New South Wales* (1953)[185]. Wragg was a potato grower in Tasmania, who exported potatoes to various other States including New South Wales. The *Prices Regulation Act* 1948-1949 (NSW) empowered the Prices Commissioner to set maximum prices for the sale of certain goods in NSW, and in 1953 the Commissioner accordingly established maximum prices for the sale of potatoes at the primary wholesale stage, the secondary wholesale stage and at the retail stage. Wragg complained that this declaration was contrary to s 92 inasmuch as it restricted his interstate trade in potatoes by capping the price at which they could be traded into NSW, not only because it affected the primary wholesale price but because by setting *any* maximum price *anywhere in the distribution chain* (right up to the retail stage) there was a knock-on effect upstream which ended up restricting his trade in the potatoes between Tasmania and NSW in the first place. That is, unlike in *W & A McArthur Ltd v Queensland*, Wragg's claim was not limited to the sale of goods across the border (with the contract for sale explicitly specifying such an interstate movement), but related to all the subsequent transactions once the goods had entered NSW. The Court was not sympathetic to this argument, and in rejecting it, Dixon CJ enunciated what would come to be called the 'criterion of operation' test for how the trade restriction

[185] [1953] HCA 34; (1953) 88 CLR 353.

definition of the scope of s 92 should be assessed. The reason why Dixon CJ (with whose observations McTiernan, Williams, Fullagar and Kitto JJ agreed) held that the Commissioner's declaration and the Act did not infringe s 92 was that "[t]he law restricting the price is not one operating in reference to or in consequence of any matter or thing itself forming part of trade, commerce or intercourse among the States"[186]. Although the Court would ultimately have to draw the line as to exactly when the 'importation' phase (which was protected by s 92 as interstate trade) was completed, the same characteristic of 'essentiality', which was used for defining interstateness in the trade in services in *Hospital Provident Fund Pty Ltd v Victoria*, was to be used in defining the limit of the protected importation phase in respect of goods: "Difficulties doubtless exist in saying when the importation which amounts to inter-State trade is complete, so that any further dealing with the commodity, whether by way of handling, sale or other disposition, does not belong to the inter-State transaction. It may be conceded that what is *indispensable* to the completion of the actual importation is within the protection of s 92"[187] (emphasis added). Although, if it were decided that an impugned law operated on interstate trade, it would not escape invalidity under s 92 merely because it might employ "circuitous or devious means"[188] in so doing. Moreover, in rejecting the idea that knock-on upstream effects from downstream price-fixing were enough to bring the law within the definition of 'interstate trade', His Honour was clear that this was a test of *legal operation, not practical or economic effect*: "The economic consequences which it may have upon inter-State trade may well be serious, but that is a different thing from interference by law or government action with the

[186] *Wragg v New South Wales* (1953) 88 CLR 353, 387.

[187] *Wragg v New South Wales* (1953) 88 CLR 353, 387.

[188] *Wragg v New South Wales* (1953) 88 CLR 353, 388.

freedom which s 92 confers"[189]. This criterion of operation test, with its focus on the legal operation of the impugned law rather than its economic effect, combined with the 'essentiality' definition of interstateness were to prove significant in the establishment of the trade restriction analysis for the scope of s 92. Furthermore, as shall be seen in the following Chapter, a reaction against this legal formalism was to underpin the effects-based modern jurisprudence on the question of scope.

At this point, it is worth briefly adverting to a related issue: the 'directness' of a restriction of interstate trade. Both *Hospital Provident Fund Pty Ltd v Victoria* and *Wragg v New South Wales* considered the issue of how an action that undoubtedly constituted interstate trade (such as potatoes physically crossing a border) fit into the larger distribution chain for that product or service, and how far upstream or downstream in that chain the commercial transactions would still be defined as 'interstate trade'. The solution given was to look for what transactions were 'essential' to the act of interstate trade. Closely related to this was the argument that a restriction of trade imposed on a downstream part of the distribution chain (which clearly failed the 'essentiality' test for being interstate trade) would nevertheless flow upstream to the specific act of interstate trade and thus restrict it contrary to s 92. The Court rejected such an argument in these cases, deciding that any effect on the specific act of interstate trade was 'too indirect or remote', and that it was only a direct restriction of interstate trade which was obnoxious to s 92[190]. In effect, this creates a form of justification for laws which do restrict interstate trade but do so in an indirect manner, remote from the actual transaction constituting the protected interstate trade. Given that the question of 'interstateness', which is part of the *scope* of s 92,

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[189] *Wragg v New South Wales* (1953) 88 CLR 353, 387.

[190] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 17 (Dixon CJ), 44 (Taylor J); *Wragg v New South Wales* (1953) 88 CLR 353, 387 (Dixon CJ), 393 and 398 (Taylor J).

and the question of directness, which is part of the *justification* of laws falling within the scope of s 92, are often considered in rapid succession, it is important to distinguish between the two, and to understand that it is properly only the former which is part of the definition of the scope of the provision and so the subject of the present Chapter. Questions of justification are dealt with in Chapter VI.

The Nexus between Trade Restriction Analysis and Justification:

Delivered hot on the heels of *Hospital Provident Fund Pty Ltd v Victoria* and *Wragg v New South Wales* was *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955)[191], a case likewise evidencing the Court's adherence to the dominant trade restriction analysis. For present purposes, the relevance of this case is simply to indicate how strictly this trade restriction analysis was applied, and how easily such an analysis could render an Act invalid. Briefly stated, a NSW Act imposed a licence charge for vehicles used on roads in the State; it specified that the charge for an interstate trader should never be greater than that for a purely intrastate trader in the same licence class. Nevertheless, although there was clearly no discrimination against interstate trade[192], the Court was of the opinion that the restriction of interstate trade by the mere *existence* of such a licence charge was enough to bring the Act within the scope of s 92 and, in the end, render it unconstitutional. This case will be discussed in further detail in Chapter VI on justification, since the Court's decision ultimately turned on whether the conditions

[191] [1955] HCA 28, (1955) 93 CLR 127.

[192] Since the licence fee for an interstate trader using a given class of vehicle over a given route could never exceed, but could be less than, the fee for an equivalent intrastate trader, "[a] discrimination is, of course, involved between inter-State and intra-State movement of goods, but it is designed to favour the former." *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 153 (Dixon CJ, McTiernan and Webb JJ).

established by the Act for the grant or refusal of a licence were too vague to constitute ‘reasonable regulation’ of interstate trade by way of justification.

In a similar vein was the case of *Samuels v The Readers’ Digest Association Pty Ltd* (1969)[193], which confirmed the trade restriction analysis but indicated that once the controversy as to how to define the *scope* of s 92 was (for the time being at least) settled, differences of opinion would emerge as to whether or not an Act within that scope were nevertheless saved by some *justification*. During this period in the Court’s jurisprudence from the 1940s onwards, which I have termed in this section ‘The Long Reign of Trade Restriction Analysis’, the fact that the Court had settled on a trade restriction definition of scope did not obliterate the different legal, economic, political and philosophical understandings which different judges brought to the ambiguous language s 92: those who tended to interpret this ambiguity in favour of the government’s power to regulate still held that view, and those who tended to interpret it in favour of the traders’ freedom to engage in unencumbered commerce still held that view. Indeed, in this period the judicial interpretation of s 92 can be conceived of as a system with two different pressure release valves, scope and justification, and as the pressure of competing judicial approaches built up, and the scope valve seemed to be sealed shut, the pressure would be released through the justification valve, as differences emerged as to what constituted ‘direct’ restrictions on trade and what restrictions were permissible regulation. *Samuels v The Readers’ Digest Association Pty Ltd* was a good example of this. Since the case ultimately turned on the question of justification, it will be dealt with in that context in Chapter VI, but the application of trade restriction analysis to the question of scope will be covered here. In *Samuels v The Readers’ Digest Association Pty Ltd*, the *Trading Stamp Act* 1924-1935 (SA) prohibited the issue

[193] [1969] HCA 6, (1969) 120 CLR 1.

of any 'trading stamp' in connexion with the sale or advertising of goods, and prohibited any written promise that, by purchasing one good, a person would thereby become entitled to another good for free or at a discounted price (or derive any other form of refund or advantage). As this element of the case turned on the question of whether the defendant had indeed issued a 'trading stamp' within the meaning of the Act, it is important to set out the precise facts in this respect. The Readers' Digest Association produced a monthly magazine containing a 'digest', or edited collection, of stories which had previously appeared in other publications; it was also in the business of selling goods by mail order throughout Australia from its office in New South Wales. Individuals who subscribed to its magazine would also have advertising material mailed to them relating to the various products which Readers' Digest sold. So it was that in 1966, a letter came to the mailbox of Mr and Mrs Davis of Glenuga, South Australia. The Davises were subscribers to the Readers' Digest magazine, and this letter delivered to them the happy news that, without any effort or involvement on their part, they had already won a prize. The letter didn't tell them what the prize was, but it did tell them that, in addition to this undescribed prize, if they were to return the certificate included in the letter, they would go into the draw for another prize in the $16 999 Lucky Number Contest. Why this gratuitous, though undescribed, prize, and why this likewise gratuitous Lucky Number Contest? The letter explained that it was all to draw attention to a further offer contained in the letter: the Readers' Digest Association offered to the Davises a "magnificent 10 record album"[194] of the 120 Greatest Hit Songs from Broadway, which the Davises could play and enjoy for 10 days for free, and then either return at no charge, or retain at

[194] For the benefit of 21st Century readers, the records referred to here were Long Play records ('LPs'); discs of black vinyl 25 or 30 cm in diameter with tiny grooves cut into them to record the sound waves of the material recorded on them. They were played at a speed of 33 1/3 revolutions per minute (i.e. 100 revolutions for a typical 3 minute song) with a microgroove stylus reading the depth of the grooves to determine what sound to replicate on the player. They were the dominant form of home audio-playback between the late 1940s, when they replaced the earlier short play gramophone records, and the late 1970s, when they in turn were replaced by cheaper and more portable magnetic cassette tapes.

a charge some $22.51 less than they would have had to pay had they bought the magnificent 10 record album in a retail store. (Evidence later disclosed that, in fact, it was not actually possible to buy the magnificent 10 record album at any retail store, so this $22.51 saving was more notional than real.) The certificate contained in the letter was accompanied with a little chit of paper, and this presented the Davises with a choice: they could either return the certificate with the chit placed in the box marked 'Yes' or in the box marked 'No'. 'Yes' would constitute acceptance of the magnificent 10 record album for the trial period, as well as calling on Readers' Digest to send out the prize already won and to enter the Davises into the Lucky Number Contest[195]; 'No' would decline the offer of the album, but would still call on the company to send out the prize and to enter them into the Lucky Number Contest. Not returning the certificate at all would mean no album, no prize, and no contest. As an incentive to make up their minds quickly, the letter told the Davises that if they sent the certificate back with the chit in the 'Yes' box within 10 days of first receiving the letter, then they would not only be sent the magnificent 10 record album but would also be sent an eleventh record[196] on the same terms as the first 10: 10 days' free trial, then either return or retain and purchase, although the eleventh record was free in that it would not increase the eventual price of the album should the Davises choose to retain it.

Within this somewhat convoluted set of facts, the Court was called on to judge whether any of the material sent by Readers' Digest did indeed constitute the issue of a 'trading stamp' under the Act. The material relating to the Lucky Number Contest, including the chit of paper, was

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[195] A further detail was that if the Davises returned the certificate with the chit in the 'Yes' box and then ended up winning a major prize in the Lucky Number Contest, they would thereby also win a special $50 bonus prize.

[196] Presumably resulting in a 10% increase in the magnificence of the album.

judged not to constitute a trading stamp since it was just a form of advertising for the magnificent 10 record album which offered no discount to the purchaser[197]. Likewise, the material which detailed the supposedly bargain price for that album (claimed to be $22.51 less than the store price) did not infringe the Act since it was not actually possible to purchase the album from any other source, and in that sense the price was not 'reduced' under the terms of the Act – since there was no other real price to reduce it from![198] (The dollar figure of the supposed saving was mere advertising puffery, Readers' Digest being free to sell for below some notional market price if they wished.[199]) Furthermore the prize already won did not contravene the Act because the Act did not prohibit any offer of money or goods which was independent of a future purchase, only those offered in connexion to such a purchase[200]. Nor did the chit of paper constitute a trading stamp in respect of the 'free' 11th record, as it was merely a method of ordering the record and didn't in itself create an entitlement to the record[201]. However, the Act did prohibit the offer of a free gift with purchase, and this is what the 11th record was in respect of the magnificent 10 record album, thus enlivening consideration of the constitutionality of the Act[202]. Trade restriction analysis being the dominant method for defining the scope of s 92, it was quite clear that the Act did restrict the trade of interstate dealers such as Readers' Digest, and all members of the Court were in agreement on this. It was well established that s 92 also

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[197] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 10 (Barwick CJ).

[198] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 10 (Barwick CJ).

[199] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 10 (Barwick CJ).

[200] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 10 (Barwick CJ).

[201] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 10 (Barwick CJ). Taylor J thought otherwise (at 34) since the chit was supplied in connexion with the 11th record which, as will be seen immediately below, was itself an infringement of the Act, but in the end nothing would turn on this disagreement.

[202] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 13 (Barwick CJ).

extended to preparatory material to the sale itself, such as advertising[203], and the lack of discrimination against interstate traders as such[204], and even the presence of similar legislation in many other jurisdictions, was immaterial[205]. Likewise it was of no use to plead that the Act was outside the scope of s 92 simply because it only prohibited a certain type of commercial practice and Readers' Digest could have chosen some other method to promote their products, as they had in fact chosen *this* method and been restricted in doing so[206]. Although there was unanimity on this question of scope, the members of the Court diverged on the question of whether and how the Act might be justified; in the end, a majority (McTiernan, Taylor and Menzies JJ) held that the Act was nevertheless justified as mere regulation[207].

What is notable about *Samuels v The Readers' Digest Association Pty Ltd* in the larger context is that it marks the point from which a revised version of the trade restriction analysis takes shape: with the retirement of Dixon CJ and the ascent of Barwick CJ to the leadership of the Court, trade restriction moved from being underpinned by a philosophical concept of individual rights to an economic concept of a free market. While these two concepts can and do often go hand in hand in *laissez-faire* economics, the doctrinal significance here is that the Barwick interpretation of trade restriction, being motivated by an economic concept, focused on

[203] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 15 (Barwick CJ).

[204] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 19 (Barwick CJ).

[205] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 20 (Barwick CJ).

[206] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 18 (Barwick CJ).

[207] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 23 (McTiernan J), 38 (Taylor J) and 39-40 (Menzies J). Kitto J also thought that the Act was justified, but on the grounds that it was not a 'direct' restriction of interstate trade (at 31). Barwick CJ dissented, believing that the Act was not justified as an indirect restriction or as regulation, as so would have held it unconstitutional (at 21); interestingly, Barwick CJ's judgment contains one of the few references in the Australian case law, although just a passing one, to the European Economic Community and how it faced similar questions of managing a common market (at 14-15).

the practical effect of the legislation rather than its legal form[208]. A practical example of this can be seen by comparing two cases decided under different versions of the trade restriction analysis, both on the same subject matter of first sales of goods after interstate importation: in the case of *Wragg v New South Wales* (1953) discussed above, during the leadership of Dixon CJ, the NSW legislation fixing maximum prices for potatoes sold within the State was judged not to come within the scope of s 92 because it did not restrict the interstate trader as such but rather affected sale of potatoes once they were within NSW (after their importation had been completed). By contrast, in the Barwick era case of *Permewan Wright Consolidated Pty Ltd v Trewhitt* (1979)[209], which concerned a Victorian law that required all eggs sold for human consumption to be submitted the Victorian Egg Marketing Board for grading even if they had already been inspected in their State of production, the Court decided that the Victorian law did fall within the scope of s 92 because even though it formally applied to all eggs in Victoria and did not touch upon the interstate trade as such, nevertheless its economic effect was to increase the price of imported eggs which had already been inspected to the same standard in their home State due to 'double inspection'[210]. Although the Court did become more receptive to an economic, rather that strictly legalistic, understanding of trade restriction during the tenure of Barwick CJ, the phenomenon of individual judges delivering separate decisions in which they 'talked past one another' rather than locking step in plain agreement or disagreement continued unabated.

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[208] James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 157.

[209] [1979] HCA 58, (1979) 145 CLR 1.

[210] The factual parallel with the circumstances giving rise to the product requirements jurisprudence in the EU from *Cassis de Djion* onwards will be seen in Chapter III; the contrast between the judicial response to those factual circumstances will be examined in Chapter V.

With the trade restriction analysis now ascendant, it remained for the Court to confirm how it should be applied to legislation imposing compulsory agricultural marketing schemes, the prevalence and economic importance of which in Australian life had persisted since the various *James* cases, *Peanut Board v Rockhampton Harbour Board* and *Milk Board (NSW) v Metropolitan Cream Pty Ltd* of previous decades. This was an age before the rise of the free trade politics of the 1980s, and in Australia the single-desk marketing scheme was king. So it was that the biggest of all the single-desk schemes came before the Court to be judged – wheat. In *Clark King & Co Pty Ltd v Australian Wheat Board* (1978)[211], Clark King was one of various millers charged with violation of the *Wheat Industry Stabilization Act* 1974 (NSW). As in previous compulsory Australia-wide marketing schemes, Commonwealth and State legislation worked together to create a single-desk marketing scheme for all wheat grown throughout Australia. Commonwealth legislation established the Australian Wheat Board and charged it with the marketing of all wheat sold in the domestic and international markets. Complementary State legislation enabled the Board to compulsorily acquire any wheat grown in the State (with the exception of wheat used for on-farm purposes) and require delivery of it to the Board. It further instituted a penalty for anyone who refused to comply with any such notice from the Board, and made it an offence to deal in any way with such wheat without the Board's permission. The Board was then required to market all the wheat it had acquired that season and divide the net proceeds proportionally amongst the growers from whom it had been obtained, after making appropriate deductions for transport and storage fees, the Board's marketing fees and any industry-wide charge imposed by legislation (but not forgetting to credit back the grower's account for the corn sacks in which the wheat had been supplied!). The purpose of the

[211] [1978] HCA 34, (1978) 140 CLR 120.

joint Commonwealth and State scheme was the stabilisation of wheat prices against major fluctuations on the international market, given that Australia produced a quantity of wheat far in excess of domestic demand and was indeed one of the world's greatest wheat exporters, and the scheme had been operating in this way since 1948[212]. Against this background, Clark King operated a wheat mill in Victoria, and contracted to purchase wheat which had been grown in NSW for delivery to its mill in Victoria. Sometimes, this wheat was delivered directly to the Victorian mill, and sometimes it was temporarily stored by the transporter within NSW *en route* to Victoria. In either case, it was a contractual condition of Clark King's purchase of the wheat that it would be transported across the State border for milling, and the wheat was thus 'committed' to interstate trade[213]. There was no dispute that the whole course of the trade in wheat, from the grower's farm in NSW to Clark King's mill in Victoria qualified as interstate trade under s 92[214]. However, the Court was split on whether the legislation was ultimately constitutional, with the majority ultimately ruling in favour of its constitutionality, although for

[212] Prior to the adoption of the scheme in 1948, low prices during the 1930s recession had been ameliorated by specific State and Commonwealth Acts which had provided relief payments to growers, and this had prompted calls from growers to set up a single-desk marketing scheme to provide a more systemic solution to the problem of price fluctuation. With the outbreak of war in 1939 the Commonwealth passed emergency legislation to acquire the whole of the national wheat crop and pay a guaranteed price to growers, and after its conclusion, with the support of growers, the State and Commonwealth Parliaments had collaborated to establish the present scheme. However, a draft report by the Industries Assistance Commission from early 1978, tendered by Clark King, had strongly criticising the effectiveness of the scheme, arguing that it was an economically inefficient mechanism, had failed to raise prices for growers to any significant degree, and was so expensive that any price increases achieved were more or less wiped out by the cost of administering the scheme – and the AWB had no incentive to conduct itself more efficiently as it had a legislated monopoly. The report had thus recommended that the scheme be discontinued in respect of domestic wheat sales.

[213] Various other Victorian millers were in a similar factual situation, with some operating their own storage facilities in NSW where the wheat purchased in NSW was kept before being transported to Victoria. These other millers did not have contractual stipulations committing the wheat to interstate trade. Nevertheless, in the end nothing turned on whether the storage facility was operated by the miller itself or by a mere transporter, or on whether the miller had a contractual stipulation committing the wheat to interstate trade, as in all cases the wheat was purchased by a Victorian miller from a NSW grower to be milled across the border in Victoria, and this fact in and of itself necessarily brought the transaction within 'interstate trade': *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 140 and 144 (Barwick CJ).

[214] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 165 (Stephen J) and 194 (Murphy J).

somewhat confused reasons. The major split was between Barwick CJ and Stephens J in minority, who judged it a restriction on trade which failed to qualify as 'mere regulation', and Mason and Jacobs JJ in majority, who likewise judged it a restriction on trade but one which *did* qualify as regulation. This difference of opinion is addressed in Chapter VI. The more immediately relevant point is the question of the scope of s 92. On this issue, Barwick CJ, Stephens, Mason and Jacobs JJ all formally agreed that trade restriction was still the appropriate test, and that discrimination against interstate trade was thus sufficient but not necessary to bring a law within the scope of the prohibition in s 92 – and here there was no such discrimination[215]. It is worth noting, however, that Mason and Jacobs JJ's judgment does contain what may be seen as a feint towards the re-establishment of the discrimination test for scope, inasmuch as they declared that State-based compulsory marketing schemes – that is, ones which are conducted solely under the legislation of one State and not part of a nationwide collaboration between the Commonwealth and the several States – are unconstitutional because they are directed at interstate trade[216]. Nevertheless, they did not formally question the trade restriction analysis. On the other hand, in a brief judgment quite unconnected with the arguments addressed in his colleagues' lengthier opinions, Murphy J boldly re-asserted that discrimination was indeed the test for s 92, and seemed to confine the relevant form of discrimination specifically to fiscal imposts in the nature of customs duties – "any customs duty or similar tax discrimination against trade or commerce among the States"[217]. Since Murphy J joined Mason and Jacobs JJ in

[215] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 147 (Barwick CJ), 178 (Stephen J) and 192 (Mason and Jacobs JJ).

[216] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 192 (Mason and Jacobs JJ). In the course of rejecting this test, Barwick CJ at 151-152 declares that this question of whether legislation is 'aimed at interstate trade' is just a version of the discrimination analysis, so the undercurrent of differing judicial opinion was clearly still flowing in the question of the scope of s 92.

[217] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 194 (Murphy J).

declaring the legislation constitutional (although for a somewhat different reason), the wheat marketing scheme survived challenge. Thus, even though trade restriction analysis was formally still dominant, *Clark King & Co Pty Ltd v Australian Wheat Board* shows that the discrimination analysis was not fully eradicated from the judicial landscape, and exercised a certain power over the opinions of judges in this period. Furthermore, this case shows the nexus between the questions of scope and justification under s 92, since Mason and Jacobs JJ's more expansive view of government legislative power under the Constitution manifested itself in their being more ready to find the compulsory marketing scheme, once within the scope of the prohibition in s 92, to be justified as 'mere regulation', whereas the more restricted view of government power held by Barwick CJ and Stephen J led them to have a more restrictive understanding of 'mere regulation'.

Given the uncertainty of the *ratio decidendi* for the majority's decision in *Clark King & Co Pty Ltd v Australian Wheat Board*, with Mason and Jacobs JJ using trade restriction as the definition of scope but then holding the legislation justified as regulation and Murphy J simply using discrimination (and a particularly limited version of it) as the definition of scope, it was inevitable that the constitutional validity of the compulsory wheat marketing scheme (and so all such schemes) should soon be re-litigated. Accordingly, just two years later, the wheat marketing scheme was once again the subject of a High Court decision in *Uebergang v Australian Wheat Board* (1980)[218]. The factual situation was substantially similar to the previous case, this time with Uebergang being a NSW wheat grower who sold wheat across the border to a Qld poultry feed producer, and with two State Acts (the *Wheat Industry Stabilization Act* 1974 (NSW) and the *Wheat Industry Stabilization Act* 1974 (Qld)) being the subject of constitutional

[218] [1980] HCA 40, (1980) 145 CLR 266.

challenge. (These Acts were part of the same Commonwealth-State legislative scheme challenged in the previous case.) Likewise, there was no dispute that Uebergang was engaged in interstate trade. Unsurprisingly, then, the decision of the Court, this time with a larger Bench of seven Justices, was in many ways a restatement of the arguments aired in that previous case: there was a general acceptance that trade restriction was the definition of the scope of s 92, and the difference of judicial opinion then came down to the question of whether the legislation was justified in imposing such a restriction, with a majority declining to find the legislation unconstitutional. Stephen and Mason JJ declared that the proper test for justification should be that the regulation was "no more restrictive than is reasonable in all the circumstances, due regard being had to the public interest"[219], and found the wheat marketing scheme to pass that test. Murphy J once again stated his view that s 92 should properly only related to discriminatory fiscal burdens[220], but, acknowledging that this interpretation had failed to find favour with others, supported the reasoning of Stephen and Mason JJ[221]. Gibbs and Wilson JJ confined their opinion to answering the specific question reserved for judgment, namely whether

[219] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 306.

[220] Murphy J's interpretation was based on three pillars: the constitutional context of s 92, the text of the section, and the negative consequence of a broader interpretation. Firstly, His Honour argued that s 92 occurred in the context of other provisions of the Constitution which solely related to fiscal matters, and so s 92 should be understood as similarly limited to fiscal imposts (*Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 307). Secondly, the word 'absolutely' in s 92 should be properly read as 'absolutely', not read down to mean something more like 'relatively', and this was only possible if s 92 were confined to fiscal imposts; indeed, the whole jurisprudence of justification for laws which qualified as 'mere regulation' was a gloss on the actual words of the Constitution which was only necessary because the section had been read too broadly, necessitating this reading down of 'absolutely' (at 308). Thirdly, the broader reading of s 92, and the consequent jurisprudence of 'mere regulation', had forced the Court to sit in judgment of legislative (and executive) measures in a manner inconsistent with the proper role of the judicial power: "it becomes clear that those who espouse [a broader view of s 92] are being forced to assume a supervisory role over the national economy…The adoption by the Court of a super-legislative role in relation to the national economy is inconsistent with the separation of powers between the legislature and the judiciary" (at 308-309). His Honour dismissed the suggestion that the presence of the word 'intercourse' in s 92 must point to a broader interpretation, as s 92 was not the sole provision by which the Constitution sought to enshrine freedom of speech, assembly, communication and travel, and so it need not be given an over-broad interpretation on this basis – these rights were explicitly and implicitly guaranteed elsewhere in the Constitution (at 311-312).

[221] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 309.

the constitutional validity of the Act depended on the establishment of any particular fact in Court; in their view, once a law restricted interstate trade, its justification naturally turned whether facts could be established which showed that it was the only reasonable and practical method of regulating the trade in question. In issuing such a restricted judgment, Their Honours deliberately declined to declare the present Act and the broader wheat marketing scheme unconstitutional[222]. In their minority judgments, Barwick CJ and Aickin J, on the other hand, believed that the Act did not represent mere regulation and its restriction of interstate trade was not justified, and so would have declared it unconstitutional[223]. Thus, as in the previous case, the difference of judicial opinion did not formally relate to the question of scope – all Justices accepted the prevailing trade restriction definition – but rather to the question of justification covered in Chapter VI. However, there were deeper differences of opinion which, given later developments in the law, demonstrate the powerful undercurrents which still moved beneath this apparently smooth surface. On the side of those Justices who tended to give the prohibition in s 92 a broad reading and so curtail government power to regulate trade, Barwick CJ was at pains to demonstrate that his interpretation of the Constitution did not depend on "some particular theory of political economy"[224] and that it was not appropriate to look to the drafting history of that section to determine whether its authors entertained any such theory, but rather one must confine one's judgment to the mere words of the section itself[225]. (While he does notionally grant an exception to this in cases of textual ambiguity, if s 92's notoriously unclear and heavily litigated "absolutely free" does not qualify as textual ambiguity, it is difficult to imagine what could!) On

[222] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 302.

[223] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 295 (Barwick CJ) and 326 (Aickin J).

[224] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 294.

[225] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 294-295.

the other hand, on the side of those Justices who tended to confine the reading of the prohibition in s 92 and preserve government legislative power, Murphy J openly acknowledged that judicial interpretation necessarily involved some application of “economic and social ideas”[226], and that it was not appropriate for judges to cling to an outdated social and economic philosophy from a prior century and entrench it in constitutional law[227]. This difference of judicial reasoning between these two prominent Justices not only reveals their differing interpretation of the degree to which the Constitution protected individual freedom to trade from government regulation or, otherwise put, the degree to which the Constitution curtailed the government’s power to regulate aspects of the economy in the public interest; it also demonstrates the nexus between the questions of scope and justification under s 92, as this difference of interpretation will end up finding expression in one aspect of the interpretation of s 92 or another. Since trade restriction was, at this time, accepted as the definition of scope, those Justices who favoured a narrower reading of s 92 and so a broader understanding of government legislative power tended to be more willing to find impugned Acts to be justified (and duly constitutional) as ‘mere regulation’. Finally, it is worth adverting to the question of whether ambiguity in the meaning of s 92 should be resolved by reference to the statements of the authors of that section and its drafting history. This question would soon be answered with a definitive ‘Yes’, and a new, and much more judicially united, era in the history of the interpretation of s 92 would begin. This era will be the subject of Chapter II.

[226] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 309.

[227] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 309-310.

Section 5: Conclusion:

Thus far, the interpretation of the scope of s 92 has been seen to oscillate between two poles: trade restriction and discrimination. Each of these schools exerts a powerful force on the judicial mind: the plain language of s 92 declaring that trade shall be "absolutely free" seems to indicate that *any* restriction of such trade comes within the scope of that section, but the notion of shielding out-of-State traders from protectionist legislation seems to argue that it is only discrimination against interstate trade that should enliven s 92. Furthermore, each of these tests connects to a wider view of the place of s 92 within the Constitution, with trade restriction analysis viewing s 92 as a guarantee of an individual's right to engage in interstate trade free from governmental interference (a *laissez-faire* economic theory, with a focus on the individual), and discrimination analysis viewing s 92 as an attempt to create an Australia-wide market which is nevertheless subject to non-discriminatory regulation to achieve certain public purposes (a free trade economic theory, with a focus on the public interest).

It has been seen that there have so far been four major periods in the history of the interpretation of s 92. The first phase, lasting from the inception of the Constitution in 1901 to the 1920s, saw trade restriction analysis adopted as the definition of the scope of s 92. The potential for s 92 to strike down legislation and impede regulation of the market was mitigated by the decision that governmental expropriation of goods did not come within the scope of the section (*The Wheat Case*) and by a narrow definition of what constituted 'interstate trade' which required that the goods be contractually committed the crossing of a State border (*W & A McArthur Ltd v Queensland*). The second phase, in the early 1930s, is marked by the emergence of discrimination analysis as a rival definition for the scope of s 92. It was a period in which different judges cleaved to different schools of thought on this issue, with Dixon J championing the trade restriction analysis and Evatt J the discrimination analysis, each motivated by fundamentally different interpretations of the intended economic impact of that section. The appeal to the Privy Council in *James v Cowan* not only failed to resolve the question one way or the other, but actually prolonged the uncertainty by seeming to have a bet each way. The third phase, lasting from the mid-1930s to the mid-1940s saw discrimination analysis, championed by Evatt J, become the dominant definition of the scope of s 92, thus saving more legislation from constitutional invalidity. This occurred against the background of greater government regulation of industry to prevent profiteering during the Depression and to mobilise the totality of Australian industry in support of the war effort. Having been endorsed by the Privy Council in *James v Commonwealth*, discrimination analysis was thereafter duly applied even by judges who had formerly espoused the trade restriction analysis in the earlier phase of competing interpretations. With the Depression and the Second World War passing into history, and with Evatt J departing from the High Court and Dixon J being elevated to Chief Justice, the discrimination analysis ceded ground again, and from the mid-1940s to the 1980s, trade restriction analysis came to be re-asserted, and to reign as the dominant interpretation. This period was marked by significant early decisions striking down government attempts to nationalise major industries, but as time wore on, the fundamental difference of judicial opinion between those who tended to give an individual-focused, *laissez-faire* interpretation to s 92 and those who tended to give a public interest-focused interpretation manifested itself in other ways. With the pressure valve of scope being closed (for the time being), differences of judicial opinion escaped through the valve of justification, and by the end of this period it was established, although in a somewhat muddled pair of decisions, that a compulsory marketing scheme for agricultural goods could indeed be justified under s 92. So it was that, by the dawn of the 1980s, the dominant definition of scope seemed to be trade restriction analysis, but underneath that seeming dominance lay significant disagreement as to the true character and purpose of s 92, and without a clear and universal guiding principle in this regard, the case law had evolved in a convoluted and confusing manner. Section 92 was ripe for a decisive judicial restatement, and in 1988, this is exactly what it received.

<u>PART 1: SCOPE</u>

SUBPART 1: AUSTRALIA

<u>CHAPTER II:</u>
<u>THE SCOPE OF s 92 AFTER</u>
<u>*Cole v Whitfield* (1988)</u>

The previous Chapter has traced the evolution of the jurisprudence on the scope of s 92 from the inauguration of the Australian Commonwealth through the early rise of trade restriction analysis, the ascendancy of discrimination analysis, and then the re-establishment of the trade restriction analysis. It has shown that, even where one or the other school is apparently in the ascendant for the time being, there was constant judicial disagreement within the High Court, which manifested itself in dissenting judgments favouring the other school of interpretation. Appeal to the Privy Council (while such an avenue was available) had failed to definitively resolve the question, and had in fact added to the confusion. It is against this background that the High Court came to consider the scope of s 92 again in the case of *Cole v Whitfield* (1988)[228]. Since this marks the beginning of a new and much more unified era in the judicial history of s 92 which has continued to the present day, in this chapter the modern law from *Cole v Whitfield* onwards will be presented as an integrated whole, and the chapter is divided into three sections: the true historical meaning of the constitutional phrase 'absolutely free', the centrality of

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[228] [1988] HCA 18, (1988) 165 CLR 360.

discrimination against interstate trade (that is, the re-establishment of the discrimination analysis), and the concept of protectionism.

'Discriminatory Burdens of a Protectionist Kind'

Section 1: 'Absolutely Free' from Protectionism:

The abiding issue in identifying what constitutes a relevant restriction for the purpose of s 92 of course is the need to define *from what* trade and commerce is to be 'absolutely free'. In *Cole v Whitfield*, the High Court engaged in a lengthy analysis of the history of the interpretation of s 92 (which has been covered in detail in Chapter I). The Court said that although it was "difficult to speak of the section as having achieved a settled or accepted interpretation at any time since federation"[229], the closest thing to such a settled interpretation was the 'criterion of operation' doctrine which had been influential for a period of some 25 years between the early 1950s and late 1970s[230]; this doctrine had invalidated any law which took interstate trade as its criterion of operation (that is, any law which, on its face, singled out interstate trade for special treatment). As has been seen in the previous chapter of this thesis, at no time in the long history of s 92 was there ever a uniform judicial position on the scope of s 92; the most that could be said is that trade restriction analysis or the discrimination analysis was ascendant at one point or another, though always with significant judicial dissent. Even this criterion of operation test was never

[229] *Cole v Whitfield* (1988) 165 CLR 360, 384.

[230] The ascendance of the criterion of operation formula was said to have begun with *Hospital Provident Fund Pty Ltd v Victoria* [1953] HCA 8, (1953) 87 CLR 1 and lasted until *Bartter's Farms Pty Ltd v Todd* [1978] HCA 36, (1978) 139 CLR 499, but to have lost the command of the majority by the time of *Clark King & Co Pty Ltd v Australian Wheat Board* [1978] HCA 34, (1978) 140 CLR 120. The origin of the criterion of operation formula can be traced back to Dixon J's decision in *O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW)* [1935] HCA 8, (1935) 52 CLR 189, which was in fact a judgment in dissent.

particularly clear in its meaning or uniform in its adoption by the members of the High Court Bench, and certainly by the time of the instant case, the influence of the criterion of operation doctrine had waned. The most that could be said, before *Cole v Whitfield*, was that there was an acceptance, grudging or otherwise, that the trade restriction analysis in some sense defined the scope of s 92, but the proper application of it (particularly as regards its interconnexion with the issue of legitimate justification of impugned laws within that scope) was by no means clear. This lack of a clear, uniform, dominant interpretation on the scope of s 92 was, to the Court, a "quite unacceptable state of affairs"[231]. This created for them not only the opportunity, but the *duty*, to provide such an authoritative interpretation.

In order to determine how to interpret s 92, the High Court turned to the historical circumstances in which the Constitution had been drafted and indeed to the debates of the Conventions which had drafted it, although naturally the Court stressed that this was only to provide a guide to interpreting the words of the section, not to supplant those words in favour of the drafters' subjective intentions[232]. This is already, in and of itself, a remarkable departure from the first nine decades of s 92 jurisprudence seen in Chapter I; throughout those decades, judges had argued in favour of either trade restriction or discrimination analysis as a matter of economic or social principle, or as a matter of textual legalism, but had not gone behind the words to look for the historical background of their authorship[233]. Looking now to the historical

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[231] *Cole v Whitfield* (1988) 165 CLR 360, 384.

[232] *Cole v Whitfield* (1988) 165 CLR 360, 385.

[233] It is worth noting that a rare, passing reference to the historical impetus behind the words of s 92 is to be found in the judgment of none other than Barton J in *Fox v Robbins* [1909] HCA 81, (1909) 8 CLR 115, 123: "And we may be allowed to recollect as a matter of history that one of the chief objects of the struggle for federation was to secure that which s 92 ordains, free trade among the States...". Edmund Barton knew what he was talking about on this matter: he had been one of the chief participants in the Second Constitutional Convention of 1897-1898 and had been such a driving force behind the federation movement that he had been appointed Australia's first Prime

background of s 92, the Court stated that during the decades leading up to the drafting of the Constitution, colonial politics were dominated by the clash between advocates of free trade and advocates of protectionism as general economic policy[234], and that the advocates of federation knew that they could not achieve political federation without securing intercolonial free trade[235].

The Court then went on to detail the drafting history of s 92, explaining that it was meant only to ensure freedom of intercolonial trade from *protectionist* restrictions, not all regulation. The phrase ‘absolutely free’ was used in what became s 92 in both the First and Second National Australasian Conventions at which the Constitution was drafted (meeting in 1891 and 1897-1898 respectively). While some reservations were expressed during the course of the Second Convention by Isaac Isaacs (later Isaacs CJ of the High Court) and Samuel Griffith (later Griffith CJ of the High Court) that the use of the phrase ‘absolutely free’ without further qualification would preclude *any* sort of regulation of trade, even mere licences, in the event no alteration of the phrase was made, it being observed by George Reid that doing so would simply complicate the issue further by introducing limitations which would themselves require definition and qualification, and so ‘absolutely free’ was duly included in the Constitution. On the basis of this analysis, the Court averred that even though s 92 does not explicitly state what sort of regulation is compatible with trade and commerce remaining ‘absolutely free’, its intention is nevertheless clear:

> The delimitation of the precise scope and effect of the guarantee [of ‘absolute freedom’] was left as an unresolved task for the future. The purpose of the section is clear enough: to create a free trade area throughout the Commonwealth and to deny to the

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Minister, immediately after the institution of the Commonwealth on 1 January 1901 and before the first elections were called (which he went on to win).

[234] *Cole v Whitfield* (1988) 165 CLR 360, 386.

[235] *Cole v Whitfield* (1988) 165 CLR 360, 387.

> Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries.[236]

As for the reason why such an elliptical provision was inserted into the Constitution in the first place, the Court suggests that the decision was not motivated by legal, but political, considerations, as the phrase 'absolutely free' originated "as a rallying call for federationists who wanted to be rid of discriminatory burdens and benefits in trade and who would not suffer that call to be muffled by nice qualifications"[237].

Cole v Whitfield's identification of the prohibition of protectionism as the focus of s 92 has been supported in all subsequent case law[238]. Thus, the case marks a decisive confirmation that it is indeed the discrimination analysis which determines the scope of s 92 in the modern era.

In addition to identifying the proper scope of the ambiguous phrase 'absolutely free' and laying down the theoretical basis of s 92, *Cole v Whitfield* is also important in establishing the specific legal elements of the test for relevant restrictions which, if not justified according to the principles examined in Chapter VI, will constitute a breach of s 92[239].

Cole v Whitfield states that the test for whether a law constitutes a relevant restriction for s 92 (and thus a breach of s 92, if not justified) is whether it imposes 'discriminatory burdens of a

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[236] *Cole v Whitfield* (1988) 165 CLR 360, 391.

[237] *Cole v Whitfield* (1988) 165 CLR 360, 392. See also 394.

[238] *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411, 424; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 465-467; *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182, 199; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 451; *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 263; *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 318.

[239] Another way of expressing this is that laws which have the effect of imposing discriminatory burdens of a protectionist kind are not, in fact, "*relevantly* discriminatory and protectionist" (emphasis added) if they are justified: *Cole v Whitfield* (1988) 165 CLR 360, 410.

protectionist kind' upon interstate trade[240]. Although the elements of discrimination and protectionism are often treated separately in the case law, both are necessary, and there is an obvious connexion between them in that discrimination looks forward to protectionism (as it is only protectionist discrimination that is relevant), and protectionism cannot be achieved without some sort of discrimination (since protectionism is based on differential burdens on trade from local and interstate sources). For the sake of clarity, however, discrimination and protectionism will be analysed under separate headings so as to better elucidate the development of the jurisprudence on these two distinct, though interconnected, concepts.[241]

Section 2 - Discrimination:

The Concept of Discrimination:

In *Cole v Whitfield*, the Court said that discrimination connotes a departure from equality of treatment between interstate and intrastate trade[242]; in this respect, the Court is repeating the familiar definition of discrimination from the convoluted early history of s 92 examined in Chapter I. However, the great contribution of *Cole v Whitfield* on this point was not to just to state that discrimination defines the scope of s 92, but that such discrimination need not be

[240] *Cole v Whitfield* (1988) 165 CLR 360, 394.

[241] Academic commentary likewise distinguishes between two separate, interconnected and mutually necessary concepts in the *Cole v Whitfield* test for scope; see, e.g. Gerard Carney, 'The Re-Interpretation of Section 92: The Decline of Free Enterprise and the Rise of Free Trade' (1991) 3 Bond Law Review 149, 154-156; and P H (Patrick Harding) Lane, 'Recent Trends in Constitutional Law' (2002) 76 ALJ 154, 154.

[242] *Cole v Whitfield* (1988) 165 CLR 360, 399. The qualifications expressed by the Court relate more properly to the protectionism element, signifying that it is only *protectionist* discrimination which is relevant for s 92.

apparent on the face of the law but may also be found in its practical effect[243] (contrary to the earlier decisions of the Court under the criterion of operation test which insisted on locating discrimination on the face of the law[244]). Furthermore, the existence of discrimination, especially discrimination in practical effect, is "a question raising issues of fact and degree. The answer to those questions may, in the ultimate, depend upon judicial impression"[245]. These two characteristics of the modern jurisprudence on the scope of s 92, that judges must look to both the legal and the practical effect of the law in question and that they must ultimately make a decision as to whether the law falls on one side or other of this discrimination test (particular in practical effect), are significant because they mark the rise of the discipline of economics in the reasoning process for s 92. As was seen in Chapter I, until *Cole v Whitfield*, judicial reasoning was highly legalistic, looking at the form of the law and the precise legal operation of the business affected by it (*W & A McArthur Ltd v Queensland* being the clearest example). From *Cole v Whitfield* onwards, however, economic concepts such as elasticity of demand, product substitution and market analysis enter the Court's reasoning, underscoring the move away from the legal technicality of the older jurisprudence to an effects-based jurisprudence intended to realise s 92's guarantee of free trade.

Interestingly, after the Court established this discrimination test for the scope of s 92, it then seems to somewhat misapply it in the factual circumstances of *Cole v Whitfield* itself. In that case, Tasmanian law established a certain minimum permissible size for crayfish caught, possessed or sold in that State, but South Australian law established a lower minimum size for

[243] *Cole v Whitfield* (1988) 165 CLR 360, 399.

[244] *Cole v Whitfield* (1988) 165 CLR 360, 401.

[245] *Cole v Whitfield* (1988) 165 CLR 360, 407-408.

the same species. Whitfield imported crayfish into Tasmania from South Australia, and although the crayfish were above the South Australian minimum size, they were below the Tasmanian minimum size, and he was prosecuted under Tasmanian law. The Court, however, did not view the Tasmanian law as discriminatory because it applied equally to all crayfish in Tasmania[246], but this ignores the fact that interstate trade is, in practice, more heavily burdened than intrastate trade. Compatibility with the minimum size requirement is determined by measuring crayfish against a graduated ruler (or some similar device), and for intrastate trade this need only be done once, when Tasmanian crayfishermen pull up their pots in Tasmanian waters. For interstate trade going from a State with a lower minimum size to a State with a higher minimum size (e.g. South Australia to Tasmania) the measurement must be performed once in the first State and then a second time in respect of any crayfish to be imported into the second State. When a significant commercial quantity of such crayfish are consigned to interstate trade in this way, any such double measurement will increase the processing time and thereby increase the cost of such interstate trade. (This does not preclude the possibility of justification of such double measurement on the grounds of, say, environmental protection, but this is a separate, and subsequent, enquiry to the question of the scope of the prohibition in the first place: see Part II of this thesis.) This error on the part of the Court is telling because, as will be seen in Chapter III, during the periods when EU law has operated under a test of discriminatory practical effect similar to that of Australian law, differential product standards have *automatically* qualified as

[246] *Cole v Whitfield* (1988) 165 CLR 360, 409.

relevant restrictions on the free movement of goods precisely because such product standards will always have a heavier impact on importers[247].

It is worthwhile here to draw a clear distinction between the formulation of the discrimination analysis adopted in *Cole v Whitfield* and the previous tests employed by the Court from time to time in the first 90 years of its jurisprudence, which was the subject of the previous Chapter. Firstly, and most obviously, the *Cole v Whitfield* formulation contrasts with the trade restriction test which held sway between the 1900s and the 1930s, and from the 1940s to the 1980s. The trade restriction test declares a law to be within the scope of s 92's prohibition whenever it restricts interstate trade, regardless of whether that restriction is equally borne by intrastate trade. As was seen in Chapter I, the trade restriction test casts a wider net, catching more laws within the scope of s 92, thereafter enlivening the question of justification as a way to 'save' such laws from invalidity. The trade restriction test was motivated by a view of s 92 that saw the Constitution as a compact between the citizens of Australia limiting the powers that their Commonwealth and State governments could thereafter exercise, and saw interstate trade as the 'individual right' of Australians which, analogous to freedom of speech, could not be restricted merely because someone else's right (an intrastate trader's right) was similarly restricted. Secondly, although the *Cole v Whitfield* test is one of discrimination against interstate trade, it is not a mere resuscitation of the discrimination test which directed the Court's judgments between the 1930s and the 1940s. The earlier discrimination test, as championed by Evatt J in *Peanut Board v Rockhampton Harbour Board*, *R v Vizzard; Ex parte Hill* and *Milk Board (NSW) v Metropolitan Cream Pty Ltd*, was one which looked for discrimination on the face of the law or

[247] The same automatic inclusion of differential product standards within the scope of the prohibition also applies in EU law where the market access test (a 'trade restriction' test) is used to identify relevant restrictions: see Chapter III.

in its ‘real object’, that is, the purposes of the law as evident in its legal operation[248]. It did look beyond the simple question of whether interstate and intrastate trade were subject to different legal provision in the law (the face of the law), but in looking to the ‘real object’, it confined itself to examining the other provisions of the law to determine what the animating purpose behind the law was. It was a test which looked to the *purpose* of the law, not its *effect*. Consequently, it was a test which was not interested in economic or commercial evidence which might show the harm done to a litigant’s interstate business as compared to their intrastate competitors. The test established in *Cole v Whitfield* on the other hand, was one which would locate such discrimination on the face of the law or in its practical effect, and this gave rise to the increased use of economic evidence and concepts in the subsequent case law, as will be seen below. In particular, it raised questions about how to identify cross-elasticity of demand between competitors’ products, and how broadly to definite the ‘market’ in which such competition was taking place.

It should also be noted that *Cole v Whitfield* cut the Gordian knot of s 92 jurisprudence by introducing a new source for defining the meaning of that section. In contrast to earlier jurisprudence which had focused on the mere words of the section – which had proven so elliptical over previous decades – and economic or social theories of the nature of the Constitution (*laissez-faire* and individual rights, or free trade and equal treatment), the Court in *Cole v Whitfield* looked to the drafting history of s 92 to guide its interpretation of the section, much as a Court would look to the drafting history of normal statutory legislation to determine an ambiguous provision thereof. The consistency of this approach with the established

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[248] The same discrimination – real object test had been unsuccessfully advanced by Gavan Duffy J in *W & A McArthur Ltd v Queensland* several decades earlier; it was similarly focussed on locating discrimination on the face of the law or in its real object, as revealed by its legal operation.

interpretative method used for other laws, and the uniformity of intent detected by the Court in the framers' debates, suggests that a revision of the scope of s 92 (which has not occurred between the decision of *Cole v Whitfield* in 1988 and the present) is unlikely to occur in the future.

Discrimination and Interstate Trade:

As indicated in *Cole v Whitfield*, the kind of discrimination which is relevant for s 92 is discrimination against interstate trade as compared to intrastate trade *in the same market*, and is not made out by showing that the interstate trading opportunities of traders *in different States* are different. This issue was raised in *Barley Marketing Board (NSW) v Norman* (1990)[249], which concerned a challenge to NSW laws which divested all barley grown in NSW from growers, vested it in the Barley Marketing Board and forbad the selling of barley except by, or with the permission of, that Board; the Normans, barley-growers in NSW, had purported to sell the barley on their farm to a Victorian maltster (a buyer of malting grade barley) without the permission of the Board. For anyone familiar with the history of s 92 explicated in Chapter I, it would have come as no surprise that the issue of a compulsory marketing scheme would so soon be re-litigated! The Court was of the opinion that although the result of the barley marketing scheme was that NSW maltsters could buy from individual growers in Victoria but Victorian maltsters could not buy from individual growers in NSW (only from the Board or from those selling with the Board's permission), all this indicated was that the position of buyers on one side of the NSW-Victoria border was not the mirror image of the position of buyers on the other side, in respect of interstate buying opportunities. This did not constitute the 'discrimination' which

[249] [1990] HCA 50, (1990) 171 CLR 182.

defined the scope of s 92. Such discrimination is only proven when it is shown that out-of-State and in-State traders are in different positions *in the same market*:

> The purchasing entitlements of the maltsters in each of the two States are identical. Both Victorian and New South Wales maltsters have equal access to the barley sold by Victorian growers and that sold by [the Board]. The maltsters in both States are denied direct access to the growers in New South Wales. The Act does not result in the exclusion of one group but not the other from any market; nor does the Act lead to any difference in price of product to maltsters in the two States[250].

On a related point, *Castlemaine Tooheys Ltd v South Australia* (1990) [251] dealt with the question of whether a law could be discriminatory against interstate trade in practice even if the terms of its operation made no reference to interstate or intrastate trade. A South Australian law which imposed a refundable bottle deposit of 4¢ per bottle for refillable bottles but 15¢ per bottle for single-use bottles was found to be discriminatory against interstate trade in beer, because, as a matter of practical reality, South Australian-produced beer was sold exclusively in refillable bottles whereas beer produced interstate was sold mostly in single-use bottles. The Court was of the opinion that where a law imposes a heavier burden on a product which comes exclusively from interstate trade than a product which comes from interstate or intrastate trade, this amounts to discrimination against interstate trade because, as a matter of practical reality, the law burdens interstate trade more than intrastate trade[252]. Importantly, discrimination will still be made out even if the law also provides benefit for *some* interstate traders (here, the limited number of interstate beer producers who used refillable bottles), because by burdening the products which

[250] *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182, 203.

[251] [1990] HCA 1, (1990) 169 CLR 436.

[252] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 475.

only come from interstate trade (beer in single-use bottles), the law has reduced interstate competition for intrastate trade.

Another significant point relating to discrimination and interstate trade is the question of the breadth of the ‘trade’ or ‘market’ in which discrimination is to be identified. In *Barley Marketing Board (NSW) v Norman* the Court mentioned that discrimination for s 92 may be identified where a law imposes a burden on one particular type of goods and does not impose the same burden on another type of goods with which the first type are in competition[253]. This issue of discrimination by burdening one product more than another with which it is in competition was raised again in *Betfair Pty Ltd v Western Australia* (2008)[254]. In that case, Western Australian law prohibited the operation or use of a betting exchange in that State, although it left unaffected other forms of wagering such as bookmakers and totalisators. (The difference between these three kinds of wagering is described in the paragraph below; for immediate purposes it is enough to say that they are three different methods of betting on the same race, and a wagering operator provides one kind of service or the other.) The legislation also prohibited the publication of a Western Australian ‘race field’ (a list of all the competitors in a race run in WA and the time of the race) except with permission of the responsible Minister, who made it clear that no betting exchange would be granted such approval[255]; without the use of such a race field, no wagering operator could successfully provide their services to gamblers. Only one betting exchange had been established in Australia, Betfair Pty Ltd, based in Tasmania, and

[253] *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182, 204-205.

[254] [2008] HCA 11, (2008) 234 CLR 418.

[255] “The State Government’s legislation is not specifically about Betfair, but about betting exchanges generally whereby punters can back a runner to lose. The integrity of the racing industries has to be protected at all costs.” Western Australia Minister for Racing & Gaming Ljiljanna Ravlich, ‘Betfair application to publish WA race fields not in the public interest’ (Press Release, 11 October 2007).

Betfair complained that the WA legislation breached s 92 by creating protectionist discrimination in respect of WA wagering providers such as bookmakers and totalisators who were not prohibited from operating in the State and (as a group) using WA race fields. It was thus necessary for the Court to determine what 'market' Betfair was in. If the market was specifically gambling by the use of a betting exchange, then the law would not discriminate in a protectionist way because no competitive advantage would be conferred on betting exchanges locally established in WA as there weren't any. If, on the other hand, the market were gambling in general, then the restriction of the out-of-State betting exchange would arguably give a competitive advantage to its in-State competitors offering bookmaking and totalisator betting services. The Court took an economic lens to this question, and decided that in circumstances in which there is cross-elasticity of demand and close substitutability of products, the burdening one such product more than another could constitute discrimination where it engenders a competitive or market advantage of the domestic competitor[256], endorsing the reasoning it had employed the earlier case of *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003)[257] on the subject of Australian federal competition law[258]. Accordingly, Betfair was successful in its argument that it existed in a general gambling market with other, unburdened, wagering operators. The broader ramification of this judicial approach is that laws

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[256] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 480-481.

[257] [2003] HCA 5, (2003) 215 CLR 374.

[258] Stellios cautions against the tendency to over-use competition law principles in s 92 constitutional jurisprudence: "competition principles will have an important, but limited, role to play. They are important because they assist in identifying the dynamics of the market; whether, for the purposes of the discrimination enquiry, there are like or substitutable products; and whether there is a protectionist purpose or effect. However, they are limited because the question to be answered is not whether the law in question has a generalised protectionist purpose or effect in the market", but whether it creates a competitive disadvantage for interstate trade: James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 176-177. The tendency to lean on competition law jurisprudence is understandable not only from a theoretical perspective, but because, as a matter of practicality, there is an order of magnitude more litigation of competition law than constitutional law, given the sums of money involved and the volume of legislation on the subject.

will run a greater risk of being judged to have impinged upon s 92 the more they restrict a specific competitor (or class of competitors) within a market; in order to avoid being judged to create protectionist discrimination, a legislature (particularly a State legislature, whose laws apply only within their own borders) will have to legislate to endeavour to cover as much of the 'market' of mutually substitutable products or services as it can. This has implications for the emerging field of the regulation of e-commerce, as the regulation of solely internet-based market participants is just as much subject to this risk of breaching s 92 by selecting only some market participants for restriction or prohibition – after all, Betfair, an online service provider, was judged to be in the same 'market' as bookmakers and totalisators, in-person service providers[259].

It must also be shown that the discrimination is against interstate trade as such and is not merely a disadvantage suffered by a particular interstate trader because of the form in which they choose to trade. In *Betfair Pty Ltd v Racing New South Wales* (2012)[260], NSW law had imposed a 1.5% fee on all revenue from 'back' betting (that is, betting that an outcome would occur, e.g. that a certain horse should win) above a certain threshold[261]. The fee was imposed for the use of

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[259] See Eli Ball, 'Section 92 and the Regulation of E-Commerce: A Casenote on Betfair Pty Ltd v Western Australia' (2008) 36 Federal Law Review 265, 276-277.

[260] [2012] HCA 12, (2012) 249 CLR 217.

[261] The threshold was the first $5M of back-bet wagering turnover for thoroughbred horseracing, and the first $2.5M for harness horseracing. A separate case heard and judged concurrently with *Betfair Pty Ltd v Racing New South Wales*, namely *Sportsbet Pty Ltd v New South Wales* [2012] HCA 13, (2012) 249 CLR 298 considered the question of whether these threshold amounts themselves worked a discrimination against interstate trade. Sportsbet was an online bookmaker based outside NSW which alleged that these thresholds had been instituted in order to protect intrastate wagering operators from interstate competition. The Court affirmed that the subjective intention of legislators in passing the law in question, or that of the State racing bodies in choosing the specific level at which any such threshold should be set, were not relevant to proving discrimination under s 92, as discrimination was only to be made out by looking to the objective legal operation and practical effect of the law: *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 320 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). In the present case, there was no such evidence of objective discrimination, since the thresholds applied equally to interstate and intrastate traders in both their legal operation and their practical effect: *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 321 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Indeed, as to their practical effect, the facts showed that the threshold for thoroughbred racing exempted the same proportion of interstate and intrastate traders from paying the race field fee, and while the threshold for harness racing did exempt a higher proportion of

a NSW 'racing form', and was equally imposed on all wagering operators who did not operate on the race course itself, namely, bookmakers, totalisators, and betting exchanges, and since argument in the case turned on the supposedly disparate impact of the equal fee on the different forms of wagering, it is necessary to understand how each one operates. Bookmakers are persons who offer fixed odds to those wishing to back a certain outcome, and are the 'traditional' form of betting; they cover themselves by making bets of their own with other bookmakers. A totalisator scheme is an arrangement that allows gamblers to bet sums of money to back a certain competitor, with all the money being pooled together and then, after the race, doled out to those who had backed the winning competitor in proportion to the stake they had placed; the operator of the scheme covers their expenses by taking a commission from all these back bets before the pool is distributed, and in NSW there was one licensed totalisator, TAB Corp, headquartered in NSW. A betting exchange is a facility that matches one gambler wishing to back a certain competitor at given odds with another gambler wishing to take the other side of the bet (the 'lay' bet, i.e. the bet that the competitor would lose); the operator of the betting exchange covers its expenses by taking a commission of each gambler's net winnings, and in Australia there was only one operator of a betting exchange, Betfair. Betfair was headquartered in Victoria, and operated its betting exchange as an online service to all States, with its servers located in the Northern Territory. The fee which Racing New South Wales imposed was for permission to use a NSW race field (a list of all the horses competing in each race), and without the use of this it would be impossible for any wagering operator to do business; although the fee was equally set at 1.5% of all back bets for all kinds of wagering operators, because Betfair charged its

intrastate traders than interstate, this was non-decisive as it was simply caused by dominance of the intrastate sector of the market by a single operator, TAB Corp: *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 327-328 (Heydon J). As such, the Court ruled that the thresholds established for thoroughbred racing and for harness racing did not contravene s 92.

commission not on *all back bets* but rather on gamblers' *net winnings*, in practice this 1.5% fee took 54-61¢ per $1 of Betfair's commission, compared to merely 9¢ per $1 of commission earned by TAB. Betfair accordingly argued that, given the substitutability of the different wagering mechanisms within the NSW gambling market, although the NSW law was neutral on its face, its practical effect was discriminatory against Betfair, which was engaged in interstate trade, as compared to TAB, an intrastate trader. In doing so, Betfair sought to analogise its position to that of Castlemaine Tooheys in *Castlemaine Tooheys Ltd v South Australia*, in which a law neutral on its face was found to be discriminatory in practical effect. The Court unanimously rejected Betfair's argument on this basis that, with the rejection of the individual rights theory in *Cole v Whitfield*, s 92 should not be interpreted to guarantee each interstate trader's right to trade in the particular way they wished without suffering any legislative disadvantage as against intrastate traders who chose to operate their businesses differently. Relevant discrimination was only that which applied to the common circumstances of interstate trade:

> [Section] 92 of the Constitution is not concerned to vindicate a right in individual traders to carry on their business as they wish. The inquiry is whether the individual trader, as a participant in interstate trade is subject to a differential burden by reason of the operation of the law or measure *in the common circumstances of the trade*. The differential burden must be imposed by the law or executive measure *in the common circumstances of the milieu in which the trade occurs*: the inquiry is as to whether there is a denial by the law or measure of a *competitive advantage in trade*, not whether an individual trader's particular circumstances are such that its trade may be adversely affected by a law of general application to all traders[262] (emphasis added)

[262] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 267 (French CJ, Gummow, Hayne, Crennan and Bell JJ, quoting Full Federal Court judgment from which appeal had been made). See also 272 (Heydon J) and 286 (Kiefel J).

The reason why it was necessary to distinguish between the particular circumstances of one interstate trader and the common circumstances of interstate trade was to keep the focus on interstate trade itself, which is what s 92 protects: "…the emphasis upon the circumstances of particular traders, and upon features which may be accidental to those circumstances and to the interstate transactions in which the traders may engage, risks characterisation of the law in question not by its effect on interstate trade, the constitutional issue, but by its effect upon particular traders."[263] Betfair's claim that it was not merely a particular interstate trader, but that it was emblematic of interstate trade as such was not accepted because of the "fluid and dynamic environment of the relevant trading activities"[264], although it might have been able to prove that it was emblematic of interstate trade if it "occupied so dominant a position in interstate trade that an impact on its position was sufficiently substantial to burden interstate trade to an extent significantly greater than the burden on intrastate trade"[265]. On this basis, Betfair's position was distinguished from that of Castlemaine Tooheys in the earlier case; in *Castlemaine Tooheys Ltd v South Australia*, the eponymous company had been an interstate competitor trying to break into a stagnant State-based beer market, whereas in the instant case there were many different wagering operators in the betting market and there was "complex and vigorous trading activity across the nation in which there were numerous participants in diverse circumstances".[266] On this basis, the Court rejected Betfair's complaint that the NSW legislation was within the scope of the prohibition in s 92. Going beyond the facts of the instant case, it is clear that where the Court

[263] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 268 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[264] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 275-276 (Heydon J).

[265] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 276 (Heydon J).

[266] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 276 (Heydon J).

will draw the line between 'the particular circumstances of one interstate trader' (which are not protected by s 92) and 'the common circumstances of interstate trade' (which are protected) will be influenced by the degree to which the market is fluid, open and competitive, and how dominant a player the party reliant on s 92 is in the interstate sector of that market.

Discrimination and the Context of an Impugned Law:

The case of *Bath v Alston Holdings Pty Ltd* (1988)[267], decided just over a month after *Cole v Whitfield*, concerned the discrimination element of 'discriminatory burdens of a protectionist kind', and particularly the significance of the legislative context in which the impugned law (or provision thereof) operates. Although it concerns a fiscal impediment to the free movement of goods, the issues raised are also applicable to non-fiscal impediments. The Victorian law under consideration prescribed a system of licence fees for wholesalers and retailers of tobacco in Victoria. One section of the law prescribed, for a Victorian tobacco wholesaler's licence, a fee equal to 25% the value of sales in a certain past period, and another section of the law prescribed, for a Victorian tobacco retailer's licence, a small flat fee and a fee equal to 25% of the value of sales in a certain past period, with tobacco purchased from the holder of a Victorian tobacco wholesaler's licence exempted from the quantification of past sales. (The reason for the legislative scheme dividing collection of a general 25% *ad valorem* fee between wholesalers and retailers was that there were fewer wholesalers, so it was administratively easier to just collect the fee from the wholesalers rather than from the more numerous retailers, to the extent that this was possible[268].)

[267] [1988] HCA 27, (1988) 165 CLR 411.

[268] *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411, 432.

In the judgment of the majority[269], the section of the Victorian law which imposed the retailer's licence fee with an exemption for tobacco from a Victorian wholesaler was discriminatory against interstate trade[270] despite the existence of the same fee on tobacco from Victorian wholesalers at an earlier stage, and despite the fact that these two sections of the legislation evened each other out[271] and so did not impose a greater burden on interstate trade than on intrastate trade. The argument put by the majority was that the correct analysis of discrimination is one which compares the impact of the legislation *at the point in the distribution chain at which it applied*[272], not one which simply looks at the ultimate effect for wholesalers, retailers and consumers.

With respect, the majority's analysis of the issue of discrimination appears to be incorrect. It cannot be correct to excise a challenged provision from its legislative context and label it 'discriminatory' when another provision of the very same law removes the discrimination that the challenged provision would create if it had existed on its own. Legislative parsing of the kind engaged in by the majority does not seem consistent with the more practical, effects-oriented approach which *Cole v Whitfield* took in explicit derogation from the legislative formalism of the 'criterion of operation' doctrine[273]. In practical terms, any competitive advantage which interstate wholesalers might have enjoyed (whether or not they had been taxed

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[269] The majority comprised Mason CJ, Brennan, Deane and Gaudron JJ. The minority judgment (of Wilson, Dawson and Toohey JJ) focused on protectionism rather than discrimination.

[270] *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411, 425.

[271] *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411, 423 and 426.

[272] *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411, 428-429.

[273] "If the *Cole v Whitfield* formula is concerned only commercial reality, i.e. 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?" Gerard Carney, 'The Re-Interpretation of Section 92: The Decline of Free Enterprise and the Rise of Free Trade' (1991) 3 Bond Law Review 149, 158.

in their home State) would have been in no way affected if the Victorian Act had not bothered trying to reduce administrative expense by levying the tax partially on wholesalers and partially on retailers, and had instead simply levied the 25% tax on the Victorian retailers. Given that a split-taxation scheme like that used by the Act (partially on wholesalers and partially on retailers, but of an equal 25% amount in the end) would have had the same economic result as a simple retailer taxation scheme (of the same 25%), it cannot be said that the Act – as a whole – created a competitive or market disadvantage for interstate wholesalers. In the words of one commentator: "If the *Cole v Whitfield* formula is concerned only with commercial reality, i.e. 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?"[274]. If the ultimate effect of a whole legislative scheme imposes no heavier burden on interstate trade from the perspective of wholesalers, retailers or consumers, then it is irrelevant that one clause in a sentence, one sentence in a section, one section in an Act, or one Act in a legislative scheme might be discriminatory if that context did not exist.

[274] Gerard Carney, 'The Re-Interpretation of Section 92: The Decline of Free Enterprise and the Rise of Free Trade' (1991) 3 Bond Law Review 149, 158. Stellios agrees: "the actual decision [in *Bath v Alston Holdings Ltd*] seems inconsistent with the emphasis given to practical and economic effects in *Cole v Whitfield*.": James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 187.

Section 3 - Protectionism:

The Concept of Protectionism:

The second element in the test for contravention of s 92 is protectionism. In *Cole v Whitfield*, the Court defined protectionism as "the protection of domestic industries against foreign competition"[275] using measures "which, alone or in combination, make importing and dealings with imports *difficult or impossible*"[276] (emphasis added). This seems to set quite a high threshold for making out 'protectionism', but later in that judgment, when dealing with the facts of the instant case, the Court expressed protectionism in terms of the creation of "a competitive or market advantage"[277] in favour of intrastate trade, and this is the formulation which has been adopted in subsequent case law[278]. Moreover, the Court indicated in *Cole v Whitfield* that there is no closed list of mechanisms by which such protectionism can be achieved[279] and that such mechanisms must certainly include non-fiscal impediments to the free movement of goods or s 92 could not have its desired effect[280].

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[275] *Cole v Whitfield* (1988) 165 CLR 360, 392-393.

[276] *Cole v Whitfield* (1988) 165 CLR 360, 393.

[277] *Cole v Whitfield* (1988) 165 CLR 360, 409.

[278] *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411, 427; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 467; *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182, 203; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 481; *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 269; *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 329.

[279] *Cole v Whitfield* (1988) 165 CLR 360, 408-409.

[280] *Cole v Whitfield* (1988) 165 CLR 360, 407. The Court made these comments in the course of its rejection of Murphy J's argument in *Buck v Bavone* [1976] HCA 24, (1976) 135 CLR 110, 137 (and elsewhere) that the prohibition in s 92 should be limited to fiscal measure only.

In the factual circumstances of *Cole v Whitfield*, the Court found that the Tasmanian law in question was not protectionist because it did not give a competitive or market advantage to intrastate trade[281]. In contrast to the Court's finding, it has been argued above that the Tasmanian law was indeed discriminatory against interstate trade, and so it must follow that this discrimination would create protectionism in favour of Tasmanian intrastate trade because the fact that, in practice, some importers are required to engage in two separate (and somewhat time-consuming) size determinations will only add to the price of imported crayfish and diminish its competition with Tasmanian crayfish. Additionally, as the Court itself half-admitted in the context of justification[282], the prohibition on the importation of crayfish which are between the Tasmanian and South Australian minimum sizes eliminates the competition which Tasmanian crayfish would have suffered from imports of this size, and this must qualify as protectionism as well. As with discrimination in the previous Section, the fact that the Court appears to have misapplied its own protectionism test in *Cole v Whitfield* has relevance beyond the mere facts of that case. Since the Court recognised neither the discrimination nor the protectionism worked by the Tasmanian law on product standards, it seems unlikely that laws on product standards will come to be treated the same way in Australian law as they are in EU law in which, as shall be seen in Chapter III, they *automatically* qualify as relevant restrictions. If *Cole v Whitfield*, the seminal case in the modern interpretation of s 92, did not judge that a law on product standards qualified as a relevant restriction on an *ad hoc* basis, the likelihood of such laws automatically falling within the scope of s 92 is low.

[281] *Cole v Whitfield* (1988) 165 CLR 360, 409.

[282] *Cole v Whitfield* (1988) 165 CLR 360, 409.

Given that the Court defines protectionism as a loss of 'competitive or market advantage', it is necessary to understand how the Court identifies such 'competition'. It was emphatically stated in *Betfair Pty Ltd v Racing New South Wales* by Heydon J that the kind of competition which is relevant for s 92 is not the overall level of competition in the market as an economic metric, but rather the specific competitive position of interstate traders within the market[283]. Nevertheless, this does not mean that overall competition levels in a market are completely irrelevant, as Kiefel J was careful to point out that "insights drawn from the economic theory of competition are useful to explain the effects of a legislative or other measure upon trade in a market. Such insights have long informed discourse on s 92."[284] It shall be seen below that the precise legal relevance of this metric of 'competition levels within a cross-border market' is a live question, awaiting fuller exploration in future cases.

It is also necessary to understand what evidence the Court looks for to make out 'protectionism'. Proof of protectionism requires proof of interstate traders' loss of competitive position to intrastate traders in the form of lost market share or profit, or an impediment to increasing them[285]. In *Betfair Pty Ltd v Racing New South Wales*, for example, it was not enough for Betfair simply to show that the same 1.5% fee consumed more of its commission on each wager than was the case for its intrastate competitors: Betfair needed to actually show that

[283] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 272-274 (Heydon J). Indeed, Heydon J expressed considerable exasperation at the voluminous and largely irrelevant evidence on this point which had been presented in the case: "These proceedings have developed certain unattractive drawbacks. They are ponderous. They are slow. In them the parties tender, often successfully, copious quantities of inadmissible or marginally admissible "expert" evidence, selected with extreme discrimination, assembled at enormous expense and given with considerable impertinence in more than one sense of that word.": *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 273.

[284] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 290 (Kiefel J).

[285] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 270-271 (French CJ, Gummow, Hayne, Crennan and Bell JJ) and 295 (Kiefel J).

the fee affected them more heavily than those intrastate competitors and thus reduced their market share or disproportionately reduced their profits, and they had not managed to do this: "[The Betfair CEO] agreed that the fee had not caused the appellant to lose a single dollar of back bet turnover and that the fee had not caused the appellant to lose a single dollar of commission. He admitted that the fee had not caused the appellant to change its competitive behaviour in any way in relation to its dealings with customers and its attempts to win business away from competitors"[286]. Likewise, the abstract possibility of such loss of market share, at some point in the future, due to its different commission structure was not sufficient – actual loss of market share or profit (disproportionate to intrastate competitors) must be made out: "it would be necessary to show that it disturbed the appellant's low margin operation *in fact*"[287] (emphasis in original). On the facts submitted, despite the different commission structures and profitability of the different wagering operators, there was no proof that the 1.5% fee equally imposed on all operators had a differential impact in the form of a loss of commercial advantage as between the different operators, as each one would similarly have to decide whether to pass on the fee to their customers or to absorb it within their cost structure[288]. To put it another way, there was no evidence that the market would do anything other than absorb the cost of the fee and move on as before: "the appellant had not pointed to evidence that any change in the competitive relativities would not readjust after the fee was introduced through a process by which the appellant and the appellant's competitors priced it into their margins."[289] It is clear,

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[286] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 277 (Heydon J).

[287] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 277 (Heydon J).

[288] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 270-272 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[289] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 277 (Heydon J)

then, that in considering whether impugned legislation satisfies the ‘protectionism’ element of the scope of s 92, the Court will look to economic and financial evidence to prove an actual loss (or capping) of market share by interstate traders, and hypothetical or abstract arguments based in economic theory alone will be insufficient.

In a similar vein, it is not sufficient for a claimant to point to a subjective intention on the part of the legislature (or the body administering the law) to create a ‘competitive or market advantage’ in respect of intrastate trade. It is the objective legal operation of the law and its practical economic effect in creating this ‘competitive or market advantage’ which is relevant for proving protectionism under s 92[290]. For instance, in *Betfair Pty Ltd v Racing New South Wales*, even though the judge at first instance had found that some members of Racing NSW had indeed intended to protect the intrastate trader TAB Corp from further losses to its interstate competitors (such as Betfair) by instituting the 1.5% licence fee, nevertheless the High Court held this subjective intention to be immaterial for determining whether the law objectively created ‘protectionism’ and so fell within the scope of s 92[291]. As has been seen, the Court found that no such protectionism was objectively created by the imposition of the fee. Before leaving this issue of subjective intention, though, it should be noted that the subjective intention of the legislature does become relevant at a later stage in the Court’s enquiries: if a law is found to be within the *scope* of s 92 because it objectively creates a ‘discriminatory burden of a protectionist

[290] *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 320 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See discussion of this case above at footnote 261 above.

[291] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 296-297 (Kiefel J). Her Honour did mention, however, that such a subjective intention might be relevant in an action for judicial review of Racing NSW’s decision to impose the fee, on the grounds that ‘protecting TAB Corp from competition’ might have constituted an *improper purpose* for such a decision by a body exercising public power (at 296). One might also suggest that, in the context of a judicial review, protecting TAB Corp from competition could constitute an *irrelevant consideration* in the making of such a decision.

kind', the Court will then consider whether there is any legitimate *justification* for such a law, with such justification to be found in the subjective purposes of the legislature. As might be expected, a subjective intention to protect intrastate trade is not a legitimate justificatory purpose! The question of justification is the subject matter of Part 2 of this thesis.

Protectionism and the Context of an Impugned Law:

As was seen above, in *Bath v Alston Holdings Pty Ltd* the majority viewed the impugned provision of Victorian law as discriminatory against interstate trade, and did not consider the broader legislative context of the impugned provision to be relevant. They reached the same conclusion on the issue of protectionism, stating that the particular provision of Victorian law which rendered the retailer's licence 25% more expensive if the retailer sold tobacco from sources other than licensed Victorian wholesalers would have a protectionist effect because of the effect it would have on interstate wholesalers: it would lessen the advantage which such interstate wholesalers would otherwise have enjoyed if their home State did not tax them at all (since their tobacco would have been cheaper than Victorian tobacco), or, if their home State did indeed tax them, the combined effect of their having to pay their home State tax and then the Victorian retailers' having to pay the equivalent of the 25% Victorian wholesale tax in respect of such tobacco could make interstate trade uneconomical[292]. The minority, on the other hand, did take into account the legislative context in which the particular provision of Victorian law applied, viewing this as the natural concomitant of the post-*Cole v Whitfield* focus on the real economic effect of impugned provisions[293]. Consequently, they came to the conclusion that it

[292] *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411, 425-426.

[293] *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411, 431.

did not create protectionism of intrastate trade because, from the perspective of wholesalers, retailers and consumers, the effect of the whole legislative scheme creates no competitive advantage for Victorian tobacco[294]. The minority's view is preferable on this point, for reasons similar to those offered in the previous Section relating to the discrimination issue in *Bath v Alston Holdings Pty Ltd*: isolating a provision from its legislative context does not allow its full practical economic effect to be determined, which is what *Cole v Whitfield* rightly defined as the measure for discrimination and protectionism in the scope of s 92.

Protectionism and Interstate Trade:

Although deciding the case on the basis of discrimination, the Court in *Barley Marketing Board (NSW) v Norman* also commented on the issue of protectionism. It had been alleged that the NSW barley marketing scheme had the effect of protecting small NSW growers against interstate buyers, because the pooling of NSW barley gave the Barley Marketing Board greater bargaining power than small individual growers would be have enjoyed. The Court rejected this argument, stating that any protection of small NSW growers against buyers applied just as strongly against NSW buyers as against Victorian buyers:

> ...[T]his element of "protection" in favour of growers, especially small growers, is not accompanied by any element of discrimination against the interstate trade in barley or interstate traders in that commodity...In-State and out-of-State maltsters must buy from the [Barley Marketing Board] if they wish to make purchases of barley produced in New South Wales.[295]

Thus, the only protectionism relevant for s 92 is protection of intrastate trade against interstate trade, not protection of one class of traders against another class of traders – provided that that

[294] *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411, 431-433.

[295] *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182, 202.

protection applies in the same way across State borders as it does within them. As Prof Leslie Zines pithily puts it: “The principle in *Cole v Whitfield* is not a guarantee of free markets, but is confined to free trade in the non-protectionist sense”[296].

In making out a loss of competitive advantage as against intrastate traders, it is not sufficient for a claimant to merely label one of its competitors which engages in a mixture of interstate and intrastate trade as an ‘intrastate trader’ simply on the basis that its principal place of business is located in that State, and thereafter for the claimant to proceed to compare its market share to the competitor’s before and after the legislation[297]. A contrast between the cases of *Castlemaine Tooheys Ltd v South Australia* and *Betfair Pty Ltd v Racing New South Wales* shows the importance of the specific factual situation of the claimant and its competitors in proving loss of competitive advantage as against intrastate trade. In *Castlemaine Tooheys Ltd v South Australia*, the parties had agreed in demurrer that that the interstate trader Castlemaine Tooheys had been gaining market share in SA before the introduction of the increased bottle deposit levy, but had then effectively had its market share capped by that legislative change, since the company could not use refillable bottles (and thus avoid the higher deposit levy) except after expensive modifications to its bottling plant and the establishment of expensive transportation routes for such bottles to and from its plant across the border. In *Betfair Pty Ltd v Racing New South Wales*, on the other hand, the fact that the 1.5% fee ended up taking a larger share of Betfair’s commission per wager than TAB Corp’s commission was not due to the stipulations of the legislation, but rather was due to the commercial decision which Betfair had made as to how it structured its commission; thus the legislation had not capped Betfair’s market share. In drawing

[296] James Stellios, *Zines’s The High Court and the Constitution* (6th edn, Federation Press 2015) 190.

[297] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 268 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

this distinction, the Court was intending to make out that s 92 shielded a claimant from loss of competitive advantage to intrastate traders which was due to the effects of government legislation, but did not shield a claimant from any loss of competitive advantage which was due to their own commercial decisions, in line with the rejection of the 'individual rights' theory discussed above. However, one could question the distinction between the situation of Castlemaine Tooheys and Betfair: if Betfair's commission structure is to be regarded as a commercial decision made by the company and not amenable to protection by s 92, could it not also be said that Castlemaine Tooheys's use of single-use bottles was likewise a commercial decision made by that company – presumably because they were cheaper than refillable bottles – and likewise not amenable to protection by s 92? If there is a logical distinction to be drawn here, it must rest on the fact that the law in *Betfair Pty Ltd v Racing New South Wales* applied the 1.5% fee equally to all wagering operators (with a company's commercial decisions about its commission-structuring then operating behind that), whereas the law in *Castlemaine Tooheys Ltd v South Australia* created separate and decisively unequal deposit levies for single-use and refillable bottles (such that a company's use of one kind of bottle or the other, and the competitive consequences thereof, were not just due to the company's decision but the law's operation).

Furthermore, the removal of a pre-existing burden which had exclusively fallen on intrastate traders and its replacement with one which falls equally on both interstate and intrastate traders does not constitute 'protectionism' in favour of intrastate trade, even though it 'benefits' intrastate trade at the expense of interstate trade, as it is simply distributing the burden in a manner which nullifies its previous market-distorting effect. In *Sportsbet Pty Ltd v New South*

Wales (2012)[298], heard concurrently with *Betfair Pty Ltd v Racing New South Wales*, the history of the 1.5% fee for the use of the NSW racing form was explained: prior the implementation of the race field license fee system, it had only been intrastate traders who were contributing to the upkeep of the racing industry (promotion, animal welfare inspection, fraud prevention, etc.), as the Government of NSW only licensed NSW-based traders and the metropolitan racing clubs in NSW only levied fees upon on-course bookmakers (i.e. intrastate traders). As a result, interstate wagering operators were able to free-ride on a NSW racing industry to which they paid no maintenance fees, and as such interstate operators proliferated with the growth of online betting, this situation became intolerable to the NSW racing industry. The purpose of the imposition of the race field licence fee system in 2008 had been to change that, by equalising the burden of funding the industry. However, even though the immediate impact of this change was that the competitive position of interstate traders was weakened as against intrastate traders, since they would now have to start contributing industry maintenance fees from which they had previously been exempt, this did not constitute 'protectionism' under s 92 because it was not really the *creation* of a competitive or market advantage for intrastate traders but rather the *removal* of a selective, market-distorting disadvantage from intrastate traders which the previous funding scheme had imposed: "[b]y itself, the removal of a disadvantage for New South wales traders by imposing a regime that applied equally to non-New South Wales traders does not violate [s 92]"[299] This situation can be contrasted with that of *Bath v Alston Holdings Pty Ltd* discussed above, since that case concerned the imposition of a special fee on the retail of interstate tobacco (albeit to compensate for upstream fees which had already been exclusively imposed on

[298] [2012] HCA 13, (2012) 249 CLR 298.

[299] *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 328 (Heydon J).

intrastate tobacco), not a facially neutral fee as in the instant case. The fact that the law did not in its terms or in its practical effect seek out interstate traders in particular, and that it corrected a pre-existing market distortion that had prejudiced intrastate traders, were important factors in deciding that there was no 'protectionism' being worked against interstate trade here.

Subsequent Developments:

The formulation enunciated in *Cole v Whitfield* in 1988 of 'discrimination of a protectionist kind' has held firm throughout the subsequent cases in the intervening 20 years, despite some critical commentary[300], with the cases that followed it all acting as some sort of gloss on that

[300] The most notable criticism is that levelled by Prof Villalta Puig after the Court in *Betfair Pty Ltd v Western Australia*, the first case on the subject in over a decade, decided not to amend it: Gonzalo Villalta Puig, 'Section 92 since Betfair Pty Ltd v Western Australia' (2009) 11(4) Constitutional Law & Policy Review 152. Villalta Puig argues in favour of the abandonment of the protectionism element of the test, which he forcefully decries as "contextually irreconcilable, ahistorical, factually unascertainable, narrow, outdated, constitutionally questionable, and economically inefficient" (at 153); this would leave merely 'discrimination against interstate trade' as the measure for infringement of s 92 (subject to any applicable justification). Villalta Puig argues that the requirement of protectionism cannot be reconciled with surrounding sections in Chapter IV of the Constitution, that it contradicts the intentions of the authors of the Constitution, that it is practically difficult to ascertain the existence of protectionism, that mere discrimination is enough to fragment the Australia-wide single market which the Constitution attempts to create, that such fragmentation is an inefficient legislative restriction of that single market, and that when the Court overturned the pre-*Cole v Whitfield* jurisprudence it effectively expanded government power over citizens' commercial affairs without a proper referendum to alter the Constitution to do so (at 155-156). In the opinion of this author, none of these arguments should be accepted. As to the first two (the context of s 92 and the intention of the authors), the Court in *Cole v Whitfield* went to some lengths to examine both questions and came to the conclusion that the intention and the context of s 92 was the elimination of the protectionism which had marred the economic relationship between the Australian colonies before Federation; the reasoning of the Court is sound, and no new historical information has come to light to upend that reasoning. As to the question of practicality, it is surely no more difficult for the Court to identify protectionism than it is to identify discrimination (which is looked for in practice, not merely of the face of the law); certainly the Court had no trouble in finding protectionism in *Bath v Alston Holdings Pty Ltd*, *Castlemaine Tooheys Ltd v South Australia* and *Betfair Pty Ltd v Western Australia*. As to the question of whether mere discrimination fragments the single Australian market, it is important to understand exactly what kind of law would be discriminatory *but not protectionist*: it would be a law which in practice falls more heavily on an interstate trader but does not give any competitive or market advantage to intrastate traders. An example might be if one particular State parliament objected to the phenomenon of betting on the outcome of elections, and so passed a law forbidding the offering in that State of wagering services of any kind in respect of the outcome of any election, but other States had no such law. This law would then fall more heavily on out-of-State wagering providers (since it would prohibit one of the services they provided elsewhere, and thus put a whole in their commercial operations if they wished to trade into the State in question) than on in-State providers (who could not offer such a service anywhere, and for whom it was thus not part of their commercial operations), but it would not grant any competitive advantage to in-State providers (since it would not protect their market share or profits). (Contrast this to the situation in *Castlemaine Tooheys Ltd v South Australia* , in which the higher-deposit interstate single-use bottles were in competition with the lower-deposit intrastate refillable bottles, and *Betfair Pty Ltd v Western Australia*, in which the interstate service of Betfair's betting exchange was substitutable, and in

formulation, or an exploration of a new dimension of it in new factual circumstances. Indeed, the volume of that subsequent case law has been notably low, by comparison with the frequency with which s 92 was litigated in the pre-*Cole v Whitfield* era. This was not unexpected: after *Cole v Whitfield* was delivered, it was anticipated that the volume of laws being litigated and ultimately invalidated under s 92 would be significantly reduced compared to the previous state of the jurisprudence, both because the unanimous decision removed the ambiguity of the prior 90 years as to what the proper test for the scope of s 92 was, and because the test of 'discrimination

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competition, with the intrastate services of local bookmakers and totalisators.) It is true that such a law would fragment the Australia-wide market, but it must be seen that this is a kind of fragmentation which the Constitution countenances. The very *existence* of States with legislative capacity to regulate commercial activity – and therefore to do so in a manner different from other States – is a fact on which the Federal Constitution is based, and the kind of single market which the Constitution envisions, then, must be one that acknowledges that laws will differ from State to State. What the Court in *Cole v Whitfield* showed in its examination of the drafting history of s 92 was that the Constitution would *not* countenance the kind of single market fragmentation which came from State laws *protecting* their domestic industry against interstate competition. The same response serves to meet Prof Villalta Puig's argument about the economic inefficiency of fragmentation: it may very well be economically inefficient, but it is the legal principles of textual interpretation, not the dictates of economics, which determine the meaning to be given to s 92. As to the final argument, on *Cole v Whitfield* having supposedly represented a judicial expansion of legislative power over commercial affairs without proper constitutional amendment, it is apposite to echo the words of US Chief Justice John Marshall in the famous case of *Marbury v Madison* 3 US 137 (1803): "It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule" (at 177). The High Court has interpreted and re-interpreted s 92 many times over the century and more of its existence (which oft our page hath shown), and the test for invalidity has caught more or fewer laws from time to time as that test has been reformulated according to a trade restriction or discrimination analysis; it is intellectually unfair to select the current (and most enduring, and most widely supported) version of that test and suggest that it represents some sort of judicial end-run around the amendment provisions of the Constitution. For all these reasons, in the opinion of the author, Prof Villalta Puig's arguments in favour of jettisoning the protection element of the s 92 test and leaving only discrimination as the test for breach of that section should not be accepted.

Looking at these questions with a wider lens, while it is technically possible to conceive of discrimination without protectionism in line with the example cited above, in practice such a test would effectively amount to the return to the trade restriction analysis, as this definition of 'non-protectionist discrimination' is so wide that it would catch any State law that regulated commerce more stringently than a neighbouring State in which a trader is based. Prof Villalta Puig admits as much in his commentary on the subsequent cases *Betfair Pty Ltd v Racing New South Wales* and *Sportsbet Pty Ltd v New South Wales*: "A non-discrimination norm, ultimately, translates into a market access test for s 92, that is, a kind of rule of mutual recognition whereby products that are lawful in one State warrant full access to the market of other States." Gonzalo Villalta Puig, 'Betfair and Sportsbet: The Remains of the Federal Purpose of s 92 of the Australian Constitution' (2013) 87 Australian Law Journal 178, 179. The wider debate here is not whether mere discrimination is the proper test for s 92, but whether the Australia-wide market which s 92 intends to create is one which envisages traders having to comply with the laws of the State in which they are trading – that is, what degree of State legislative capacity is compatible with a *single* market. This question is taken up in Chapter V.

of a protectionist kind' defined a narrower scope than previous tests based on mere trade restriction[301]. It has also been suggested[302] that the adoption in 1995 of the Competition Principles Agreement, a joint agreement between the Commonwealth and all the States which prohibits laws which restrict competition except where there is no other means of achieving a certain purpose or the benefits outweigh the restriction of competition[303], has served to lessen the likelihood of any Australian government passing a law which would potentially impinge upon s 92 as defined by the Court. However, there is one particular area in which the established formulation of the test is starting to come under strain: changes in technology since the 1980s and consequent changes in how markets operate across – or independently of – State borders have raised the question of whether the *Cole v Whitfield* test should be carried forward. A question which has been gaining increasing prominence in the most recent judicial decisions on the subject of s 92, namely the two *Betfair* cases[304], is this: in an age of internet commerce, when the physical location of a trader is increasingly irrelevant to how and where it does business (and is indeed more of a legal technicality than a practical reality), what exactly does it mean for a

[301] Gerard Carney, 'The Re-Interpretation of Section 92: The Decline of Free Enterprise and the Rise of Free Trade' (1991) 3 Bond Law Review 149, 155; P H (Patrick Harding) Lane, 'Recent Trends in Constitutional Law' (2002) 76 ALJ 154, 154.

[302] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 452-453 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 291-292 (Kiefel J); Naomi Oreb, 'Betting Across Borders – *Betfair Pty Limited v Western Australia*' (2009) 31 Sydney Law Review 607.

[303] Competition Principles Agreement, 11 April 1995 cl 5(1). These concepts shall be seen in Chapter VI to inculcate into governmental competition policy the judicial concepts of 'necessity' and 'proportionality' which arise in respect of the justification of laws which come within the scope of s 92. The former is part of the High Court's jurisprudence on justification, the latter, at present, is not.

[304] Passing reference is made in the Joint Judgment of Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, both in the context of and what it means for a law to protect the 'domestic industry' of a State (at 453) and in the context of justification by reference to the welfare of 'the people of a State' (at 474; considered in Chapter VI). See also Naomi Oreb, 'Betting Across Borders – *Betfair Pty Limited v Western Australia*' (2009) 31 Sydney Law Review 607, 611; and Eli Ball, 'Section 92 and the Regulation of E-Commerce: A Casenote on Betfair Pty Ltd v Western Australia' (2008) 36 Federal Law Review 265, 273-276. The question is agitated further in *Betfair Pty Ltd v Racing New South Wales*.

trader to be engaged in 'interstate' trade? If State boundaries no longer constrain trade and are arguably non-existent in such a market, how can it be said that the trade is 'interstate'? Is it enough to settle this question merely to look to the physical situs of a trader, in the form of their registered office? Or is it the location of their computer servers which determines the issue? In the context of purely online commerce, does the physical location of a trader's registered office or computer servers actually have any relevance? In *Betfair Pty Ltd v Racing New South Wales*, the Court recognised that it could be questioned whether Betfair was engaging in 'interstate' trade, given the irrelevance of State borders to the online betting market, but reserved judgment on this matter[305]. Furthermore, Kiefel J specifically adverted to the larger question of whether, given the development and proliferation of such online and effectively borderless markets, the Court should develop its formulation of the scope of s 92 beyond that laid down in the pre-internet era in *Cole v Whitfield* – although Her Honour declined to do so in the instant case:

> It is not necessary to the outcome of this appeal to determine whether a further step should be taken, beyond what was decided in *Cole v Whitfield*, to recognise that *any effect lessening competition in a market which operates without reference to State boundaries is contrary to s 92*. This is clearly a large question and requires a particular set of facts to illuminate it. This case does not involve such facts.[306] (emphasis added)

The law, it seems, is straining to come to terms with the new forms of online, borderless markets which have developed in the Internet Age. It is very much an open question how the Court will approach the question of 'interstateness' should it be directly raised in a future case on s 92 – say, if a trader's registered office were located in the State whose law is complained of but its servers located outside that State, or *vice versa*. Will the words of s 92, describing "trade,

[305] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 271 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[306] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 293 (Kiefel J).

commerce and intercourse among the States" be interpreted to include Australia-wide trade occurring across, and without respect to, State borders[307]? If so, will the discipline of economics make further inroads into the formulation of the legal test for the scope of s 92 by providing a metric for infringement of s 92 in the form of 'decreased levels of competition in a borderless market' – in derogation of the views of Heydon J in *Betfair Pty Ltd v Racing New South Wales* discussed above? Only time, and the litigiousness of wealthy online trading companies, will tell[308].

Section 4: Conclusion:

After decades of oscillating between the discrimination analysis and the trade restriction analysis for defining the scope of s 92, the law in Australia has now decisively settled on the former.

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[307] After *Betfair Pty Ltd v Western Australia*, Simpson detected in the Court's discussion of a nation-wide betting market a movement away from 'interstateness' as an essential element in the discrimination which s 92 seeks to prevent: Amelia Simpson, 'Comment: Betfair Pty Ltd v Western Australia' (2008) 19 Public Law Review 179. Stellios, on the other hand, sees the Court's economic analysis as a means of identifying the presence or absence of the relevant interstate discrimination: "While the broad language of the joint judgment [in *Betfair Pty Ltd v Western Australia*] provides a foothold for [the view that 'interstateness' is unnecessary], it does not necessarily follow from the judgment itself…The point of emphasising the demand and supply dimensions of the national market was presumably to highlight the close attention needed for the s 92 analysis in markets where products, traders, wagering events and customers are scattered across jurisdictions and operate at different layers within the national market. Although it is more difficult in national markets to differentiate between intrastate and interstate trade, the impugned provisions in *Betfair (No 1)* provided such an example.": James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 180-181.

[308] At time of writing, Sportsbet Pty Ltd is in dispute with the State of South Australia over the government's recent imposition of a 15% tax on all net wagering revenue collected from gamblers located in that State, which commenced on 1 July 2017. At present, the dispute is political and economic, but it remains to be seen whether Sportsbet may seek to pursue legal action against SA, and whether it would rely on s 92. Such an action would give the Court the opportunity to revisit the question of how 'interstateness' should be understood in an online, borderless market, given that Sportsbet now has its registered office in Victoria and its computer servers (and wagering operator's license) in the Northern Territory. For further details on Sportsbet's objection to the imposition of the tax, see 'Sportsbet launches 'stop the punters tax' campaign' (*The Australian Financial Review*, 1 August 2016) <www.afr.com/business/gambling/sportsbet-launches-stop-the-punters-tax-campaign-20160801-gqi5r5> accessed 22 April 2019, and 'Sportsbet's "absolute dummy spit" over SA's gambling tax' (*IN Daily*, 17 August 2016) <http://indaily.com.au/news/local/2016/08/17/sportsbets-absolute-dummy-spit-over-sas-gambling-tax/> accessed 22 April 2019. See also Charles Livingstone 'South Australia's gambling tax highlights the regulatory mess of online betting' (*The Conversation*, 10 February 2017) <http://theconversation.com/south-australias-gambling-tax-highlights-the-regulatory-mess-of-online-betting-72495> accessed 22 April 2019.

Since the unanimous decision of the Court in *Cole v Whitfield* in 1988, there has been no suggestion of judicial disagreement on this fundamental point, nor any willingness to revisit it. It is now settled that s 92 prohibits the imposition of 'discriminatory burdens of a protectionist kind' against interstate trade. Discrimination essentially means unequal treatment, and this discrimination may be found on the face of the law or in its practical effect, even where the law makes no mention of interstate or intrastate trade as such. Such discrimination must be within the same market, and cannot be proven simply by showing that different State markets are regulated differently, provided that interstate and intrastate traders are treated equally in each. Where a particular provision of a law imposes a burden exclusively on interstate trade, this will constitute discrimination even if it merely offsets an equal burden placed on intrastate trade by another provision of the law (although the correctness of this judgment is disputed). Discrimination must also be shown to be levelled at the 'common circumstances' of interstate trade, and a law will not be discriminatory merely because of the effect it happens to have on a certain interstate trader who chooses to conduct their business in a particular way.

Protectionism denotes a 'competitive or market advantage' being created in favour of intrastate trade. This competitive or market advantage must be proven in the form of a loss of interstate traders' market position or profits (or an impediment to their increasing them), and it will not be sufficient to merely allege that, as an abstract matter of economics, interstate traders *may* stand to suffer a competitive disadvantage. Likewise, it will not be sufficient to make out a subjective intention on the part of the legislature to benefit their own home-State traders, as it is the objective fact of a competitive advantage being created, not the subjective intention behind the law, that matters for purposes of the scope of s 92. Additionally, the removal of a previous burden which had exclusively fallen on intrastate traders and its replacement with one equally falling on interstate and intrastate traders does not constitute protectionism.

Both the discrimination and protection elements of the test for s 92 must be proven, and there is no ‘automatic’ inclusion of certain kinds of laws as coming within the scope of s 92. Although there is growing judicial commentary on what it actually means for trade to be ‘interstate’ when it is occurring in a borderless nation-wide market, and whether the measure for protectionism should in future look to overall levels of competition in such a market, at present, the Court has maintained and developed the same jurisprudence laid down in *Cole v Whitfield*.

As has been seen, there is a strong emphasis on the importance of *equal treatment* between interstate and intrastate traders, and where a law institutes any unequal treatment between these two, even if it takes some other characteristic of the trade as the criterion for this unequal treatment, the Court will be ready to identify discrimination and protectionism where evidence is provided. Conversely, in those cases where laws have instituted general schemes without distinction for different types of trade, the Court has resisted judging such laws to fall within the scope of s 92. This should not be a surprise, since this is, at its heart, what the discrimination analysis is based on – the idea that a State legislature should treat out-of-State traders equally to how it treats its own in-State traders.

PART 1: SCOPE

SUBPART 2: EUROPEAN UNION

CHAPTER III:
THE SCOPE OF artt 34 and 35 TFEU ON FREE MOVEMENT OF GOODS

Treaty on the Functioning of the European Union (English language edition):

Article 34: Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 35: Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

A Union of European Member States, Governed By Treaties:

Unlike the Commonwealth of Australia, the European Union did not come into existence at one single moment. It grew out of a series of treaties between European countries in the aftermath of World War II and in the shadow of the Cold War, each progressively tying those Member States' economies and societies closer together[309], and over the decades it has grown

[309] The necessity for European international co-operation to grow piece by piece over time, and the link between continental peace (a relatively rarity in Europe, since the fall of the Western Roman Empire in 476 A.D.) and economic interdependence, were well appreciated by the Founding Fathers of the European Union. Robert Schuman, a Luxembourg-born statesman who served as Foreign Minister of France (1948-153) and twice as Prime Minister (1947-1948, and again during 1948), famously declared of the proposed European Coal & Steel Community, a forerunner to the European Union, that "*L'Europe ne se fera pas d'un coup, ni dans une construction d'ensemble : elle se fera par des réalisations concrètes créant d'abord une solidarité de fait…[La solidarité] de production qui sera ainsi nouée manifestera que toute guerre entre la France et l'Allemagne devient non seulement impensable, mais matériellement impossible*" ("Europe will not be made all at once, or according to a single plan. It

from six initial Member States all located in Western Europe to, at time of writing[310], 28 Member States stretching from the North Sea to the Mediterranean and the Atlantic Ocean to the Euxine.

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will be built through concrete achievements which first create a de facto solidarity…[The solidarity] thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible"): *Schuman Declaration 9 May 1950*, available at 'European Union – Europe Day' <http://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_fr> (original French) and <http://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en> (English translation) accessed 22 April 2019.

[310] Pursuant to the results of a referendum held on 23 June 2016, the United Kingdom, which joined the EU in 1973, will – probably – be leaving the EU in 2019. Article 50 of the Treaty on European Union (TEU) envisions a two-year exit negotiation process beginning when the withdrawing country officially notifies the European Council of their wish to withdraw, although this process may be extended beyond the normal two year period by the common consent of the withdrawing Member State and all the remaining EU Member States. Following the 2016 referendum, there was significant legal contention over whether the official withdrawal notification could be issued by the UK Government of its own motion as a mere executive act (as for withdrawal from any other international treaty) or whether the UK Parliament must first authorise the Government to do so (as the passage of the *European Communities Act* 1972 (UK) by the Parliament on the UK's entry into the EU had created legal rights which only that Parliament could alter or destroy). On 24 January 2017, the Supreme Court of the UK (by an 8-3 majority) declared itself to be of the latter opinion, in the case of *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61. On 13 March 2017, the UK Parliament passed the European Union (Notification of Withdrawal) Bill, which was given Royal Assent and made an Act of Parliament on 16 March 2017. This brief but momentous Act, whose effective section is a mere 50 words long, authorised the Prime Minister to give the official notice of withdrawal, and Prime Minister Theresa May accordingly did so by way of a letter dated 29 March 2017 to Donald Tusk, then-President of the European Council. Tusk's sorrowful response was the now-famous "We already miss you. Thankyou and goodbye".

The intention at the time, and until very recently, was that the United Kingdom would leave the European Union on 29 March 2019.

It was not to be.

More than a year and a half of negotiations between the British Government and the European Union produced the Withdrawal Agreement, which detailed the terms of the UK's departure from the EU, and the Political Declaration, which outlined the intended future relationship between the UK and the EU after withdrawal. The Withdrawal Agreement and Political Declaration were rejected by the UK House of Commons (432-202) on 15 January 2019. After the British Government and the EU agreed on a further Joint Statement on the future position of Northern Ireland during the withdrawal process, the Withdrawal Agreement and Political Declaration were again proposed to the House of Commons, but were again rejected (391-242) on 12 March 2019. With the planned withdrawal date of 29 March 2019 approaching, on 22 March 2019 the UK and the other Member States agreed to an extension of the departure date to 12 April 2019. On 27 March 2019, a range of further proposals on withdrawal arrangements (including withdrawal without any agreement at all or cancelling withdrawal altogether) were made by various MPs, but each failed to secure majority backing in the House of Commons. On 29 March 2019 (the originally-scheduled 'Brexit Day'), the Government once again proposed the Withdrawal Agreement to the House of Commons, this time without the accompanying Political Declaration; once again it was rejected (344-286). On 01 April 2019, further votes were held on a short-list of those MPs' withdrawal proposals which had come closest to passing on 27 March 2019, but again none managed to secure a majority. With the second planned withdrawal date of 12 April 2019 now approaching, on 10 April 2019 the UK and the other Member States agreed to a further extension of the departure date to 31 October 2019 (unless a withdrawal agreement in some form is earlier passed by the UK Parliament, in which case the UK will leave on the first day of the following month) Thus, as at the date of entry of this thesis to the Bodleian Library, the United Kingdom remains – for the time being at least – a member of the European Union.

The treaty provisions which are the concern of this thesis, however, have remained essentially unchanged since the European Union, then known as the European Economic Community, was brought into existence in 1957[311]. These provisions, which guarantee the free movement of goods and services within the EU, were an integral part of the attempt to create a common economic space encompassing all the treaty signatories, and on this rock has the European Union built its temple, with all its superstructure – common foreign policy, a monetary union, a continent-wide arrest warrant, and so forth – constructed over the intervening decades.

This foundation of the European Union is of course broader than just the prohibition of non-fiscal impediments to the free movement of goods cited above. The Treaty on the Functioning of the European Union (TFEU) and its predecessors also address fiscal impediments to free movement of goods, creating a common customs tariff against non-Member States ('third states') and prohibiting the levying of customs duties, or charges having equivalent effect, on the import or export of goods between Member States (art 30 TFEU[312]). The TFEU prohibits

[311] The original treaty in which the articles on free movement of goods appeared was the Treaty Establishing the European Economic Community (1957). Over the years, this original treaty was amended by the Single European Act (1986), the Treaty of Maastricht (1992) (dropping 'Economic' from the original treaty's title), the Treaty of Amsterdam (1997), the Treaty of Nice (2001), and the Treaty of Lisbon (2007) (the latest consolidation, operative from 2009, renaming the document the 'Treaty on the Functioning of the European Union', or TFEU). The specific version of the TFEU which will be referred to hereafter in this thesis is to be found in the Official Journal of the European Union (effectively, the EU Gazette) under the citation Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47. None of the amending treaties mentioned above had any effect on the relevant articles, except for the Treaty of Amsterdam and the Treaty of Lisbon's renumbering of the articles (and the consequent amendment to what is now art 36 so that it would still refer to the two articles immediately preceding it). The inconsistency of commas as between art 34 and art 35 has remained since 1957, and remains meaningless.

[312] In the citation of articles from the Treaty on the Functioning of the European Union, the practice is to place 'TFEU' after the article number to indicate that reference is being made to the article as it stands after the entry into force on 1 December 2009 of the Treaty of Lisbon, which implemented extensive renumbering of the articles from the previous version of the treaty (under its prior name of the 'Treaty Establishing the European Community', or TEC). This builds on the practice adopted in 1999 after the Treaty of Amsterdam came into effect and instituted a similar renumbering scheme: see CJEU Press Release No 57/99. The historic equivalents of the relevant provisions, and the periods in which those numberings prevailed, are as follows: artt 30, 34 & 36 of the EEC Treaty (25 March 1957 to 30 April 1999) correspond to art 28, 29 & 30 TEC (1 May 1999 to 30 November 2009), which correspond to art 34, 35 & 36 TFEU (1 December 2009 to present). The necessity for distinguishing exactly which treaty's

taxation which is discriminatory against the goods of other Member States (art 110 TFEU). It guarantees the free movement of workers (art 45 TFEU), freedom of establishment (art 49 TFEU), freedom to provide services (art 56 TFEU) and free movement of capital (art 63 TFEU). Together with these other great freedoms enshrined in the TFEU, the provisions on free movement of goods are intended to aid in the creation of the 'internal market' described in art 26 TFEU, that is, "an area without internal frontiers, in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of [the TFEU and the Treaty on European Union (TEU)]"[313]. The legal mechanisms by which the establishment of this internal market is achieved are, broadly, the determination by the Court of Justice that a national law is incompatible with EU law (known as 'negative integration', as it requires the disapplication of a national law without replacing it with any other law) and the creation of European Union-level laws by the legislature of the European Union (known as 'positive integration', because it creates one new law to replace the various different national laws of the Member States). As was indicated in the Introduction, this thesis is concerned with the examination of judicial decisions on the subject of *non-fiscal* impediments to the free movement of goods and services, so negative integration under artt 34-36 TFEU (free movement of goods) will be the focus of this Chapter,

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articles are being discussed is obvious! For ease of understanding, in this thesis all quotations from cases and other sources from the pre-Lisbon era will be 'updated' to refer to the articles as they are currently numbered in the TFEU.

[313] For the centrality of art 34' s guarantee of free movement of goods to the creation of this internal market, see Case C-265/95 *Commission v France ('Protests Against Imported Food')* [1997] ECR I-6959, para 30. Historically, the designations 'common market', 'single market' and 'internal market' have all been used the EU treaties to describe this concept. To the extent that there was a concrete difference between them, it seemed that the 'common market' was a stage in the progressive creation of the 'single market', which was a version of the 'internal market'. The Court of Justice offers this explanation: "The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market" (Case C-15/81 *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal* [1982] ECR 1409, para 33**).**

and negative integration under art 49 TFEU (free movement of services) will be the focus of Chapter IV.

A European Court to Judge European Union Treaties:

The court which is called upon to adjudicate complaints pursuant to the TFEU is the Court of Justice of the European Union[314]. Created under the Treaty Establishing the European Coal and Steel Community (1951) and continued and expanded under all the successive EU treaties, the Court of Justice consists of 28 members who are formally appointed by common accord of all the Members States for a six-year renewable term, with one Judge being nominated by each Member State[315]; the Judges elect one of their own to serve as President of the Court of Justice for a 3 year renewable term[316]. The Court normally sits in chambers of 3 or 5 Judges, but will sit as a Grand Chamber of 15 Judges on request from a Member State or EU institution party to litigation, which it tends to do when important matters of law are under consideration[317]. Given

[314] Under art 19 TEU, formally the 'Court of Justice of the European Union', the EU legal structure, comprises the Court of Justice, the General Court and the Civil Service Tribunal. The General Court is the court of first instance for most cases in which an organ of the EU is the defendant, and appeal lies from the General Court to the Court of Justice. The Civil Service Tribunal hears cases concerning disputes between the EU and its employees, with appeal lying from the Civil Service Tribunal to the General Court. Neither of these latter bodies is relevant for present purposes, as it is the Court of Justice itself which hears the sort of cases which concern alleged violations of the free movement provision of the TFEU. Henceforth, references to 'the Court' shall be to the Court of Justice in the specific sense of the highest court in the EU legal structure.

[315] Art 19 TEU.

[316] Art 253 TFEU. Half of the Judges come up for replacement or re-appointment every 3 years: art 253 TFEU and art 9 of the Statute of the Court of Justice of the European Union ('CJEU Statute').

[317] Art 16 CJEU Statute. There are at present 10 regular chambers (6 chambers of 5 Judges, 4 chambers of 3 Judges), and most Judges are assigned to multiple chambers at once. The same article of the CJEU Statute also makes provision for the Court of Justice to sit as a Full Court of 28 Judges when hearing a case to dismiss the European Ombudsman, a member of the EU Commission or a member of the EU Court of Auditors, or when the Court considers a case to be of exceptional importance.

the stipulation that the Court's decisions are made by majority[318] and the requirement that its deliberations be kept secret[319], all its judgments are delivered *in banco*, that is, as a single judgment of the Court as a whole without the lodgement of any dissenting opinions[320]. The Court of Justice has broad jurisdiction to judge all matters of EU law under the TFEU and the TEU[321] (save for certain exemptions with regard to EU foreign affairs policy), and in cases concerning the free movement provisions of the TFEU, the Court typically takes cognisance of a case upon a reference from a court of one of the Member States[322] or a complaint laid by the EU Commission against a Member State for failure to uphold provisions of the Treaties[323]. From the point of view of the Member State court making such a reference, the Court of Justice can be regarded as a specialist tribunal adjudicating on matters of EU law, to which a case is sent and

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The chambers of 3 and 5 Judges are composed as follows. The leader of each chamber is elected by the college of Judges as a whole, 5-Judge chambers for 3 years, 3-Judge chambers for 1 year (art 50 CJEU Statute and art 12 Rules of Procedure of the Court of Justice of the European Union). When a case comes to the Court, the President appoints a certain Judge to act as *Rapporteur* on the case (art 15 Rules of Procedure), and the Court in general meeting (all the Judges and Advocates-General, with the President presiding) decides to which chamber it will be allocated, along with its *Rapporteur* (art 60 Rules of Procedure); the chamber is then completed with the requisite number of Judges according to a rota system (art 28 Rules of Procedure). The Grand Chamber, on the other hand, comprises the President, the Vice-President (elected in the same fashion as the President), the leaders of the 5-Judge chambers, the *Rapporteur* on the case and the requisite number of further Judges according to a rota system (art 27 Rules of Procedure).

[318] Art 17 CJEU Statute.

[319] Art 35 CJEU Statute.

[320] Art 32 (4) Rules of Procedure. For readers from a common law background, this will no doubt seem unusual, but the prohibition of the publication of individual judicial opinions may be understood as an attempt to protect the integrity of judgments which are being delivered by Judges who *lack security of tenure*. Since their jobs are up for renewal (or not) by their home State government every 6 years, if judgments were to be delivered under the name of individual Judges, they would be subject to a conflict of interest between their duty to provide an honest account of their judicial opinion and a desire not to deliver a politically unpopular verdict (especially where the case concerned a matter of high controversy in their home State), hence the amalgamation of all Judges' individual opinions into the unitary, anonymous 'judgment of the Court'.

[321] Art 263 TFEU.

[322] Art 267 TFEU.

[323] Art 258 TFEU.

then returned with the EU law question answered. From the point of view of the Court of Justice itself, EU law is supreme over all the Member States' individual legal systems, and the Court of Justice is a supreme court answering questions of law within its purview and then referring cases back to lower, Member State courts for factual determination. The existence of multiple, equally arguable points of view – national and supranational – is a pervasive feature of the entire institution of the European Union.

The Court is aided in its deliberations by a figure quite unfamiliar to those from a Common Law background, but quite familiar to those from the Civil Law tradition: an Advocate-General. After the parties to the case have presented their arguments before the Court, the Advocate-General will provide a lengthy Opinion to the Court containing his or her recommendations, involving an explication of the relevant law and how it should be applied in the instant case. The Advocate-General is intended to be an independent legal expert aiding the Court, separate from the parties and any witnesses which they may call. Although the Advocate-General's Opinion is merely advisory to the Court, in practice it is highly influential[324], and since it is the product of a single author (unlike the Court's *in banco* judgment), it tends to be a more thoroughgoing examination of the intricacies of the law, such that where the Court has indeed agreed with the Advocate-General, the latter's Opinion may be in effect fill in *lacunae* in the official judgment in which the need for agreement sometimes trumps the need for detail and clarity. There are at present 11 Advocates-General, with each of the six most populous

[324] A recent study has shown that the Court is 67% more likely to annul an impugned Act (or part thereof) if the Advocate-General has made such a recommendation, compared to where the Advocate-General has recommended that the Court dismiss the case or declare it inadmissible: Carlos Arrebola, Ana Julia Mauricio and Héctor Jiménez Portilla, 'An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union' (2016) University of Cambridge Legal Studies Research Paper Series 3/2016 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714259> accessed 22 April 2019.

Member States[325] appointing one, and the remaining five being appointed in rotation amongst the other Member States; like the Judges, they serve six-year renewable terms and are formally appointed by the common accord of Member State governments[326]. The Court of Justice chooses one of them to serve as First Advocate-General for a year, and the First Advocate-General then decides which Advocate-General will advise on each case.

The Scope of the Prohibition on 'Quantitative Restrictions and Measures Having Equivalent Effect' under artt 34 and 35 TFEU

Just as with the jurisprudence of the High Court of Australia which was discussed in the previous two Chapters, the TFEU's provisions on free movement of goods have been interpreted by the Court of Justice as requiring a two-stage analysis of an impugned legislative or administrative measure: the Court must first consider whether it comes within the *scope* of the prohibition laid down in the Treaty, and, if it does, the Court must then consider whether it is nonetheless a *justified* restriction, thereby escaping incompatibility with EU law. Indeed, the distinction between scope and justification and the need for a two-stage analysis is all the clearer in EU law, given the separation of the articles dealing with these two elements: artt 34 and 35 lay down a prohibition on import and export restrictions, and then art 36 provides for justification for certain kinds of measures which have come within the scope of the previous two articles. This

[325] Germany, France, UK, Italy, Spain and Poland. As at the time of writing, the impact which the UK's impending withdrawal from the European Union in March 2019 (see footnote 310 above) will have on the selection of Advocates-General is unknown; however, the simplest and least contentious, and so most likely, solution would be for the UK's nominated 'slot' not to be succeeded by the next most populous country (Romania), but rather for the slot to return to the general pool of Advocates-General chosen by the other Member States in rotation. See the comments of AG Szpunar cited in Piotr Maciej Kaczynksi 'Brexit unexpected fallout in the Court of Justice' (*2019EUelectionsPoland.com*, 26 March 2019) <http://2019euelectionspoland.com/2019/03/26/brexit-unexpected-fallout-in-the-court-of-justice/> accessed 22 April 2019.

[326] Art 253. Likewise, half of the group of Advocates-General (i.e. 5 or 6 alternately) are up for replacement or re-appointment every 3 years.

Chapter will examine the Court of Justice's jurisprudence on the scope of the prohibition on import and export restrictions, that is, artt 34 and 35. Justification under art 36 will be the subject of Chapter VII. Just as was seen with respect to the High Court of Australia in the previous Chapters, in adjudicating questions of free movement law, the Court of Justice must perform a complicated balancing act on multiple different planes, as Prof Möstl puts it, balancing "the regulatory autonomy of the Member States to pursue legitimate aims of public interest…[against] the functioning of the internal market"[327], and "respect for freedoms and rights of the individual, on the one hand, and the legitimate pursuit of public interests on the other"[328].

Articles 34 and 35 TFEU provide that quantitative restrictions on imports and exports and all measures having equivalent effect are to be prohibited between Member States. Thus, there are two concepts at work here, firstly, the concept of a 'quantitative restriction', and secondly, the concept of a 'measure having equivalent effect'. Since quantitative restrictions *per se* are largely self-explanatory – quotas limiting the amount of a certain good which may be imported or exported – and do not tend to be an area of live controversy, they shall be passed over in favour of the more significant element of 'measures having equivalent effect'.

[327] Markus Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405, 411.

[328] Markus Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405, 407.

Section 1: 'Measures Having Equivalent Effect' under art 34 TFEU

There have been a number of particularly important landmark cases which have contributed to the development of the concept of 'measures having equivalent effect' to restrictions on imports[329], and because the proper definition of 'measures having equivalent effect' has oscillated back and forth a few times between competing formulations, it will be necessary to set out the evolution of the case law on this topic, just as was done for the historical Australian jurisprudence in Chapter I.

Early Cases on Mere Formalities:

It was established relatively early on that 'measures having equivalent effect' extended to the requirement that a trader possess an importation licence in respect of goods to be imported from another Member State. No matter how trifling the conditions for issue of a licence, indeed even if the only condition was that the importer should request such a licence (which would then automatically be issued), the licence requirement would still breach art 34 TFEU:

> ...apart from the exceptions for which provision is made by Community law[330] itself those provisions [artt 34 and 35 TFEU] preclude the application to intra-Community trade of a

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[329] I shall omit reference to *Directive 70/50/EEC* (which specifically prohibited Member State laws which applied unequally to imported and domestic goods, or which applied equally but disproportionately or unnecessarily restricted importation), since the Court's case law has largely developed on its own without reference to the Directive, aided by the fact that the relevant articles of the TFEU are directly effective (a doctrine in EU law which means that they are law in the Member States even without implementing legislation at the EU or national level): Case C-24/76 *Ianelli & Volpi SpA v Ditta Paulo Meroni* [1977] ECR 557, para 13.

[330] Cases and commentary delivered before the entry into force of the Treaty of Lisbon on 1 December 2009 refer to 'Community law', since the prevailing term for the economic dimension of the European project was the European Economic Community or, later, the European Community; after the Treaty of Lisbon, the project as a whole is simply the European Union. In keeping with the practice adopted by the Court of Justice, in this thesis such references will not be 'updated' to refer to 'EU law', since the meaning of the original is clear. (This is in contrast to the updating of references to article numbers in prior versions of the treaty, since leaving these in the original would result in unnecessary discombobulation.)

> national provision which requires, even purely as a formality, import or export licences or any other similar procedure.[331]

The decisions in this earliest phase of free movement law show a Court which is relatively cautious, by comparison with later developments, in exercising its power to declare Member State laws incompatible with EU law, and the degree to which Member States' legislative autonomy is constrained is still quite limited.

'Hindrance to Intra-Community Trade':

In *Procureur du Roi v Dassonville* (1974)[332] the court considered the compatibility with EU law of a Belgian Act which required that imported goods bearing a designation of origin (e.g. 'made in Scotland') be accompanied by a certification from the country from which they were exported that that country indeed had the right to the designation in question. The problem was that it was very difficult to obtain such a certification if a trader imported goods not directly from the Member State in which they were originally produced but from another Member State into which they had been imported after their original production and in which they were now in free circulation. The Dassonvilles had encountered just such a problem when they imported into Belgium a quantity of Scotch whisky (i.e. whisky bearing a designation of Scottish origin) not directly from the United Kingdom but from France, into which the whisky had earlier been imported from the United Kingdom. The Dassonvilles' case, then, was that the Belgian law made indirect imports much more difficult than direct imports and consequently was a 'measure

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[331] Joined Cases C-51/71 to C-54/71 *International Fruit Company NV v Produktschap voor Groeten en Fruit* [1971] ECR 1107, para 9.

[332] Case C-2/74 [1974] ECR 837.

having equivalent effect' under art 28 EC. The court responded by laying down a general definition of 'measures having equivalent effect':

> All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having equivalent effect to quantitative restrictions.
>
> In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.[333]

The problem with this definition is that it does not specify whether the 'hindrance to intra-Community trade' (or 'hindrance to trade between Member States') is to be determined by comparison with the situation which would obtain if the law didn't exist at all (i.e. limitation of market access, which might also be called 'trade restriction'[334]) or by comparison with how the law applies to intrastate trade (i.e. discriminatory effect). If the first of these two interpretations were correct, any law burdening interstate imports at all would offend against art 34 TFEU, because the burden would always be greater than what would apply if the burdensome law didn't exist in the first place. If the second of these interpretations were correct, any law imposing a burden on interstate imports would only offend against art 34 TFEU if this burden were greater than the burden imposed on intrastate trade, which would restrict the scope of the prohibition in

[333] Case C-2/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paras 5-6.

[334] A test for the scope of a prohibition which is defined by 'market access' and a test defined by 'trade restriction' amount to the same thing, but approach the issue from different perspectives: the former from the point of view of the cross-market trader, the latter from the cross-border trader in the market. The EU jurisprudence uses the term 'market access', influenced by the TFEU's focus on the building of the 'internal market'; the Australian jurisprudence, as seen in the previous Chapters, tends to use terms like 'trade restriction' (or derivations thereof), influenced by the prevailing interpretation of the Constitution for much of the 20th Century that it prevented the restriction of individual traders' right to trade across borders. For the sake of facilitating ready comparison between the two, 'trade restriction' will be used as the common terminology in discussing both systems of jurisprudence, save for where the concept of 'market access' as such is subjected to special scrutiny (see below).

art 34 TFEU and so preserve a greater degree of national regulatory autonomy. These are the two competing interpretations of 'measures having equivalent effect' which have continued to struggle for ascendancy, from *Dassonville* to the present day.

Another issue worth adverting to here is how low the bar is set for an 'interstate element' of an impugned Member State law, that is, how low the threshold is above which a national law has the requisite interstate effect to become subject to the TFEU's free movement provisions. *Dassonville*'s definition of a restriction of free movement of goods as being effected by a Member State law which "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" is so wide that almost any Member State law could be subject to challenge under EU law, as any Member State law could at least *potentially indirectly hinder* interstate trade.

This has meant that EU law has not seen the development of a sophisticated jurisprudence of what constitutes an 'interstate element' or 'cross-border element'; a *de minimis* test, which would have a similar function to a requirement of a certain level of 'interstateness' in the effect of a Member State law, has been rejected by the Court[335]. Furthermore, as will be seen in Chapter VII, even in the field of justification, there is – at least officially – no defence of minimality of effect nor that the subject matter of the legislation is of purely local (that is, intrastate) effect on free movement of goods. (Whether such a defence exists or should exist in practice is canvassed in that Chapter.)

Moreover, in giving such a broad scope to free movement law ("capable of hindering, directly or indirectly, actually or potentially, intra-Community trade"), *Dassonville* represented a

[335] See discussion about the possible imposition of a *de minimis* test by the Court in *Viacom II* in Chapter IV.

significant advancement of the Court's willingness to use what is now art 34 TFEU to push forward the creation of the internal market and thereby push back against Member State legislative autonomy. As the internal market matured (and the then-European Economic Community experienced its first ever expansion, welcoming Denmark, Ireland and the United Kingdom at the beginning of 1973), the Court was steadily advancing the centralising power of the internal market at the expense of Member States' ability to regulate their own national spheres.

Mutual Recognition:

The next important step in the development of the concept of 'measures having equivalent effect' came in *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (1979)[336] (referred to as '*Cassis de Dijon*' on account of its immediate subject matter). In establishing the doctrine of mutual recognition of product standards (which was enthusiastically adopted by the European Commission[337]), *Cassis de Dijon* undoubtedly represents one of the most significant judgments of the Court of Justice, and has become one of the pillars on which the European Union's internal market is built[338].

In *Cassis de Dijon*, the Court considered the compatibility, under what is now art 34 TFEU, of a German law which specified that fruit liqueurs must have a minimum alcohol content of 25%, whereas the situation in other Member States from which traders might wish to import such

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[336] Case 120/78 [1979] ECR 649.

[337] *Communication of the Commission Concerning the Consequences of the Judgment Given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon')* [1980] OJ C256/2.

[338] Alan Dashwood and others, *Wyatt & Dashwood's European Union Law* (6th edn, Hart Publishing 2011) 411-415; Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* [1995] ECR I-179, Opinion of AG Jacobs, para 25.

products into Germany was that fruit liqueurs were not required to have such a high minimum alcohol content. In the instant case, Rewe-Zentral AG wished to import into Germany from France a consignment of 'Cassis de Dijon', a blackcurrant liqueur produced in the city of Dijon in France, which had an alcohol content of between 15% and 20%[339]. The Court's response to this was to create a principle of mutual recognition of product standards as between Member States, subject to Member States' ability to legislate to satisfy 'mandatory requirements':

> Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[340]
>
> ...
>
> [Where the provisions are not so recognised] There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower that the limit set by the national rules.[341]

The identification of the principle of mutual recognition and its cognate, the doctrine of mandatory requirements (which will be discussed in Chapter VII on justification), was certainly an innovative step for the court, considering that neither principle is actually mentioned in art 34

[339] The range of alcohol contents is due to the fact that different varieties of 'Cassis de Dijon' were produced to different alcoholic strengths; it may also be assumed that in some of the smaller, more artisanal production houses, the precise alcohol content might have varied over the course of the year as blackcurrant liqueur was a natural product subject to seasonal variation in the sugar content of the fruit, causing variation in the amount of ethanol produced by the fermentation of those saccharides. In the absence of any equivalent of the German law on minimum alcohol content, there was no incentive for French producers to standardise the product in this way.

[340] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649, para 8.

[341] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649, para 14.

TFEU. In the form in which they were stated in *Cassis de Dijon*, the principle of mutual recognition and the doctrine of mandatory requirements related particularly to *the marketing of products* (i.e. mutual recognition of product standards *for marketing purposes*) and this was the context in which the European Commission interpreted the case[342], but the judgment did not explicitly limit these principles solely to the marketing of products. The question of whether the principle of mutual recognition, which was capable of being interpreted in the broader sense of 'non-application of local restrictions to imported goods', applied to factors other than product standards was much agitated in subsequent case law. The acute cause of this, of course, was that the judgment in *Cassis de Dijon* did not explicitly limit mutual recognition to product standards, but the broader reason was that *Cassis de Dijon*, like *Dassonville* before it, did not directly address the issue of whether a law burdening interstate trade (e.g. by preventing sale of fruit liqueur with less than a certain alcohol content) contravened art 34 TFEU merely because it limited imported goods' access to the local market or only if the burden on imported goods was heavier than that which applied to local goods.

Looked at in the larger context of the internal market versus Member State legislative power, the decision in *Cassis de Dijon* undoubtedly represented a great constriction of Member States' power. Henceforth, Member States' ability to create standards for products sold within their own border, as Germany had tried to do in the instant case, was severely constrained by being automatically held to be within the scope of what is now art 34 TFEU; it would thus require justification – the burden of which it is for the *Member State* to discharge to the Court's satisfaction – or the law would be struck down. It remained to be seen, however, whether this

[342] *Communication of the Commission Concerning the Consequences of the Judgment Given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon')* [1980] OJ C256/2.

was because *Cassis de Dijon* had instituted a trade restriction or discrimination test for scope, and this held great significance for Member State legislative autonomy inasmuch as the former would impose a greater restraint on it, catching *any* restriction within the scope of free movement law, rather than just restrictions which fell more heavily on interstate trade.

The Ascendancy of Trade Restriction:

For some years after the decision in *Cassis de Dijon*, the uncertainty as to whether the scope of art 34 TFEU were to be identified by a trade restriction test or a discriminatory effect test continued, with contrary indications to be found in the case law. In *Criminal Proceedings against Herbert Gilli and Paul Andres* (1980)[343], for example, the Court's reference to protectionism seemed to indicate a preference for the discriminatory effect test[344]. Likewise, in *Criminal Proceedings against Karl Prantl* (1984)[345], the Court referred to the discriminatory effect of the law in question when finding it to be a relevant restriction[346]. The problem with the remarks in both *Gilli and Andres* and *Prantl*, however, is that although they indicate that a breach of art 34 TFEU will be created by measures which are discriminatory in effect, they do not necessarily indicate that a breach of art 34 TFEU may *only* be created by measures discriminatory in effect – in other words, neither *Gilli and Andres* nor *Prantl* excludes the wider interpretation that art 34 TFEU may be breached by any measure limiting imported goods' access to a national market.

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[343] Case C-288/79 [1980] ECR 2071.

[344] Case C-288/79 *Criminal Proceedings against Herbert Gilli and Paul Andres* [1980] ECR 2071, para 10.

[345] Case 16/83 [1984] ECR 1299.

[346] Case 16/83 *Criminal Proceedings against Karl Prantl* [1984] ECR 1299, para 21. See also paras 22 and 24.

Just such a point was made in *Cinéthèque SA v Fédération Nationale des Cinémas Français* (1985)[347], in which the Court unambiguously stated that a protectionist effect was *not necessary* for national measures to constitute a breach of art 34 TFEU. In that case, the Court was required to consider the compatibility of a French law which banned video-cassette[348] sales of any film that had been given approval to be shown in cinemas less than a year beforehand. The law applied to all video-cassette sales, no matter whether they formed part of interstate trade or purely intrastate trade, and it was argued that the law was necessary to encourage the continued production of films, since 80% of their revenue came from showings in cinemas. Having found that in other Member States the system of an enforced delay period between a film being shown in cinemas and being released on video-cassette was substantially shorter than a year, the Court remarked that:

> ...it must be observed that such a system, if it applies without distinction to both video-cassettes manufactured in the national territory and to imported video-cassettes, does not have the purpose of regulating trade patterns; *its effect is not to favour national production as against the production of other Member States*, but to encourage cinematographic production as such.
>
> Nevertheless, the application of such a system *may create barriers to intra-Community trade* in video-cassettes because of the disparities between the systems operated in the different Member States and between the conditions for the release of cinematographic works in the cinemas of those States. In those circumstances a prohibition of exploitation laid down by such a system in *not compatible with the principle of the free movement of goods* provided for in the Treaty unless any obstacle to intra-Community trade thereby created does not exceed that which is necessary in order to ensure the attainment of the

[347] Joined Cases 60/84 and 61/84 [1985] ECR 2605.

[348] For readers unfamiliar with late 20th Century entertainment technology, a video-cassette was a plastic rectangular prism, about the size of an A5 book and usually black in colour, containing a roll of magnetic tape on which sounds and images had been recorded for later playback. At the time of writing, they had become virtually obsolete for home usage.

> objective in view and unless that objective is justified with regard to Community law.[349] (emphasis added)

Thus, the interpretation of the *Cassis de Dijon* uncertainty which *Cinéthèque* favoured was that breach of art 34 TFEU was made out where the national measures in question limited imported goods' access to the national market; this encompassed, but was not limited to, laws having a discriminatory effect against interstate trade.

The preference for the trade restriction interpretation of the *Cassis de Dijon* uncertainty reached its zenith in the cases on the compatibility of Member States' Sunday trading restrictions with art 34 TFEU. In *Torfaen Borough Council v B & Q Plc* (1989)[350], the Court considered the compatibility with art 34 TFEU of a British law which made it an offence to open a retail shop on Sunday except for the sale of certain items. B & Q Plc operated retail shops in the form of do-it-yourself centres and garden centres, which did not come within the exceptions to the British law, and opened their shops in the Welsh county borough of Torfaen on Sunday. Around 10% of the goods sold in these shops by B & Q Plc were imported from other Member States, meaning that the Sunday trading restriction would diminish the overall volume of interstate trade. The Court explicitly acknowledged that the Sunday trading restriction applied equally to interstate and intrastate trade and that, in consequence, the burden on interstate trade was not greater than that on intrastate trade[351]. Nevertheless, relying on *Cinéthèque*, the Court went on to say that such Sunday trading restrictions were in principle prohibited by art 34 TFEU except

[349] Joined Cases 60/84 and 61/84 *Cinéthèque SA v Fédération Nationale des Cinémas Français* [1985] ECR 2605, paras 21-22.

[350] Case 145/88 [1989] ECR 3851.

[351] Case 145/88 *Torfaen Borough Council v B & Q Plc* [1989] ECR 3851, para 11.

where the national law pursued a legitimate purpose and were necessary to achieve that purpose (i.e. they came within the scope of the prohibition, unless justified)[352].

A very similar decision was handed down in *Union Départementale des Syndicats CGT de l'Aisne v SIDEF Conforama, Société Arts et Meubles and Société Jima* (1991)[353], where the Court considered a French law requiring that a weekly 24-hour rest period for workers be allowed on Sunday. Conforama had allegedly contravened this prohibition in the course of its furniture retail business, which dealt with a significant amount of imported products and which made significant sales on Sundays. Affirming its decision in *Torfaen Borough Council*, the Court said that:

> National legislation which prohibits the employment of staff on Sundays in a sector such as furniture retailing is not designed to control trade. None the less, it may entail restrictive effects on the free movement of goods. Although it is improbable that the closure of certain types of shops on Sundays will cause consumers to refrain altogether from purchasing products which are available on week-days, the fact remains that such a prohibition may have negative repercussions on the volume of sales and hence the volume of imports.[354]

The decision in *Conforama* was reiterated, almost word for word, in *Criminal Proceedings against André Marchandise, Jean-Marie Chapuis and SA Trafitex* (1991)[355], which came to

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[352] Case 145/88 *Torfaen Borough Council v B & Q Plc* [1989] ECR 3851, para 12. Although the Court decided that the British law on Sunday trading came within the scope of art 34 TFEU, they remitted the secondary question of justification to the Cwmbran Magistrates' Court in the UK for determination (paras 15-16). The Magistrates' Court ultimately found that the law was justified, and accordingly that B & Q Plc had committed an offence in operating on a Sunday: *Torfaen Borough Council v B & Q Plc* [1990] 3 CMLR 455 (Cwmbran Magistrates' Court, 11 June 1990). Thus, the shoppers of Torfaen had to spend their Sundays elsewhere than their local DIY and gardening store.

[353] Case C-312/89 [1991] ECR I-997.

[354] Case C-312/89 *Union Départementale des Syndicats CGT de l'Aisne v SIDEF Conforama, Société Arts et Meubles and Société Jima* [1991] ECR I-997, para 8. Having decided that the French law came within the scope of art 34 TFEU, the Court went further than it had in *Torfaen Borough Council* and declared for itself (without remission to the national court) that the law was justified and therefore valid: see paras 10-13.

[355] Case C-332/89 [1991] ECR I-1027. As in *Conforama*, the Court found the Belgian law to be within the scope of art 34 TFEU, but decided that it was nevertheless justified and valid.

exactly the same conclusion regarding the compatibility of a Belgian law prohibiting the employment of workers after 12:00 on Sunday, and the trade restriction interpretation of the scope of art 34 TFEU was confirmed once again in *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q Plc* (1992)[356], where B & Q Plc had again tried trading on a Sunday in contravention of British law, this time in the English cities of Stoke and Norwich.

Even so, no small amount of confusion and controversy arose during this period, as it ultimately fell to the national court to decide, after the return of the preliminary reference decision from the ECJ, whether or not a law restricting trading hours was in contravention of EU law: in the UK, courts sometimes ruled in favour of the validity of Sunday trading restrictions, and sometimes against it[357].

What is more, even though the ECJ was passing the decision on the facts back to the referring court at the Member State level, the institution of this trade restriction definition of scope represented a significant diminution of Member State legislative autonomy. In this period, as the Sunday trading cases show, all Member State laws which restricted interstate trade were *prima facie* incompatible with art 34 TFEU, regardless of whether the restrictive effect was the same as for domestic trade, and thus all such Member State laws were salvageable only by the Court's decision to allow arguments advanced by way of justification, the proof of which the defendant Member State had to discharge. The fact that the final decision was often to be made

[356] Case C-169/91 [1992] ECR I-6635. As in *Conforama* and *Marchandise*, the Court re-iterated that the British Sunday trading law came within the scope of art 34 TFEU, but went on to hold it justified and preserve its validity; the reason for the Court going further than it had in *Torfaen Borough Council* and deciding the issue of justification itself was to preserve the unity of EU law, rather than have national courts each make their own idiosyncratic determinations on the question of justification (para 14). Unfortunately for B & Q Plc, they could no more trade on a Sunday in England than they could in Wales.

[357] Anthony Arnull, 'What Shall We Do on Sunday?' (1991) 16 European Law Review 112.

by a court in the Member State itself did, however, moderate the diminution of Member State power because it allowed the decision to be made within the national context, but it still subjected Member State *legislative* power to *judicial* approval.

The Ascendancy of Discriminatory Effect:

The scope of 'measures having equivalent effect' under art 34 TFEU was significantly diminished by the judgment in *Criminal Proceedings against Bernard Keck and Daniel Mithouard* (1993)[358]. The national law in question in that case was a French law prohibiting reselling of products in an unaltered state at a price lower than their original purchase price, of which MM. Keck and Mithouard were accused. The Court recognised that the French law might diminish the total volume of sales of goods in France and thereby diminish the volume of sales of imported goods, but, rather than judge this to be sufficient to bring the law within the scope of art 34 TFEU (as in *Torfaen Borough Council*, etc.), the Court was moved to review its previous jurisprudence because traders were starting to rely on art 34 TFEU "as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States"[359]. The Court therefore drew a distinction between national laws on product standards and national laws on selling arrangements, saying that the former *automatically* came within the scope of art 34 TFEU and would require proof of their

[358] Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

[359] Joined Cases C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, para 14. It should not be blithely accepted, however, that this was a case of greedy interstate traders trying to knock over national laws that stood in the way of their pocketing of the 'Sunday pound'. It was the ambiguity in the Court's own earlier jurisprudence in the Sunday Trading Cases which had opened this breach; in a European Union which takes the existence of a free market economy to be one of its essential characteristics, it can hardly be surprising that European traders should seek to trade as freely as possible in reliance of what the Court has decreed to be European law. See Weatherill, who amusingly characterises the Court's remarks on this point as a 'spiteful tantrum': Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 69.

being necessary to satisfy mandatory requirements (and escape incompatibility), whereas the latter would *only* come within the scope of art 34 TFEU if they burdened interstate trade more heavily than intrastate trade:

> It is established by the case-law beginning with "Cassis de Dijon" that, in the absence of harmonization [*sic*] of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactures and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by [art 34 TFEU]. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.
>
> By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment [reference omitted], so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.
>
> Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of [art 34 TFEU].[360]

The immediate result of *Keck and Mithouard*, then, was that it confirmed that national laws on product standards must be necessary to achieve mandatory requirements or they will be in beach of art 34 TFEU, but it reversed the earlier position in the 'Sunday Trading Cases' by stating that national laws on selling arrangements will only be in breach of art 34 TFEU where they do not apply equally to interstate and intrastate trade. In limiting the over-expansion of EU law's power to declare Member State laws incompatible with EU law in this respect, *Keck and Mithouard*

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[360] Joined Cases C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, paras 15-17.

represented a corrective rebalancing between EU internal market building and Member State legislative autonomy. As a result of the academic and popular criticism of the Sunday Trading Cases, the Court recognised that it had unduly favoured central EU power over Member State power, and took the rare step of explicitly reversing its earlier jurisprudence – "*Keck* shows the Court trying to save itself from itself…It returns to the gold standard of free movement law"[361].

The Dominance (or Decay) of Discriminatory Effect:

A key element of *Keck and Mithouard* was that it distinguished between national laws on product standards and national laws on selling arrangements. Where a national law could potentially be characterised as relating to *both* product standards and selling arrangements, as long as the law relates to the content of products, it will be treated according to the rules on product standards, that is, it will automatically fall within the scope of art 34 TFEU and will breach that article unless it is necessary to achieve a legitimate purpose[362].

It should be borne in mind, of course, that even if a national law does regulate selling arrangements, it will still come within the scope of art 34 TFEU if it is shown to have a

[361] Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 70.

[362] Case C-368/95 *Vereinigte Familiapress Zeitunsverlags und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689. The case concerned the compatibility with EU law of an Austrian regulation which forbade the selling of publications which advertised the chance to take part in games for prizes. A German-published magazine advertised prizes for correct completion of its crossword puzzle, and this magazine was also distributed across the border in Austria. In dealing with the question of whether, after the *Keck and Mithouard* bifurcation, the Austrian law should be viewed as a law on product standards or on selling arrangements, and consequently whether the law came within the scope of art 34 TFEU, the Court said the following: "even though the relevant national legislation is directed against a method of sales promotion, in this case it bears on the actual content of the products, in so far as the competitions in question form an integral part of the magazine in which they appear. As a result, the national legislation in question as applied to the facts of the case is not concerned with a selling arrangement within the meaning of the judgment in *Keck and Mithouard*. Moreover, since it requires traders established in other Member States to alter the contents of the periodical, the prohibition at issue impairs access of the product concerned to the market of the Member State of importation and consequently hinders free movement of goods. It therefore constitutes in principle a measure having equivalent effect within the meaning of [art 34] of the Treaty." (paras 11-12).

discriminatory effect on imported goods. Restrictions on advertising are a good example of this, since even though they are selling arrangements, it is quite possible that they can fall more heavily on the interstate trader seeking to use advertising to enter a national market than on the local trader who can more easily rely on other means of promotion. For instance, in *Konsumerombudsmannen v Gourmet International Products AB* (2001)[363], the Court considered a Swedish law which prohibited advertising of strong alcohol products on radio, on television or in periodicals other than those solely distributed where alcohol was sold. The Court recognised that such advertising restrictions could, at least in the context of alcohol products, have a discriminatory effect against interstate trade:

> Even without its being necessary to carry out a precise analysis of the facts characteristic of the Swedish situation, which it is for the national court to do, the Court is able to conclude that, in the case of products like alcoholic beverages, the consumption of which is linked to traditional social practices and to local habits and customs, a prohibition of all advertising directed at consumers in the form of advertisements in the press, on the radio and on television, the direct mailing of unsolicited material or the placing of posters on the public highway is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are instantly more familiar.[364]

Likewise, in *Douwe Egberts NV v Westrom Farmer NV* (2004)[365], the Court considered a Belgian law which prohibited references to 'slimming' or 'medical recommendations, attestations, declarations or statements of approval' in the marketing of products. The Court judged that such advertising restrictions were potentially within the scope of art 34 TFEU:

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[363] Case C-405/98 [2001] ECR I-1795.

[364] Case C-405/98 *Konsumerombudsmannen v Gourmet International Products AB* [2001] ECR I-1795, para 21.

[365] Case C-239/02 [2004] ECR I-7007.

> ...the possibility cannot be ruled out that to compel a producer to discontinue an advertising scheme which he considers to be particularly effective may constitute an obstacle to imports [reference omitted].
>
> Moreover, an absolute prohibition of advertising the characteristics of a product is liable to impede access to the market by products from other Member States more than it impedes access by domestic products, with which consumers are more familiar [reference to *Gourmet International* para 21].
>
> The prohibition laid down by the national legislation therefore constitutes a fetter on intra-Community trade coming within the scope of Article [34 TFEU].[366]

A similar example of a selling arrangement in respect of which restrictions may have a discriminatory effect against interstate trade and thereby fall within 'measures having equivalent effect' for art 34 TFEU is internet sales. In *Deutsche Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval* (2003)[367], the Court was called upon to determine the compatibility of a German law which prohibited the sale by mail-order (including via the internet) of drugs which in Germany could only be sold in pharmacies (there was also a corresponding prohibition on the advertising of such services). DocMorris NV, of which Mr Waterval was a director, operated a mail-order business via its website from which it sold medicinal drugs, including selling to consumers in Germany what German law classified as pharmacy-only drugs. The Court identified the significance of the internet in interstate trade, and that restrictions on its use were likely to fall more heavily on interstate than on intrastate traders:

> ...it is not disputed that the provision [prohibiting mail-order sales of pharmacy-only drugs] contains both a requirement that certain medicines be sold only in pharmacies and a prohibition on mail-order sales of medicines. It is true that such a prohibition on mail-order sales may be regarded as merely the consequence of the requirement for sales to be made exclusively in pharmacies. However, the emergence of the internet as a method of cross-border sales means that the scope and, by the same token, the effect of the prohibition must be looked at on a broader scale than that suggested by the

[366] Case C-239/02 *Douwe Egberts NV v Westrom Farmer NV* [2004] ECR I-7007, paras 52-54.

[367] Case C-322/01 [2003] ECR I-4887.

> Apothekerverband, by the German, French and Austrian Governments and by the Commission [reference omitted].
>
> A prohibition such as that at issue in the main proceedings is more of an obstacle to pharmacies outside Germany than to those within it. Although there is little doubt that as a result of the prohibition, pharmacies in Germany cannot use the extra or alternative method of gaining access to the German market consisting of end consumers of medicinal products, they are still able to sell the products in their dispensaries. However, for pharmacies not established in Germany, the internet provides a more significant way to gain direct access to the German market. A prohibition which has a greater impact on pharmacies established outside German territory could impede access to the market for products from other Member States more than it impedes access for domestic products.
>
> Accordingly, the prohibition does not affect the sale of domestic medicines in the same way as it affects the sale of those coming from other Member States.[368]

In recent cases, Member State laws imposing minimum pricing and uniform retail pricing have been subject to challenge on the basis that such regulations fall more heavily on the interstate trader than the trader established in that Member State.

Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland (2015)[369] saw challenge laid against legislation of the Scottish Government (a regional government within the UK[370]) which imposed minimum unit pricing for alcoholic drinks, on the

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[368] Case C-322/01 *Deutsche Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval* [2003] ECR I-4887, paras 73-75.

[369] Case C-333/14 ECLI:EU:C:2015:845.

[370] In British political parlance, Scotland (like England, Wales and Northern Ireland) is generally described as a constituent ‘nation’ of the UK, rather than merely a ‘region’; in the text here, the Scottish Government has been described with the sobriquet ‘regional’ only to avoid confusion, as it is elsewhere only Member State-level governments which are described as ‘national’.

At time of writing, Scotland remains within the United Kingdom, having debated and rejected (55%-45%) a referendum on independence from the UK in September 2014 (‘Indyref’). However, the subsequent UK-wide referendum on EU membership in June 2016 (‘Brexit’) saw a clear split between the result in Scotland, which favoured continued membership of the EU (62%-38%), and the UK-wide result, which favoured withdrawal from the EU (52%-48%), a process currently underway and due to take effect in March 2019 (see footnote 310 above). This led to calls for a second Scottish independence referendum, so as to preserve Scotland’s membership of the EU when the remainder of the UK would leave the EU, although later political developments in Scotland have seen the governing Scottish Independence Party support rather the holding of such an independence referendum *after* the UK’s withdrawal from the EU (in the concise contemporary political jargon, a ‘post-Brexit IndyRef2’), with the goal of an independent Scotland *re-entering* the EU (‘Nicola Sturgeon puts Scottish independence referendum bill on hold’ (*BBC News*, 27 June 2017) <www.bbc.com/news/uk-scotland-40415457> accessed 22 April 2019). It grounds that such minimum pricing restricted the free movement of goods under art 34 TFEU. As part of a government programme to reduce both excessive alcohol consumption by some individuals and levels of alcohol consumption amongst the general populace, the Scottish Government had introduced legislation to impose a £0.50 Minimum Price per Unit on alcohol on all retail sales of alcoholic beverages in Scotland. This would have the effect of creating a 'floor price' for a given strength and volume of alcohol[371]. The Court of Justice was of the opinion that the minimum price legislation did indeed constitute an infringement of art 34 TFEU, inasmuch as it hindered imported goods' access to the UK market, since it "prevent[ed] the lower cost price of imported products being reflected in the selling price to the consumer"[372]. (This should not be misinterpreted as a return to trade restriction analysis, as the hindrance of market access herein referred to is analysed in terms of the *discriminatory effect* against lower cost imported alcohol.) Thus, minimum pricing legislation such as that at issue here did constitute a *prima facie* infringement, and could only be saved by justification under art 36 TFEU or other grounds[373].

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remains to be seen what effect the delay of the UK's withdrawal from the EU (originally scheduled for 29 March 2019, then delayed to 12 April 2019, and then further delayed to 31 October 2019) may have on any plans for a second Scottish independence referendum.

[371] The formula was to be MPU x S x V x 100 = P, where MPU is the Minimum Price per Unit (here set at £0.50), S is the strength of the beverage in alcohol-by-volume, V is the volume of the beverage in litres, and P is the minimum retail sale price. For example, the minimum sale price for a standard 700mL bottle of 40% ABV Scotch whisky would be £0.50 x 0.4 x 0.7 x 100 = £14.00.

[372] Case C-333/14 *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland* ECLI:EU:C:2015:845, para 32.

[373] In the event, the case having been returned to the referring court (the Court of Session in Scotland), that court decided in favour of the validity of the minimum pricing legislation on grounds of justification. An appeal to the UK Supreme Court decided on 15 November 2017 upheld the decision of the Court of Session below. The Scottish Government accordingly brought the legislation into effect on 01 May 2018, following the results of a consultation concluded in January of that year ('Minimum Unit Pricing' (Scottish Government website, 07 March 2019) <www.gov.scot/Topics/Health/Services/Alcohol/minimum-pricing> accessed 22 April 2019; 'Alcohol Framework 2018' (Scottish Government website, 20 November 2018) <www.gov.scot/publications/alcohol-framework-2018-preventing-harm-next-steps-changing-relationship-alcohol/pages/1/> accessed 22 April 2019). See also 'Scotland

In a similar vein, after *DocMorris* had rendered unsuccessful Germany's attempt to prohibit the selling of pharmacy-only drugs by mail-order and internet companies, Germany attempted to extend its uniform retail pricing legislation to cover mail-order companies. This price-fixing legislation required that the manufacturer of prescription-only drugs establish a certain price for sale of the drugs, to which specified wholesaler additions and retailer (pharmacy) additions would be added to fix the price of such drugs at each point through the distribution chain, including retail sale to the end consumer. It also forbade the offering of any kind of bonus system (e.g. gift-with-purchase) which would have the ultimate effect of lowering the price of the drugs to the purchaser. The compliance of this legislative scheme with art 34 TFEU was challenged in *Deutsche Parkinson Vereinigung eV v Zentrale sur Bekämpfung unlauteren Wettbewerbs eV* (2016)[374]. Deutsche Parkinson Vereinigung eV (the German Parkinson Organisation) was a self-help group for persons suffering from Parkinson's disease in Germany, and in furtherance of its purpose it promoted amongst its members a bonus scheme for purchasers of certain prescription-only anti-Parkinson's drugs from the Dutch mail-order pharmacy DocMorris NV; Zentrale sur Bekämpfung unlauteren Wettbewerbs eV (the German Association for Protection against Unfair Competition) applied to the German courts to injunct Deutsche Parkinson Vereinigung eV from continuing with the promotion of this bonus scheme. The Court was of the view that preventing price competition between suppliers of prescription-only drugs did indeed have a discriminatory effect against interstate traders:

> …price competition is capable of providing a more important factor of competition for mail-order pharmacies than for traditional pharmacies, since price competition lays the

ends cheap booze as minimum price starts' (*BBC News*, 01 May 2018) <www.bbc.com/news/uk-scotland-43948081> accessed 22 April 2019.

[374] Case C-148/15 ECLI:EU:C:2016:776.

> basis for their potential access to the German market directly and to continue to be competitive in it.
>
> Consequently, and in so far as sales by mail order constitute a more important means of accessing the German market directly for pharmacies established in Member States other than Germany, if not, given the particular characteristics of the German market evidenced in the documents in the case file submitted to the Court, potentially the only means of accessing that market directly, the national legislation at issue in the main proceedings does not affect the sale of national medicinal products in the same way as it affects the sale of medicinal products originating in other Member States.[375]

On this basis, even when dealing with national laws imposing selling arrangements, such laws may still come within the scope of art 34 TFEU if it can be shown that they have a discriminatory effect against interstate traders. Specifically in respect of selling arrangements which impose advertising restrictions, restrictions on internet sales and price fixing (including minimum pricing), it seems that the Court has accepted that such discriminatory effect will, as a matter of course, be created by such laws.

On closer analysis, though, there is some question as to whether the Court has, in practice, been moving towards a restoration of the trade restriction test. Although *Gourmet International* and *Douwe Egberts* are framed in terms of the discriminatory effect test, stating that advertising restrictions place a greater burden on interstate trade than domestic trade, advertising restrictions arguably fall just as heavily on the new market entrant from the home State as on the new market entrant from another Member State; consequently, the point about new market entrants using advertising to challenge established local traders is really a matter of market access (i.e. restriction of trade), not discrimination against interstate trade[376]. Nevertheless, the Court is

[375] Case C-148/15 *Deutsche Parkinson Vereinigung eV v Zentrale sur Bekämpfung unlauteren Wettbewerbs eV* ECLI:EU:C:2016:776, paras 24-25.

[376] Perhaps tellingly, when the Court in *Douwe Egberts* states the effect which advertising restrictions have on imports, it refers (at para 52) to Case C-241/89 *Société d'Application et de Recherches en Pharmacologie et Phytotherapie SARL (SARPP) v Chambre Syndicale des Raffineurs et Conditionneurs de Sucre de France* [1990] ECR-I 4695, a case decided on the basis of the trade restriction test (before *Keck and Mithouard* rejected that test in respect of selling arrangements). Although *DocMorris* may appear to be another example of the Court confusing

formally, if not always entirely logically, adhering to the discriminatory effect interpretation of 'measures having equivalent effect'.

Recent Re-Emergence of Trade Restriction Analysis or 'Market Access':

Aside from national laws on product standards and national laws on selling arrangements, which were discussed in *Keck and Mithouard*, there is another category of national laws which has been the subject of litigation under art 34 TFEU, namely national laws imposing other forms of commercial restriction connected with trade in goods, such as restrictions on the use of goods. Early post-*Keck and Mithouard* cases on such laws seemed to indicate that they might indeed be treated in the same way as selling arrangements in that they would qualify as 'measures having equivalent effect' under art 34 TFEU if they had a discriminatory effect[377]. This was because national laws were said to be outside the scope of art 34 TFEU if their effect was 'too uncertain and indirect', and references to 'discrimination on the face of the law' suggested that the relevant 'effect' (which must not be too uncertain and indirect) was discriminatory effect:

> ...legislation such as that at issue in the main proceedings *makes no distinction according to the origin of the goods transported*, its purpose is not to regulate trade in goods with other Member States and the restrictive effects which it might have on the free movement of goods are too uncertain and indirect for the obligation which it imposes to be regarded

interstate traders and mere new market entrants, the question on which the Court was asked to rule in that case did not concern the compatibility of the German law restricting certain drugs to pharmacy-only sale in Germany, but rather the compatibility of the law restricting internet sales of such drugs: since a German company could only sell pharmacy-only drugs in Germany if it had pharmacy premises from which to sell them (and that was not in question), it could only be *interstate* companies which would seek to use the internet as a sole means of selling such drugs, and thus the restriction on internet sales did burden *more heavily* interstate traders as such in the particular circumstances of the case. The same was true in *Deutsche Parkinson Vereinigung*, where uniform pricing legislation fell *more heavily* on mail-order companies because it denied them the ability to compete on price (which was their point of advantage over bricks-and-mortar pharmacies), and mail-order was a *more important* distribution model for interstate companies than for German companies because they didn't have a physical store location in Germany from which to sell.

[377] *Pace* Alan Dashwood and others, *Wyatt & Dashwood's European Union Law* (6th edn, Hart Publishing 2011) 428-430 in which it is argued that the 'too uncertain and indirect' test is distinct from the discriminatory effect test for selling arrangements under *Keck and Mithouard*.

> as being capable of hindering trade between Member States [references omitted][378]. (emphasis added)

Recent cases, however, have indicated that whether or not such laws amount to 'measures having equivalent effect' under art 34 TFEU is to be determined by whether they limit imported goods' access to the national market, even where there is no discrimination against imported goods on the face of the law or in its practical effect. In *Commission v Portugal ('Car Window Tinting')* (2008)[379], a case concerning a Portuguese law essentially prohibiting the use of tinted film on car windows and windscreens, the Court said that:

> It must be held that potential customers, traders or individuals have practically no interest in buying [tinted film] in the knowledge that affixing such film to the windscreen and windows alongside passenger seats in motor vehicles is prohibited.
>
> ...
>
> The contested provision therefore affects the marketing in Portugal of almost all tinted film legally manufactured and sold in other Member States...intended to be affixed to the windows of motor vehicles.[380]

Likewise, in *Commission v Italy ('Motorcycle Trailers')* (2009)[381], on the subject of an Italian law prohibiting the use of trailers with motorcycles (thus effectively prohibiting the use of trailers designed to be towed by motorcycles), the Court was of the opinion that:

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[378] Case C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop arl* [1998] ECR I-3949, para 31. See also Case 69/88 *H Krantz GmbH & Co v Ontvanger der Directe Belastingen and Netherlands* [1990] ECR I-583, para 10; Case C-93/92 *CMC Motorradcenter GmbH v Pelin Baskiciogullari* [1993] ECR I-5009, para 10; Case C-379/92 *Criminal Proceedings against Matteo Peralta* [1994] ECR I-3453, para 24; Case C-96/94 *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl* [1995] ECR I-2883, para 41.

[379] Case C-265/06 [2008] ECR I-2245.

[380] Case C-265/06 *Commission v Portugal ('Car Window Tinting')* [2008] ECR I-2245, paras 33 and 35.

[381] Case C-110/05 [2009] ECR I-519.

> ...a prohibition on the use of a product in the territory of a Member State has a considerable influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State.
>
> Consumers, knowing that they are not permitted to use their motorcycle with a trailer specially designed for it, have practically no interest in buying such a trailer...Thus, [the national law in question] prevents a demand from existing in the market at issue for such trailers and therefore hinders their importation.
>
> It follows that the prohibition laid down in [the national law], to the extent that its effect is to hinder access to the Italian market for trailers which are specially designed for motorcycles and are lawfully produced and marketed in Member States other than the Italian Republic, constitutes a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article [34 TFEU], unless it can be justified objectively.[382]

Furthermore, in *Åklagaren v Percy Mickelsson and Joachim Roos* (2009)[383], which concerned a Swedish law effectively prohibiting the use of jet-skis in Swedish waters, the Court declared that:

> Even if the national regulations at issue do not have the aim or effect of treating goods coming from other Member States less favourably, which is for the national court to ascertain, the restriction which they impose on the use of a product in the territory of a Member State may, depending on its scope, have a considerable influence on the behaviour of consumers, which may, in turn, affect the access of that product to the market of that Member State [reference omitted].
>
> Consumers, knowing that the use permitted by such regulations is very limited, have only a limited interest in buying that product [reference omitted].
>
> In that regard, where the national regulations for the designation of navigable waters and waterways have the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use, which is for the national court to ascertain, such regulations have the effect of hindering the access to the domestic market in question for those goods and therefore constitute, save

[382] Case C-110/05 *Commission v Italy ('Motorcycle Trailers')* [2009] ECR I-519, paras 56-58.

[383] Case C-142/05 [2009] ECR I-4273.

> where there is a justification pursuant to Article [36 TFEU] or there are overriding public interest requirements, measures having equivalent effect to quantitative restrictions on imports prohibited by Article [34 TFEU].[384]

As a result of these cases, it seems tolerably clear that the test for whether a national law which imposes rules *other than product standards or selling arrangements* is a 'measure having equivalent effect' under art 34 TFEU is whether that law impedes market access (i.e. restricts trade) for imported goods.

The question then remains whether the effect of these cases is to re-establish trade restriction as the test for *all* kinds of national laws. This question is not conclusively resolved. In *Italian Motorcycle Trailers*, the Court seemed to go two ways in as many paragraphs. The Court first states that *Keck and Mithouard* remains good law in that national laws on selling arrangements which are non-discriminatory on their face will only fall within art 34 TFEU if they are discriminatory in their practical effect (that is, the test for whether a law on selling arrangements comes within the scope of art 34 TFEU is *discriminatory effect*):

> By contrast, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States for the purposes of the case-law flowing from *Dassonville, on condition that those provisions apply to all relevant traders operating within the national territory and that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States*. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access *any more than it impedes the access of domestic products* (see *Keck and Mithouard*, paragraphs 16 and 17).[385] (emphasis added)

[384] Case C-142/05 *Åklagaren v Percy Mickelsson and Joachim Roos* [2009] ECR I-4273, paras 26-28.

[385] Case C-110/05 *Commission v Italy ('Motorcycle Trailers')* [2009] ECR I-519, para 36.

Immediately afterwards, however, the Court seems to indicate that discriminatory effect is merely one species of a more general criterion of *market acces*s limitation (i.e. trade restriction):

> Consequently, measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article [34 TFEU], as are [national laws imposing product standards]. *Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept.*[386] (emphasis added)

As such, it is unclear whether trade restriction has been re-established as the general criterion for identifying national laws that come within the scope art 34 TFEU or whether it only prevails in respect of these national laws which impose some restriction on the trade of goods which is not in the form of product standards or selling arrangements (such as the usage restrictions in the above cited cases).

It is worth observing at this juncture the larger context of this (at least partial) re-emergence of trade restriction analysis. The Court's re-embrace of trade restriction analysis in respect of usage restrictions on goods can be seen in the light of a growing confidence of the Court in advancing the centralised EU internal market building objective – these decisions were handed down in a period of treaty revision and closer integration, while the 2007 Treaty of Lisbon was in the process of being adopted and before the paroxysms which have beset the EU in more recent years, namely the Eurozone debt crisis from late 2009 onwards and Brexit in 2016. In this context, the Court can be seen to be tipping the balancing back in favour of EU internal market creation and away from Member State legislative autonomy in recognition of the fact that the mere prevention of discrimination will not be enough to make the internal market work, even though goods are flowing freely across borders as such.

[386] Case C-110/05 *Commission v Italy ('Motorcycle Trailers')* [2009] ECR I-519, para 37.

But what of this concept of 'market access'? Is it meaningfully distinct from the two analyses used in the earlier case law, namely discrimination and trade restriction? Is it a 'third way' which can mediate between these two prior modes of thinking, with a more moderate impact on Member State legislative autonomy than the trade restriction definition of scope, but mounting a more effective defence of the internal market than the discrimination definition?

Market Access as a 'Third Way' Analysis:

In response to the Court's frequent reference to 'market access', the true meaning of the term and its utility in defining the scope of the Treaty freedoms have been the subject of considerable discussion. This discussion has been most immediately prompted by the use of the notion of 'market access' in relation to national restrictions on the use of goods (in which it seems to have accompanied a movement of the Court's jurisprudence away from discrimination analysis and back towards trade restriction analysis[387]), although the term is also employed in respect of freedom to provide services (in which, as will be seen in Chapter IV, the trade restriction analysis was already dominant), and the increasing use of the term has led to divergent interpretations of the effect of 'market access' on the scope of Treaty freedoms such as the freedom to provide services. On the one hand, Prof Jukka Snell[388] has argued that 'market access' does not really aid in the definition of the scope of Treaty freedoms, as the issue of scope

[387] See discussion of Case C-265/06 *Commission v Portugal ('Car Window Tinting')* [2008] ECR I-2245, Case C-110/05 *Commission v Italy ('Motorcycle Trailers')* [2009] ECR I-519 and Case C-142/05 *Åklagaren v Percy Mickelsson and Joachim Roos* [2009] ECR I-4273 above.

[388] Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 Common Market Law Review 437.

still boils down to the need to choose between discrimination analysis and trade restriction analysis, with 'market access' being a vague term deployed to obfuscate this choice. On the other hand, Prof Gareth Davies[389] has argued that the notion of 'market access' is indeed an essential clarification of the free movement jurisprudence which, rightly understood, brings EU free movement law into alignment with EU competition law.

'Market Access' as Avoidance of the Substantive Question:

Snell's contention is that free movement law ultimately needs to choose between a discrimination analysis and a trade restriction analysis for determining the scope of the Treaty's provisions, and that 'market access' is not an independent third form of analysis that may be used to determine that scope since "when pressed, the notion of market access collapses into economic freedom or anti-protectionism [i.e. trade restriction or discrimination analysis], and as a consequence it obscures more than it clarifies"[390]. 'Market access' is a term which has drifted into free movement law from competition law, where it is associated with the identification of a 'barrier to entry' to a particular market. Snell argues that the competition law definition of a 'barrier to entry' cannot be easily transposed to free movement law because, due to a long standing dispute in competition law as to whether a 'barrier to entry' should be identified from a static or dynamic viewpoint[391], competition law has settled on a consumer protection-oriented

[389] Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671.

[390] Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 Common Market Law Review 437, 438 and 467-469.

[391] The static viewpoint of a 'barrier to access', advocated by Joe Bain, is that any advantage which happens to be enjoyed *at the present time* by an existing market operator which allows it to maintain supracompetitive prices without attracting competition from new market entrants constitutes a 'barrier to access'. The dynamic viewpoint of a 'barrier to access', advocated by George Stigler, is that only an advantage which was enjoyed by an existing market operator *at the time when it entered the market and is not still available to potential new market entrants*

definition of ‘barrier to entry’ which defines the term by reference to whether a market actor has sufficient power to maintain supracompetitive pricing in that market. Such matters are proper to competition law, but cannot be applied to free movement law where it is the freedom of interstate trade under a Member State’s legislation, not the dominance of a particular market actor, which is under consideration. Thus, Snell says “it seems unlikely that the concept of barriers to entry can really help internal market law in its quest for the definition of market access”[392] and, having also rejected comparisons with WTO jurisprudence, “[if] there is a legal concept of market access in EU free movement law, it has to be a fully autonomous one”[393].

That being so, Snell turns to the question of whether ‘market access’ can be interpreted in terms of the distinction between access to a market in the first place and exercise of an economic activity once access has been achieved, whereby ‘market access’ would only be hindered for the purpose of the Treaty by restrictions on access in the first, strict sense. This is not a clean logical distinction, he argues, since restrictions on the exercise of an activity are, in economic terms, restrictions on profit-maximising behaviour in which market operators would otherwise engage, and when profitability is sufficiently constrained by such restrictions, market operators would simply choose not to enter the market, thus effectively restricting access to the economic activity; there is, then, no clear line between a mere restriction on the exercise of an activity and access to that activity in the first place (as the Court itself has explicitly acknowledged[394]), and

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constitutes a ‘barrier to access’. Snell neatly summarises the theoretical problem with the static viewpoint and the practical problem with the dynamic viewpoint at 439.

[392] Jukka Snell, ‘The Notion of Market Access: A Concept or a Slogan?’ (2010) 47 Common Market Law Review 437, 440.

[393] Jukka Snell, ‘The Notion of Market Access: A Concept or a Slogan?’ (2010) 47 Common Market Law Review 437, 443.

[394] Case C-464/02 *Commission v Denmark (‘Danish Vehicle Registration Tax’)* [2005] ECR I-7929, para 37.

so any interpretation of 'market access' based on such a distinction must ultimately founder[395]. Furthermore, in addition to this theoretical problem with the interpretation of 'market access' the case law has shown sufficient inconsistency for it to be said that 'market access' does not have a clear enough meaning to be consistently and universally applied as a test for the scope of Treaty freedoms: on the one hand, a rule limiting participation in a Europe-wide judo competition to the one or two participants nominated in a given weight category by each national judo body did not limit players' access to the market[396], but on the other hand, a rule limiting the participation in a basketball competition by excluding players who had transferred between European countries after a given deadline did limit players' access to the market[397].

In light of these logical and practical problems with 'market access' as an independent third form of analysis, Snell concludes that 'market access' is ultimately a cipher for the discrimination analysis or the trade restriction analysis, depending on the reasoning of the judgment. In some circumstances, 'market access' is incidental to the discrimination analysis, since hindrance of entry by new market actors is likely to entrench existing market dominance by domestic traders[398]. In other circumstances, the fact that market access can, to some degree, be hindered by any restriction on profit-maximising activity allows 'market access' to assume the

[395] Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 Common Market Law Review 437, 445-446 and 467-468.

[396] Joined Cases C-51/96 and C-191/97 *Deliège v Ligue francophone de judo et disciplines associées ASBL and others* [2000] ECR I-2549.

[397] Case C-176/96 *Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL* [2000] ECR I-2681.

[398] Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 Common Market Law Review 437, 468.

same meaning as 'trade restriction'[399]. The term 'market access' is not used because it has a clear meaning, but precisely because it has an *unclear* meaning, such that "the Court may use it freely either to approve or to condemn measures that it happens to like or dislike". Snell warns against the use of 'market access' in this way, arguing that by using an ambiguous, multi-adaptable term to avoid the explicit choice of the discrimination analysis or the trade restriction analysis the Court does not properly respect the constitutional significance of declaring a national law incompatible with the Treaty, that it opens its jurisprudence to strong public criticism, and that it creates the kind of unplanned expansion of its jurisprudence that will eventually require a sharp *Keck and Mithouard*-style overturning of prior cases[400]. Consequently, the term 'market access' should be abandoned in favour of the explicit use of either the discrimination analysis or the trade restriction analysis to determine the scope of the Treaty's various free movement provisions.

'Market Access' as Neutral Market Regulation vs Selective Competitive Distortion:

Davies, by contrast, does believe that competition law has a useful part to play in the interpretation of 'market access' in free movement law. Unlike Snell, for whom competition law is unhelpful due to its focus on market dominance and consumer protection, for Davies competition law provides a useful distinction between laws which do not distort competition in the market and laws which do distort competition in the market. Laws of the first kind affect the whole market and so burden all market actors equally, whereas laws of the second kind have a

[399] Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 Common Market Law Review 437, 467-468.

[400] Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 Common Market Law Review 437, 469-470.

selective effect on some market actors and so burden some market actors more than others[401]. He argues that the use of the term 'market access' points to a genuine movement in the case law towards this competition law-style analysis of the effects of Members States' legislation, whereby legislation will come within the scope of the Treaty's free movement provisions if it impedes market access either1) by having a selective effect, or 2) by having an effect which, although equal as between market actors, so shrinks the whole market that access to it becomes economically or legally impossible[402]. According to this argument, product requirements as in *Cassis de Dijon* fall within the scope of the Treaty because they apply selectively to imports (which must meet a new product standard)[403], non-discriminatory selling arrangements as in *Keck and Mithouard* fall outside the scope of the Treaty because they apply equally to all market actors[404], and prohibitions on use fall within the scope either because they cause the product to be substituted with a competing product (having selective effect) or as in *Italian Motorcycle Trailers* and *Mickelsson and Roos* because, despite having equal effect on all market actors, they shrink the market to virtually nothing and so genuinely hinder market access[405].

Davies candidly acknowledges that a perfect distinction between equal burden and selective burden measures is probably only possible in theory, since, in practice, a measure will probably

401 Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671, 675.

402 Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671, 682-683.

403 Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671, 695.

404 Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671, 692.

405 Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671, 696-697.

always affect some market actors more than others if it is examined closely enough. Nevertheless, he says that the distinction is neat enough to be put to practical use if the selectivity of a burden is assessed in conjunction with a *de minimis* limitation (i.e. minimal selective effect is treated as equal effect), such a limitation being inherent to any useful economic rule:

> All substantive economic rules must have a *de minimis* rule and exclude marginal effects, whether judges choose to admit this or not. The totality of the economy and its actors and regulators are bound together by infinitely complex and unexplored paths of cause and effect. Yet this does not render the law impractical or meaningless...Judges can draw lines, if not perfectly, at least well enough to keep the system going.[406]

With an eye to the debate described above about whether a static or a dynamic viewpoint should be taken when determining barriers to market entry, Davies contends that although his analysis appears to be vulnerable to criticism for its static viewpoint, it better represents the reality of a market where, particularly in relation to goods, there may be many intervening market actors (such as wholesalers and retailer) between the producer and the ultimate consumer. It is only be examining the effect of a measure from this static viewpoint at each stage of the market at the present time that competition at each stage can be preserved from distortion[407].

Having thus identified the meaning of 'market access' by reference to this practical distinction between equal burden and selective burden measures, the second question which Davies must answer is what *kind* of selectivity is relevant for 'market access', that is, what class

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[406] Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671, 676. A more forceful argument against the reality of equal burden measures might be that, even if a national measure has an equal effect and costs can be passed straight through to consumers (as Davies contemplates at 684), increased prices are likely to hinder new entrants' access to the market because when a product or service becomes more expensive, consumers become more conservative in their choice and are less likely to stray from familiar established providers.

[407] Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671, 677.

of market actors must suffer a selective burden in order for the national measure to be selective in the sense that it hinders ‘market access’ and brings the measure within the scope of free movement provisions. His answer is that *any* measures with selective effect hinder ‘market access’ in the relevant sense and it is not necessary that the hindered market actors be interstate traders as such (nor new market entrants as such), although he does seem to envision that it is only an interstate trader who has standing to invoke the Treaty rights in the first place[408]. In simple terms, interstate trade is necessary for standing but, once that is satisfied, the scope of the provision is not defined by nationality discrimination but by any discrimination (a.k.a selectivity[409]).

The principal reason Davies offers for why selectivity is preferable to nationality discrimination for defining the scope of free movement provisions is that it allows that scope to extend to any competitive disadvantage caused to an individual interstate trader. Firstly, a selective measure need only be shown to disadvantage the present interstate trader as an individual, and it need not be shown that the measure disadvantages interstate traders as a class[410]. Secondly, this need not require a detailed economic analysis of the market, which may be difficult for a private litigant to produce, but may be evidenced by the necessary operation of the law and by facts pertaining to the litigant’s own commerce, which would presumably be readily at hand[411]. As practical points, he also notes that the nationality of corporate market

[408] Gareth Davies, ‘Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law’ (2010) 11 German Law Journal 671, 689.

[409] Gareth Davies, ‘Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law’ (2010) 11 German Law Journal 671, 690.

[410] Gareth Davies, ‘Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law’ (2010) 11 German Law Journal 671, 678 and 689-690.

[411] Gareth Davies, ‘Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law’ (2010) 11 German Law Journal 671, 678.

actors is often a complex matter in any case[412] and that the market actors more heavily burdened by a selective law are likely to be interstate traders anyway[413]. Despite jettisoning nationality from his definition of the scope of the Treaty's free movement provisions, Davies does clearly state that the presence of specific nationality discrimination will weigh against a national measure for purposes of justification[414].

Tying all the above together is Davies's overall view of the purpose of the Treaty as being the removal of competitive distortion rather than the removal of national regulation as such. His reading of the Treaty is primarily economic: it permits competition-neutral market regulation which corrects for the market's failure to price an externality, but prohibits, subject to justification, competition-distorting market regulation; such justification must amount to the correction of a market failure, with its goal being the internalisation of the externality[415]. He argues that the trade restriction analysis is inappropriate for defining the scope of the free movement provisions because its scope would catch competition-neutral regulations and therefore have a deregulatory effect without consequent benefit to competition, and its effect could even be the overall reduction in the volume of trade due to the market uncertainty caused by so many national laws being open to challenge[416].

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[412] Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671, 678.

[413] Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671, 678 and 690.

[414] Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671, 701.

[415] Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671, 679-680.

[416] Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671, 686.

Is ‘Market Access’ a Genuine Third Way?:

On close examination, Prof Davies’s concept of ‘market access’ as selectivity analysis does amount to an intellectually defensible third way analysis beyond discrimination against interstate trade and restriction of interstate trade, but the fact that it has yet to be explicitly adopted by the Court means that, for the moment, the jurisprudential history of the scope of free movement provisions remains a contest between discrimination analysis and trade restriction analysis. The resistance of market access-as-selectivity to being swallowed up by either discrimination or trade restriction in the manner argued by Prof Snell can only be seen by comparing it closely with both discrimination and trade restriction to determine whether it produces genuinely different results in the examination of the question of scope.

On the one hand, Davies’s concept of selectivity does have some similarities with discrimination, and so, despite its admirable intellectual basis in the competitive distortion theory, it might be thought to amount to a modified form of the discrimination analysis. In one sense, this is so: ‘selectivity’ is another kind of ‘discrimination’. What distinguishes it from the concept of discrimination is that selectivity is discrimination against *any* group of economic actors, not just interstate traders as in the discrimination analysis. The connexion and the distinction between these two concepts can be seen from the fact that Davies’s argument consists of two questions. The first question (which is also addressed by Snell) is ‘What sort of analysis is used to define the scope of free movement provisions?’. Davies’s answer to this is ‘selectivity’, a term used to marry his answer to principles of competition law and to prepare for the answer which he will give to the second question, but at this stage selectivity is underpinned by the same principle as discrimination, namely that one group of market actors is more heavily burdened than another. This second question Davies asks is, ‘What kind of selectivity is relevant?'. It is here that selectivity splits from discrimination, as the answer is that any selectivity of effect is relevant, not just selective effect against interstate trade. It is because selectivity is a broader concept than discrimination as this second stage that it is, in retrospect, genuinely different from discrimination at the first stage. This being the case, Davies's summary argument (mentioned above) that selectivity will mostly be a proxy for discrimination anyway does not indicate that selectivity is merely a subtle reformulation of discrimination, rather it means that Member States' laws caught by the discrimination analysis will be caught by a selectivity analysis but that selectivity will also catch other laws – although in practice perhaps not many more.

On the other hand, Davies's concept of selectivity has some similarities with trade restriction too, and so if it is understood as including, but being wider than, discrimination it might be thought to amount to trade restriction analysis which similarly encompasses, but exceeds, the kind of laws caught by discrimination analysis. There are two differences between selectivity and trade restriction, however. The first is inherent in the competition law description of selectivity already given, namely, that selectivity only catches laws which distort the competitive forces within a given market, and does not catch laws which merely shrink a market uniformly as between market actors, whereas trade restriction would also catch these latter laws if they applied (even equally) to interstate trade. In this sense, selectivity is narrower than trade restriction. The second difference is less obvious, but is significant because it may make selectivity broader than trade restriction: as shown earlier, Davies clearly defines selectivity as not requiring proof that interstate traders *as a class* bear the burden of the law, merely that the interstate trader who is the present litigant has borne the burden of the law. His argument is based on the applicability of the Treaty's free movement provisions to each interstate trader as an individual and easier satisfaction of evidentiary requirements if the litigant need only show that some market actors are affected by the law, not that these actors coincide with interstate traders as such. Trade restriction analysis, on the other hand, requires proof that the Member State law is liable to hinder interstate trade as such; while trade restriction does not look at the comparative burden suffered by interstate and intrastate trade (as in discrimination analysis), its focus is the hindrance of interstate trade. In this sense, selectivity appears to lead to a wider definition of scope than trade restriction because the former does not require a link between the hindrance and the fact that the trade hindered is interstate trade, but this effect is probably more theoretical than real since standing for the purposes of selectivity analysis includes the fact that the litigant is engaged in interstate trade, and so if selectivity of effect were made out in respect of such a litigant (who must necessarily be an interstate trader), trade restriction analysis would probably judge that restriction to be *ipso facto* a restriction of interstate trade because the present interstate trader is being restricted.

Given that the concept of selectivity is demonstrably different from both discrimination and trade restriction, it must be concluded that Davies has indeed established 'market access'/selectivity analysis as a genuine third way of determining the scope of the Treaty's free movement provisions. 'Market access' (henceforth referred to as 'selectivity analysis') is notable in this sense because it emerges from competition law principles, meaning that its framework is more economic than discrimination analysis and trade restriction analysis, which have developed from notions of Member State regulatory autonomy and the appropriate supervisory power of the ECJ as a central court, and so have a more constitutional framework. Nevertheless, the economic formulation of selectivity cannot obscure the fact that its operation must have a constitutional effect, just as discrimination and trade restriction do. As Snell observed in relation to discrimination and trade restriction[417], the way that the Court decides the issue of scope (and any subsequent justification) is motivated by different views of the proper constitutional division of powers between the Member States (here, their legislatures) and the EU (here, the ECJ); such decisions serve to bring about these desired constitutional arrangements in practice. Selectivity analysis, as set forth by Davies, is motivated by a competition-based view of the EU single market wherein Member States should be free to regulate their markets to correct for market failure and to mandate the inclusion of economic externalities, but they should not be free to otherwise distort the competitive forces within their own markets; it is the ECJ's responsibility to examine and decide on the economic effect of Member States' laws. The constitutional effect of selectivity analysis seems to fall between the two traditional analyses of discrimination and trade restriction. Like discrimination, selectivity presupposes the existence of separate national markets and Member States' legislative power over their own markets, as compared to trade restriction which tends towards a presupposition of one EU-wide market with limited Member State power to obstruct free movement. However, like trade restriction which places interstate economic mobility above State legislative capacity, selectivity places the economic principle of undistorted competition *above* Member States' legislative power and gives this principle a wide application beyond merely those distortions which are unfavourable to interstate trade. As such, the use of selectivity analysis to determine the scope of free movement provisions does assume the preservation of Member States' regulatory autonomy but subjects that autonomy to a strict limitation in the form of economic, as distinct from primarily constitutional, concept of potentially broad application.

[417] Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 Common Market Law Review 437, 449-450.

Nevertheless, in all such discussion of selectivity analysis it must be borne in mind that selectivity remains at this stage merely a proposed new form of analysis, unlike discrimination and trade restriction which each have a long history of explicit judicial use and have each risen and fallen in the Court's jurisprudence over time. However much selectivity may be argued to be consistent with this past jurisprudence of the Court[418], it has not been explicitly adopted in any judgment and remains only a suggested way of determining the scope of free movement provisions. Consequently, its constitutional consequences on Member State regulatory autonomy remain speculative, without the benefit of judicial exegesis in case law.

Normative Arguments on 'Discriminatory Effect' and 'Trade Restriction':

With the concept of 'market access' as a third way thus dealt with, the jurisprudence on the definition of scope can thus be seen as being dominated by the discrimination analysis on the one hand and trade restriction analysis on the other. What, then, are the normative aspects of these two competing definitions? In the competition between them, does the advancement of the trade restriction analysis by *Italian Motorcycle Trailers* and similar cases on usage restrictions connote a general shifting of the balance between EU internal market creation and Member State legislative autonomy back in favour of central EU power?

Under the current jurisprudence, national laws on product standards *automatically* fall within art 34 TFEU, national laws on selling arrangements fall within art 34 TFEU if they are *discriminatory in effect* against imported goods and national laws on other aspects of the movement of goods and their use fall within art 34 TFEU if they restrict interstate trade in goods

[418] Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 German Law Journal 671, 691-701.

(i.e. limit imported goods' *market access*). This is, on the face of it, quite a long way from the text of art 34 TFEU which does not mention any of these three categories of national laws, much less prescribe different tests for each. As such, various judicial and academic commentators have sought to bring all 'measures having equivalent effect' in art 34 TFEU under one interpretation of that provision, that is, under the discriminatory effect interpretation or the trade restriction interpretation. A large part of this debate has been motivated by normative arguments as to which of these interpretations is preferable, given that the narrower discriminatory effect definition of the scope preserves more national laws from incompatibility with art 34 TFEU whereas the broader trade restriction definition catches more national laws and promotes EU-wide economic integration. There have been, of course, many views expressed on either side of the issue over the decades, with various shades of distinction between them, but for present purposes it is only necessary to indicate the broad distinction between these two possible interpretations, and accordingly the two contrary views of Nicholas Bernard (discriminatory effect) and Advocate-General Francis Jacobs (market access/trade restriction) shall be expounded[419]. While the purpose of doing so is to show the normative argument made for discriminatory effect or trade restriction, it will be useful to consider how the normative argument is applied to the distinction between different types of laws which was created by *Keck and Mithouard*, a distinction which both of the chosen commentators accept.

Looking first at Bernard's argument that discriminatory effect is the appropriate interpretation of 'measures having equivalent effect' in art 34 TFEU, he argues that *Keck and*

[419] Both opinions were delivered principally in response to *Keck and Mithouard* and well before the recent cases which established that the trade restriction interpretation applied in relation to restrictions other than product standards and selling arrangements, but they are useful for the force of their argument on what was, at the time, a recent and controversial judicial reversal, and their arguments may readily be extended to cover this third kind of restrictions too.

Mithouard not only lays down a discriminatory effect interpretation in respect of selling arrangements, but is also consistent with such an interpretation in relation to what it says about product standards because the automatic inclusion of product standards within art 34 TFEU merely reflects the fact that, in practice, the imposition of product standards by a national law will always have a discriminatory effect because it will always amount to 'indirect discrimination':

> It is worth recalling that the problem the court sought to address in *Cassis* was that of obstacles created by disparities between national laws. The problem here is that goods which have been produced in one member State under a given legal regime have to submit themselves to a different set of regulations, those of the State of importation, in order to be marketable in that State. Trading rules therefore have a disparate impact on imported goods and domestic goods, which results in additional cost for the imported goods, such as repackaging or reprocessing costs, that are not borne by domestic goods. This disparate impact of trading rules means that the mere imposition of national requirements on goods imported from other member States always constitutes indirect discrimination.[420] [footnote: 'An effects-based criterion of discrimination is assumed']
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> ...
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> By way of contrast, there is no necessary disparate impact in measures that regulate selling arrangements. In the majority of cases those measures will indeed be truly non-discriminatory. A ban on Sunday trading affects imported products in exactly the same way as domestic products. Evidence of a discriminatory effect [footnote: 'Or intent'] will therefore be required before art [34 TFEU] can apply to these measures. This does not mean that the requirements for the applicability of art [34 TFEU] differ depending on the category of measures. In all cases art [34 TFEU] will apply only if there is a discriminatory effect on imported goods. The only difference between requirements imposed on goods themselves and restrictions on selling arrangements is that, in the former case, no specific evidence of discrimination needs to be adduced as the very imposition of the importing State's rules is *per se* discriminatory, although such discrimination may be justified by reference to a legitimate objective.[421]

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420 Nicholas Bernard, 'Discrimination and Free Movement in EC Law' (1996) 45 International & Comparative Law Quarterly 82, 92.

421 Nicholas Bernard, 'Discrimination and Free Movement in EC Law' (1996) 45 International & Comparative Law Quarterly 82, 92-93.

In short, the identification of ‘measures having equivalent effect’ in art 34 TFEU depends on discriminatory effect, and *Cassis de Dijon* indicates that product standards will be *deemed* to have discriminatory effect, whereas *Keck and Mithouard* indicates that selling arrangements must be *proven* to have discriminatory effect.

As to why the discriminatory effect interpretation is normatively preferable, Bernard argues that because it catches a narrower range of national rules within the scope of art 34 TFEU and thus preserves greater national regulatory autonomy, it is more appropriate to the European Union’s political identity:

> The main consequence of a theory of free movement based on discrimination is that it recognises the right of Member States to exercise regulatory powers, provided they do so in a non-discriminatory manner. A federation is not a centralised state. By recognising the legitimacy of national regulation, as opposed to starting from the assumption that it is *prima facie* an obstacle to integration, the Court implicitly recognises the federal structure of the Community. The case law of the Court has a decentralising effect, but decentralisation is not synonymous with fragmentation.[422]

Thus, Bernard argues, the discriminatory effect interpretation of ‘measures having equivalent effect’ under art 34 TFEU is broadly supported by *Keck and Mithouard* and subsequent case law on product standards and selling arrangements, and is the preferable interpretation because it does not necessitate the destruction of non-discriminatory national regulatory systems. This normative preference for the discriminatory effect interpretation can easily be seen to apply also to national restrictions other than product standards and selling arrangements, such as those

[422] Nicholas Bernard, ‘Discrimination and Free Movement in EC Law’ (1996) 45 International & Comparative Law Quarterly 82, 108. The tendency of an over-wide scope of EU free movement laws to unduly constrain national regulatory autonomy (which the EU expressly preserves) is a theme frequently discussed within commentary on EU law: see, e.g. Stephen Weatherill, *Cases and Materials on EU Law* (12th edn, OUP 2016) 333 and 419, Niamh Nic Shuibne and Marsela Maci, ‘Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law’ (2013) 50 Common Market Law Review 965, 969.

which have been the subject of recent litigation in *Portuguese Car Window Tinting*, *Italian Motorcycle Trailers* and *Mickelsson and Roos*.

Turning to Advocate-General Jacobs's argument in favour of the market access/trade restriction interpretation of 'measures having equivalent effect', in his Opinion delivered for *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* (1995)[423], he argued that 'measures having equivalent effect' under art 34 TFEU should be any measures which substantially limit the access of imported goods to the national market, and not just measures which have a discriminatory effect. Measures which do not have a substantial effect on market access should not come within the scope of art 34 TFEU because this would impinge upon national regulatory authority[424] (given that such measures would not have a substantial effect on the development of the EU-wide market). Although rejecting a categorical distinction between product standards and selling arrangements[425], Advocate-General Jacobs did say, regarding measures of the kind considered in *Cassis de Dijon* as opposed to selling arrangements as in *Keck and Mithouard*, that "the former *inevitably* creates a substantial barrier to trade between member states, whereas the latter *may* create such a barrier"[426] (emphasis added).

Advocate-General Jacobs's normative basis for preferring the trade restriction interpretation was that the purpose of art 34 TFEU was the creation of one EU-wide internal market, and a

[423] Case C-412/93 [1995] ECR I-179.

[424] Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* [1995] ECR I-179, Opinion of AG Jacobs, para 41.

[425] Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* [1995] ECR I-179, Opinion of AG Jacobs, para 38.

[426] Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* [1995] ECR I-179, Opinion of AG Jacobs, para 45.

discriminatory effect interpretation of that article would not achieve this purpose because, at best, it could only ensure that in each separate national market imported and local goods would be treated equally, not that these separate national markets should become one:

> ...the exclusion from the scope of art [34 TFEU] of measures which "affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States" amounts to introducing, in relation to restrictions on selling arrangements, a test of discrimination. That test, however, seems inappropriate. The central concern of the Treaty provisions on the free movement of goods is to prevent unjustified obstacles to trade between member states. If an obstacle to inter-state trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade. I have difficulty in accepting the proposition that a member state may arbitrarily restrict the marketing of goods from another member state, provided only that it imposes the same arbitrary restriction on the marketing of domestic goods. If a member state imposes a substantial barrier on access to the market for certain products--for example, by providing that they may be sold only in a very limited number of establishments--and a manufacturer of those products in another member state suffers economic loss as a result, he will derive little consolation from the knowledge that a similar loss is sustained by his competitors in the member state which imposes the restriction.
>
> Equally, from the point of view of the Treaty's concern to establish a single market, discrimination is not a helpful criterion: from that point of view, the fact that a member state imposes similar restrictions on the marketing of domestic goods is simply irrelevant. The adverse effect on the Community market is in no way alleviated; nor is the adverse effect on the economies of the other member states, and so on the Community economy. Indeed the application of the discrimination test would lead to the fragmentation of the Community market, since traders would have to accept whatever restrictions on selling arrangements happened to exist in each member state, and would have to adapt their own arrangements accordingly in each state. Restrictions on trade should not be tested against local conditions which happen to prevail in each member state, but against the aim of access to the entire Community market. A discrimination test is therefore inconsistent as a matter of principle with the aims of the Treaty.[427]

Advocate-General Jacobs's Opinion in *Leclerc-Siplec* was not accepted by the Court in that case, which preferred to reiterate the discriminatory effect approach to the selling arrangement at

[427] Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* [1995] ECR I-179, Opinion of AG Jacobs, paras 39-40.

issue[428]. Furthermore, it has been shown above that the case law on selling arrangements has generally continued to support the discriminatory effect interpretation, although there has been a recent decisive swing in favour of the trade restriction interpretation in respect of regulations other than product standards and selling arrangements which might yet presage a broader resuscitation of the market access/trade restriction test.

Present State of the Law:

On the present state of the case law it is not clear whether there is a general preference for the market access/trade restriction interpretation of 'measures having equivalent effect' or if the trade restriction interpretation only applies to certain types of national laws, with the discriminatory effect interpretation applying to other types. The recent support for the market access interpretation in respect of regulations other than product standards and selling arrangements may indicate a creeping preference for that interpretation, and indeed the nature of the trade restriction interpretation is such that any national law caught by discriminatory effect would also be caught by market access, meaning that a wholesale adoption of the trade restriction interpretation, although in some sense a retreat from *Keck and Mithouard*, would not represent an unthinkable change in the art 34 TFEU jurisprudence. After all, if *Keck and Mithouard* was a reversal, a reversal from a reversal may yet be called progress!

[428] Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* [1995] ECR I-179, para 21. The selling arrangement which was the subject of litigation in this case was a French law which banned television advertisements of various kinds of products and economic activities, including the distribution sector – that is, the law concerned selling arrangements because it "prohibits a particular form of promotion (television advertising) and a particular for of marketing (distribution)" (para 22). Leclerc-Siplec wished to advertise fuel distribution at its supermarkets, but the Court decided that the French law did not come within the scope of art 34 TFEU because it did not have a discriminatory effect against imported goods, and thus the French ban stood.

What it would represent would be a diminution in the *prima facie* autonomy of national regulatory systems and an increased role for justification under art 36 TFEU, which shall be investigated in Chapter VII below. Whether this would be a positive change, however, depends on one's views as to the intended economic consequences of artt 34-36 TFEU within the scheme of an internal market, and on one's views as to how these articles should relate to the political structure of the European Union. Are the concepts of the "ever closer union among the peoples of Europe", which the TEU and the TFEU both resolve in their recitals to create, and the 'internal market', which art 26 TFEU declares, intended to progressively abolish the differences between national markets by declaring incompatible with EU law all national laws which (substantially) limit interstate traders' access to those markets? Or is the continued existence and legislative competence of Member States' own parliaments evidence that the Treaties do intend for national markets to continue to be subject each to their own distinctive legislation, provided that intrastate and interstate traders are treated equally within each? These issues, and the contrasts thrown by the Australian experience in dealing with similar questions, will be discussed in coming Chapters.

Section 2 – 'Measures Having Equivalent Effect' under art 35 TFEU:

Art 35 TFEU has not been the subject of anywhere near the same volume of litigation as art 34 TFEU, simply because it is not usually in the interests of a Member State to restrict the exportation of goods[429]. To the extent that 'measures having equivalent effect' under art 35

[429] See Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (2nd edn, OUP 2007) 167. (Barnard's work has subsequently been updated to a 5th edition in 2016, taking account of a small amount of subsequent case law, although without recanting the relevant point about the comparatively low volume thereof and the reason why.)

TFEU have been considered, the hallmark of such measures is that they are discriminatory against exports either on their face or in their practical effect. The 1979 case of *P.B. Groenveld BV v Produktschap voor Vee en Vlees*[430] considered the compatibility with what is now art 35 TFEU of a Dutch ban on the handling of horsemeat by any processed meat manufacturer; the ban had been imposed due to several other Member States' revulsion for the horsemeat trade, which was so strong that the Dutch regulator considered it necessary to make *absolutely sure* that no horsemeat should be able to make its way into processed meat products purportedly produced from other meats (such as beef or venison, from which horsemeat would be, according to the technology of the 1970s, indistinguishable when in sausage form). In deciding that the Dutch ban was not contrary to art 35 TFEU because it applied equally to processed meat manufacturers selling into the domestic and export markets, the Court laid down a discrimination test for the scope of that article:

> [Art 35 TFEU] concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States.
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> …
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> …in the present state of Community law a national measure prohibiting all manufacturers of meat products from having in stock or processing horsemeat is not incompatible with Article [35] of the Treaty if it does not discriminate between products intended for export and those marketed within the Member State in question.[431]

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[430] Case C-15/79 [1979] ECR 3409.

[431] Case C-15/79 *P.B. Groenveld BV v Produktschap voor Vee en Vlees* [1979] ECR 3409, paras 7-9. In retrospect, the Dutch authorities were furlongs ahead of their time, given the central involvement of a Dutch meat processor in the Tesco 'Beef' Burger Scandal of 2013! On the conviction of Dutch meat trader Willy Selten for the Tesco meat substitution affair, the Dutch court declared that by mixing horsemeat and beef and selling it on as pure beef "he contributed to a negative image for the Dutch meat industry and damaged the sector's interests" – the very thing that the Dutch law in *Groenveld* had been strenuously trying to avoid.

See 'Horsemeat Scandal: Where Did the 29% Horse in Your Tesco Burger Come From?' (*The Guardian*, 22

Article 35 TFEU went largely unlitigated for some decades thereafter, but in 2008 this discrimination test was re-confirmed in *Criminal Proceedings against Lodewijk Gysbrechts and Santurel Inter BVBA* (2008)[432]. European Union law created a 'cooling-off period' of seven working days for distance contracts (including internet purchases), during which the purchaser could freely rescind the purchase and the vendor was obliged to refund all charges associated therewith (except the cost of physically returning the goods), and allowed for Member States to take more stringent action in consumer protection. Pursuant to this, Belgian law forbade a vendor in a distance contract from requiring any payment from a purchaser during the cooling off period. Santurel Inter BVBA (of which Mr Gysbrechts was the manager) was a company which sold food supplements on the internet, selling to purchasers both in Belgium and in other Member States. After an incident in which they sold a product to a purchaser in France who claimed to have changed his mind and mailed it back to the company but it had never arrived, the company instituted a policy whereby purchasers outside Belgium could only pay by credit card, and must provide their credit card details at the time of purchase (although no charge was to be made until after the cooling off period). The Belgian Economic Inspection Board was of the opinion, however, that this requirement to provide credit card details amounted to a demand for payment during the cooling off period – even though the company's policy and practice was not to charge the card during that period, and brought an action in the Belgian courts against Santurel Inter BVBA and Mr Gysbrechts. A preliminary ruling was sought of the Court of Justice on whether the Belgian law amounted to an infringement of art 35 TFEU inasmuch as it made it

October 2013) </www.theguardian.com/uk-news/2013/oct/22/horsemeat-scandal-guardian-investigation-public-secrecy> accessed 22 April 2019 and 'Horsemeat Scandal: Dutch Trader Found Guilty and Jailed' (*BBC News*, 7 April 2015) <www.bbc.com/news/world-europe-32202995> accessed 22 April 2019.

[432] Case C-205/07 [2008] ECR I-9947.

more difficult, in practice, to engage in internet sales into other Member States. The Court was of the opinion that the burden of the Belgian law did indeed fall more heavily on exports than purely domestic trade: prohibiting a company from taking any form of payment during the cooling off period would impose a greater practical restriction on interstate trade, “by reason, *inter alia*, of the obstacles to bringing any legal proceedings in another Member State against consumers who default, especially when the sales involve relatively small sums”[433]. (The Belgian Government had actually acknowledged the discriminatory practical effect of the law in its pleadings[434].) The same discriminatory effect was created by the Belgian prohibition on the gathering of credit card details during the cooling off period[435], and the mere fact that the Belgian law applied equally to domestic and interstate trade on its face did not displace the significance of its discriminatory effect in practice[436]. That being so, the Court re-affirmed the application of the discrimination analysis in respect of the definition of the scope of art 35 TFEU[437].

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[433] Case C-205/07 *Criminal Proceedings against Lodewijk Gysbrechts and Santurel Inter BVBA* [2008] ECR I-9947, para 42.

[434] Case C-205/07 *Criminal Proceedings against Lodewijk Gysbrechts and Santurel Inter BVBA* [2008] ECR I-9947, para 22.

[435] Case C-205/07 *Criminal Proceedings against Lodewijk Gysbrechts and Santurel Inter BVBA* [2008] ECR I-9947, para 44.

[436] Case C-205/07 *Criminal Proceedings against Lodewijk Gysbrechts and Santurel Inter BVBA* [2008] ECR I-9947, para 43.

[437] The Advocate General in the case, AG Trstenjak, had argued for the re-definition of the scope of art 35 TFEU to bring it in line with what, in her view, was a general principle of trade restriction analysis then obtaining across not only art 34 TFEU but the other three Treaty Freedoms (services, person and capital): see Case C-205/07 *Criminal Proceedings against Lodewijk Gysbrechts and Santurel Inter BVBA* [2008] ECR I-9947, Opinion of AG Trstenjak, paras 42-48. The Court’s focus on the Belgian law having a *more restrictive* effect on interstate than domestic trade clearly signals that the Court did not follow AG Trstenjak’s Opinion on this point, and affirmed the discrimination analysis it had previously employed in *Groenveld*, albeit with the rider that this discrimination could now be found in effect, even if the law applied without distinction to interstate and domestic trade. On this point, see Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, OUP 2016), 101-102.

Obviously, much of the reason why art 35 TFEU has never been subject to a trade restriction test is the relative lack of litigation of this article, but the very fact that Member States are less likely to wish to restrict exports than imports means that it is the *importation* of goods which stands in greater need of protection by European Union law, which is arguably what encouraged the adoption of the trade restriction test for art 34 TFEU in the first place, as it subjects more national laws on import restriction to the requirement of justification in accordance with European Union law. For this reason, the jurisprudence on art 35 TFEU has not had to balance EU central power in the form of internal market creation and Member State legislative autonomy in the form of diverse national laws (fragmenting the internal market) in the same way, and the competitive tension between these two forces is not so acute. Nevertheless, the close textual parallel between artt 34 and 35 TFEU argues in favour of keeping the jurisprudence on these two articles as unified as possible.

Section 3: Conclusion:

As it stands, EU law on the scope of free movement of goods is broken down into four categories: 1) laws on product standards relating to imported goods, 2) laws on selling arrangements relating to imported goods, 3) laws on other aspects relating to imported goods (such as use of goods), and 4) laws on exported goods. All laws in the first category are automatically within the scope of art 34 TFEU and require justification if they are to survive. Laws in the third category are within the scope of art 34 TFEU if they substantially limit imported goods' access to the Member State's market. Laws in the second and fourth categories are within the scope of art 34 or 35 TFEU only if they discriminate against interstate trade, as compared with intrastate trade, on their face or in their practical effect. Ordered in this way, there can be seen to be a diminishing scope for EU free movement provisions running from imported product standards to selling arrangements for imports and all laws on exports. There is no textual basis for the split characterisation of laws on imports, nor is there any textual basis for the differential treatment of import and export restrictions (although there is a normative argument mentioned above). Despite this, the Court of Justice appears to be set on its categorisation of free movement jurisprudence in this way, and after one unusual jurisprudential reversal in *Keck and Mithouard* there seems to be no appetite for another. The discrimination and trade restriction tests each evince a different view of the EU internal market created by the TFEU, and of Member States' ongoing legislative role within that EU-wide market. Given the contest between these different views of Member States' role in the regulation of the internal market, the centrality of free movement of goods to the formation of that internal market, and the reticence, even sometimes opacity, of the Court's obligatory *in banco* judgments[438], it is unsurprising that the fingerprints of both ways of thinking should be seen on different parts of the Court's jurisprudence on the scope of free movement of goods.

[438] Frustratingly, this problem is most acute in respect of those judgments which are delivered on a complex and highly contested point of law – or which reverse previous ECJ case law – because that is exactly where Judges of the Court are most likely to disagree. The signal case of *Keck and Mithouard*, for instance, has been disdained as "not written with forensic precision and…almost certainly the product of compromise among the judges" (Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 69), as well as "methodologically rather destitute" (Thorsten Kingreen, 'Fundamental Freedoms', in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd ed, Hart Publishing 2010) 516).

PART 1: SCOPE

SUBPART 2: EUROPEAN UNION

CHAPTER IV:
THE SCOPE OF art 56 TFEU ON FREEDOM TO PROVIDE SERVICES

Treaty on the Functioning of the European Union (English language edition):

Article 56: Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.
...

Article 57: Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.
...

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Introduction:

As for the free movement of goods, the TFEU's provisions on freedom to provide services have been the subject of a long history of judicial interpretation in which the question of the scope of the freedom has been agitated. The question essentially being asked is how a *prima facie* interference with the protected freedom is to be identified, that is, what analysis is to be used to determine the existence of such an interference? The text of the Treaty provisions themselves appears to incline towards a discrimination analysis for impermissible interference with freedom to provide services, since those provisions refer to a person's right to provide services "under the same conditions as are imposed by [the host] State on its own nationals"[439], inviting a comparison between the way the non-national is treated and the way the national is treated under host State law – the classic discrimination analysis[440]. Indeed, early case law employed this discrimination analysis to identify *prima facie* impermissible interferences with freedom to provide services. However, beginning at least with the case of *Säger v Dennemeyer* (1991)[441], the Court made a decisive shift to the use of trade restriction analysis to identify interferences with freedom to provide services, no longer comparing the way in which the non-national and the national are treated under host State law, but instead asking whether the effect of the host State law was to "prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services"[442]. Since the shift in *Säger v Dennemeyer*, the Court has maintained this trade restriction analysis for determining the scope of the freedom to provide services, and confirmed it on numerous occasions[443].

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439 Art 57 TFEU.

440 Steiner and Woods note that, although art 56 (and art 57) TFEU does not contain an explicit reference to discrimination, its jurisprudence developed along similar lines to that of art 45 TFEU (free movement of workers) which does explicitly refer to the prohibition of nationality discrimination, and that under a discrimination analysis these provisions may be seen as specific instances of the general prohibition of nationality discrimination contained in art 18 TFEU: Lorna Woods and others, *Steiner & Woods's EU Law* (13th edn, OUP 2017) 478.

441 Case C-76/90 [1991] ECR I-4221.

442 Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221, para 12.

443 See, for example, Case C-272/94 *Criminal Proceedings against Michel Guiot and Climatec SA* [1996] ECR I-1905, para 10; Case C-439/99 *Commission v Italy ('Trade Fairs')* [2002] ECR I-305, para 22; Case C-442/02 *Caixa-Bank France v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-8961, para 11; Joined Cases C-447/08 and C-448/08 *Criminal Proceedings against Otto Sjöberg and Anders Gerdin* [2010] ECR I-6921, para 32.

Section 1: Early Case Law and Discrimination Analysis:

As for many of the Treaty freedoms, particularly in the years following the end of the Common Market transitional period[444], the early case law concerned direct nationality discrimination in a Member State's law, and consequently the Court of Justice identified the Member State law as coming within the scope of the Treaty freedom by reference to a discrimination analysis. *Reyners v Belgium* (1974)[445] is an example of such discrimination in national law and of the Court's use of discrimination analysis to define the scope of freedom to provide services. Reyners was a Dutch national who held the necessary legal diploma to allow him to take up the profession of *avocat* (lawyer) in Belgium, but Belgian law prohibited non-Belgians from being admitted as *avocats*. Unsurprisingly, in these circumstances, the Court simply proceeded to declare the Belgian law as coming within the scope of the Treaty freedom by reference to a discrimination analysis, identifying the prohibition of nationality discrimination as one of the overriding principles of the Treaty, in what is now art 18 TFEU.

In *Procureur du Roi v Debauve* (1980)[446], the Court explicitly stated that it was *only* discriminatory laws which were caught within the scope of the freedom to provide services, not all laws which established in the host State a stricter scheme of regulation than the cross-border

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[444] Article 8(1) of the original *Treaty Establishing the European Economic Community* [1957] 298 UNTS 3 provided for a transitional period of 12 years from its entry into force during which the Common Market would be progressively established; during this time Member States were obliged to progressively abolish restrictions on the free movement of goods (art 32 and 34 TEEC) freedom to provide services (art 59 TEEC) and free movement of capital (art 67 TEEC). The Treaty having come into effect on 1 January 1958, the transitional period ended on 31 December 1969.

[445] Case 2/74 [1974] ECR 631.

[446] Case 22/79 [1980] ECR 833.

trader would have found in his/her home State. In that case, Belgian law prohibited the broadcasting and cable transmission of commercial advertising on radio and television and Debauve ran a company which provided cable transmission of both Belgian television and television from other Member States, without excising the commercial advertisement from the foreign television programmes. Criminal proceedings were commenced against Debauve and other officers of the company for breach of this prohibition, and it fell to the Court of Justice to determine whether the Belgian prohibition was compatible with artt 56 and 57 TFEU. The Court noted that commercial advertising on television was subject to widely different schemes of regulation in different Member States, ranging from prohibition to broad commercial freedom, but stated that the Treaty's provisions on freedom to provide services were not engaged merely by the host State employing a more restrictive scheme of regulation than that of the service provider's home State[447]. Rather, incompatibility with the Treaty only arose where a national measure was applied with "distinction as regards the origin, whether national or foreign, of [the content of the services in question, here advertisements], the nationality of the person providing the service, or the place where he is established"[448]**.**

The Court confirmed in the *German Insurance Services Case* (1986)[449] that the kind of discrimination which would bring a national measure within the scope of art 56 TFEU included

[447] Case 22/79 *Procureur du Roi v Debauve* [1980] ECR 833, paras 12-13.

[448] Case 22/79 *Procureur du Roi v Debauve* [1980] ECR 833, para 16. Somewhat confusingly, despite thus judging the Belgian law to be outside the scope of the Treaty's freedom to provide services, the Court goes on to address, albeit rather briefly, the question of whether the Belgian prohibition was disproportionate to the purpose to be achieved, a consideration which should only arise if the Belgian law was indeed within the scope of art 56 TFEU and required justification (including proportionality to its intended purpose) to avoid being found incompatible with the Treaty. Since the Court was addressing the issue of proportionality explicitly in response to one of the questions put to it by the Belgian court as part of the preliminary reference, this part of the Court's judgment is best regarded as a discussion of the proportionality of the Belgian law *in the alternative* to its prior conclusion that the Belgian law was not within the scope of the Treaty freedom (which would render the question of its proportionality nugatory).

[449] Case C-205/84 *Commission v Germany ('Insurance Services')* [1986] ECR 3755.

not only discrimination on the basis of nationality but also discrimination on the basis of the service provider's being established in another Member State[450]. Similarly, it had long been clear that discrimination for the purposes of art 56 TFEU was not confined to unequal treatment on the face of the law, but also extended to where, in practice, the law operated unequally as between nationals and non-nationals (or those established in the home State and those established elsewhere)[451].

This parallels the development of the Court's jurisprudence on free movement of goods (explored in Chapter III), in which the definition of scope employed in the early decades of the case law is one based on discrimination against interstate trade, which consequently had a fairly light effect on Member State legislative autonomy.

Section 2: The Shift to Trade Restriction Analysis:

The dominance of the discrimination analysis began to be eroded, however, as a result of the Court's attempt to give the freedom to provide services contained in art 56 TFEU a meaningful effect separate from the freedom of establishment contained in art 49 TFEU. Where national measures required establishment in the host State in order to provide services in that State, or subjected service providers established in another Member State to regulation in the host State in addition to the regulation to which they were already subject in their home State without making provision for the equivalence of the home State regulation, the Court perceived that the distinction between freedom to provide services and freedom of establishment was at risk of

[450] Case C-205/84 *Commission v Germany ('Insurance Services')* [1986] ECR 3755, para 25.

[451] Case C-15/78 *Société générale alsacienne de banque SA v Koestler* [1978] ECR 1971, para 4.

effectively being collapsed, and the former folded into the latter, if Member States were not required to justify such national measures. Since justification was only required where national measures came within the scope of art 56 TFEU, that is, where they constituted a *prima facie* breach of that article, it was necessary for the scope of art 56 TFEU to be enlarged so as to include national measures of this kind.

An example of this expansion of art 56 TFEU's scope for the purposes of maintaining the distinction between freedom to provide services and freedom of establishment is found in *Société générale alsacienne de banque SA v Koestler* (1978)[452]. In that case, German law required that those providing direct insurance in Germany through salesmen and other representatives be established in Germany, prohibited German insurance brokers from arranging insurance contracts between German residents and insurers not established in Germany, and further required that in the case of co-insurance on a risk situated in Germany the lead insurer be established in Germany and authorised by Germany to cover the risk as a sole insurer; German law also set very high thresholds in respect of co-insurance of fire and civil liability. In addressing the issue of the German law's compatibility with art 56 TFEU, the Court repeated its earlier reasoning that artt 56 and 57 TFEU prohibited discrimination on the grounds of nationality (or location of establishment), but with the important corollary that the mere absence of such discrimination did not necessarily prove the compatibility of a national measure with the freedom to provide services where the national measure had the effect of hollowing out that freedom by imposing establishment requirements:

> ...the principal aim of [art 57 TFEU] is to enable the provider of the service to pursue his activities in the Member State where the service is given without suffering discrimination in favour of the nationals of the State. However, it does not follow from that paragraph

[452] Case C-15/78 [1978] ECR 1971.

> that all national legislation applicable to nationals of that State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other Member States.[453]
>
> ...
>
> If the requirement of an authorization [*sic*] constitutes a restriction on the freedom to provide services, the requirement of a permanent establishment is the very negation of that freedom. It has the result of depriving [art 56 TFEU] of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided...[454]

The Court having decided that the integrity of the Treaty's guarantee of freedom to provide services as distinct from the freedom of establishment should be maintained, it explained how it would maintain that integrity by examining national measures to determine whether they were objectively justified:

> ...the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by provisions which are justified by the general good and which are applied to all persons or undertakings operating within the territory of the State in which the service is provided insofar as that interest is not safeguarded by the provisions to which the provider of a service is subject in the Member State of his establishment. In addition, such requirements must be objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected.[455]

In order for the Court to be in a position to examine whether such national measures were justified, though, it was necessary that it should first judge that the measures in question came within the scope of the freedom to provide services (thus requiring justification) by raising a *prima facie* incompatibility with art 56 TFEU. Accordingly, the German law's authorisation and establishment requirements in respect of insurance providers were judged to come within the

[453] Case C-15/78 *Société générale alsacienne de banque SA v Koestler* [1978] ECR 1971, para 26.

[454] Case C-15/78 *Société générale alsacienne de banque SA v Koestler* [1978] ECR 1971, para 52.

[455] Case C-15/78 *Société générale alsacienne de banque SA v Koestler* [1978] ECR 1971, para 27.

scope of art 56 TFEU on the grounds that the restriction on provision of insurance services by insurers established outside Germany increased the cost of those services in Germany:

> It must be stated that the requirements in question in these proceedings, namely that an insurer who is established in another Member State, authorized [*sic*] by the supervisory authority of that State and subject to the supervision of that authority, must have a permanent establishment within the territory of the State in which the service is provided and that he must obtain a separate authorization [*sic*] from the supervisory authority of that State, constitute restrictions on the freedom to provide services inasmuch as they increase the cost of such services in the State in which they are provided, in particular where the insurer conducts business in that State only occasionally.[456]

Thus, out of a concern to maintain the integrity of freedom to provide services as distinct from freedom of establishment, and without explicitly disavowing the discrimination analysis, the Court had shifted from looking for *differential treatment* as between nationals and non-nationals (or persons established within the Member State and persons established elsewhere) to looking for a *restriction on cross-border trade* which decreases the price competitiveness of such trade. Furthermore, the effect on cross-border trade did not need to be demonstrated by empirical data showing the actual financial effect of the national measure in question, but need only be an economic projection of the financial effect of the law[457].

A similar expansion of the scope of art 56 TFEU can be seen in *Gouda v Commissariaat voor de Media* (1991)[458]. After acknowledging that one way in which a national measure could fall within the scope of art 56 TFEU was by applying differently to nationals and non-nationals

[456] Case C-15/78 *Société générale alsacienne de banque SA v Koestler* [1978] ECR 1971, para 28.

[457] In the event, the Court found the German law to be justified in respect of its authorisation requirements (provided that equivalent standards already complied with in the home State could be credited towards meeting the condition of such German authorisation), and in respect of the thresholds set for insurers. The elements of German law requiring establishment of an insurer in Germany, including that a lead insurer on a co-insurance deal be established in Germany, were found not to be justified.

[458] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007.

(or those established in the host State and elsewhere), the Court stated that, even absent such discrimination, a national measure could still constitute a *prima facie* breach of the freedom to provide services (and so invite questions of justification) if it created double regulation for those established in other Member States: "restrictions on the freedom guaranteed by the Treaty in this field may arise in the second place as a result of the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State' s legislation". This echoes the reasoning in *Société générale alsacienne de banque SA v Koestler* above that a national measure will come within the scope of art 56 TFEU where it diminishes the competitiveness of cross-border service provision, but generalises it beyond the specific circumstances of the earlier case in which the national measure had threatened to collapse the distinction between freedom to provide services and freedom of establishment. Evidently, then, by the time of *Gouda v Commissariaat voor de Media* the Court had moved some distance away from its earlier instance in *Procureur du Roi v Debauve* that discrimination *and only discrimination* would bring a national measure within the scope of art 56 TFEU, and appeared to be subsuming the question of discrimination into a broader question of whether the national measure restricted cross-border trade – the Court seemed to be moving from a discrimination analysis to a trade restriction analysis for identifying the scope of the freedom to provide services.

In fact, in a judgment delivered on the same day as *Gouda v Commissariaat voor de Media*, although with a smaller and differently populated bench[459], the Court made unambiguously clear

[459] *Gouda v Commissariaat voor de Media* was heard by an 11 judge Grand Chamber (comprising Mancini, O'Higgins, Moitinho de Almeida, Rodríguez Iglesias, Díez de Velasco, Slynn, Kakouris, Joliet, Schockweiler, Grévise and Zuleeg JJ), whereas *Säger v Dennemeyer* was heard by the Sixth Chamber almost entirely composed of

that it had indeed adopted a trade restriction analysis for identifying relevant interference with freedom to provide services. In *Säger v Dennemeyer*[460], German law required that persons providing services relating to the maintenance of industrial property rights (such as patent renewal) be licensed patent agents possessing certain professional qualifications. Dennemeyer & Co Ltd was a company established in the UK which provided patent renewal services to patent holders in other Member States, these services consisting of maintaining a record of when a patent was due to be renewed, sending a reminder to the client that the patent needed to be renewed, and then paying for the renewal of the patent when instructed to do so by the client. Dennemeyer & Co Ltd did not, however, provide patent *advice* services, and so did not provide advice to clients as to whether the patent should be renewed, the consequences of renewing or not renewing the patent, or any changes in the law that would affect the validity of the patent; as such, the company was not a licensed patent agent. Dennemeyer & Co Ltd provided its patent renewal services to clients in Germany at a lower cost than was typical for patent agents licensed and established in Germany, and suit was brought against the British company by a competitor, a German patent agent, for breach of German law, with the Court of Justice being called on to determine the compatibility of that German law with art 56 TFEU. Plainly, the German law did not discriminate against the provision of services by a non-German company, nor did it discriminate on the basis of whether the company was established in Germany, so under a discrimination analysis the German law would not fall within the scope of the Treaty freedom. The Court, however, explicitly adopted a trade restriction analysis in defining the scope of the freedom:

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judges who formed part of the Grand Chamber in the former case (Mancini, O'Higgins, Kakouris, Schockweiler and Kapteyn JJ).

[460] Case C-76/90 [1991] ECR I-4221.

> It should first be pointed out that [art 56 TFEU] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.[461]

Although the Court did refer to the issue of national measures not being able to subvert freedom to provide services by placing establishment requirements on service providers, by now this consideration, which had originally opened the way to the trade restriction analysis for the scope of the freedom, was now seen as just one particular instance of such a trade restriction[462]. In light of the adoption of the trade restriction analysis, the German law in question did indeed come within the scope of the Treaty freedom as the requirement that a provider of patent renewal services gain an administrative licence restricted the provision of such cross-border services[463].

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461 Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221, para 12.

462 Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221, para 13. Despite the distinction drawn between services and establishment here and elsewhere, the Court later adopted a trade restriction analysis for freedom of establishment too: Case C-55/94 *Gebhard v Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37. Indeed, in *Gebhard* the formulation "national measures liable to hinder or make less attractive" was expressed as being a general test of scope for *all* the Treaty's provisions concerning the exercise of fundamental freedoms, explicitly referring to a very similar formulation previously pronounced in respect of a free movement of workers ("liable to hamper or to render less attractive" in Case C-19/92 *Kraus v Land Baden-Württemburg* [1993] ECR I-1663, para 32). Although *Gebhard*'s "liable to hinder or make less attractive" employs somewhat weaker language than *Säger*'s "liable to prohibit or otherwise impede", the intent appears to be that its meaning should be effectively the same, and subsequent references to this *Gebhard* formula have effectively merged it with the *Säger* formula to produce "all measures which prohibit, impede or render less attractive", as employed in Case C-439/99 *Commission v Italy ('Trade Fairs')* [2002] ECR I-305, para 22, which is, like *Gebhard*, stated to be a single test for freedom to provide services and freedom of establishment.

463 Case C-76/90 [1991] ECR I-4221, para 14. On the subsequent question of justification, the Court considered that the German law was capable of being justified by reference to "imperative reasons relating to the public interest" (para 15), as it did not discriminate between domestic traders and those established in other EU countries. In the event, the Court ruled that the law was not justified, as the restrictions it imposed on the provision of patent renewal services were disproportionate to the law's purpose of protecting patent holders (paras 16-21).

Section 3: Developments in Case Law After *Säger v Dennemeyer*:

Despite *Säger v Dennemeyer* apparently representing a clear adoption of the trade restriction analysis for the scope of art 56 TFEU, the case law following that decision was not absolutely consistent in its preference for trade restriction analysis over discrimination analysis. Two streams of jurisprudence seem to have run parallel for a decade or so after *Säger v Dennemeyer*: the first stream flowing on from the formulation in *Säger v Dennemeyer* and the second stream using a somewhat different formulation that was not so clearly based on a trade restriction analysis. The first stream of cases includes *Vander Elst v Office des Migrations Internationales* (1994)[464], *Guiot* (1996)[465], *SETTG* (1997)[466], *Corsica Ferries France* (1998)[467], *Arblade* (1999)[468], *Analir v Administración General del Estado* (2001)[469], *Italian Trade Fairs* (2002)[470], *Liga Portuguesa de Futebol Profissional* (2009)[471] and *Sjöberg and Gerdin* (2010)[472], all of which essentially continue the trade restriction analysis for scope as formulated in *Säger v Dennemeyer*, although, by the time of *Guiot* the formulation had been expanded slightly to

[464] Case C-43/93 *Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803, para 14.

[465] Case C-272/94 *Criminal Proceedings against Michel Guiot and Climatec SA* [1996] ECR I-1905, para 10.

[466] Case C-398/95 *Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v Ypourgos Ergasias* [1997] ECR I-3091, para 16.

[467] Case C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop arl* [1998] ECR I-3949, para 56.

[468] Joined Cases C-369/96 and C-376/96 *Criminal Proceedings against Jean-Claude Arblade and Bernard Leloup* [1999] ECR I-8453, para 33.

[469] Case C-205/99 *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) v Administración General del Estado* [2001] ECR I-1271, para 21.

[470] Case C-239/99 *Commission v Italy ('Trade Fairs')* [2002] ECR I-305, para 22.

[471] Case C-42/07 *Liga Portuguesa de Futebol Profissional v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-7633, para 51.

[472] Joined Cases C-447/08 and C-448/08 *Criminal Proceedings against Otto Sjöberg and Anders Gerdin* [2010] ECR I-6921, para 32.

encompass (in addition to discriminatory measures) "any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede *or render less advantageous* the activities of a provider of services established in another Member State where he lawfully provides similar services"[473] (emphasis added). The second stream includes cases such as *French Maritime Transport* (1994)[474], *Kohll v Union des caisses de maladie* (1998)[475], *Smits and Peerbooms* (2001)[476], *Leichtle v Bundesanstalt für Arbeit* (2004)[477] and *Zanotti v Agenzia delle Entrate* (2010)[478] wherein the scope of art 56 TFEU is expressed as being "any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State"[479].

Both the first stream of cases and the second stream ask whether the cross-border service provider is hindered in the provision of services into the State whose law is in question, but the difference between the two streams lies in what comparator they use to identify that hindrance, as the concept of 'hindrance' requires that the actual state of affairs be compared with another, counterfactual state of affairs (the comparator). The first stream of cases maintains the use of the trade restriction analysis, comparing the cross-border service provider's position in the host State

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[473] Case C-272/94 *Criminal Proceedings against Michel Guiot and Climatec SA* [1996] ECR I-1905, para 10.

[474] Case C-381/93 *Commission v France ('Maritime Transport')* [1994] ECR I-5145, para 17.

[475] Case C-158/96 *Kohll v Union des caisses de maladie* [1998] ECR I-1931, para 33.

[476] Case C-157/99 *Geraets-Smits v Stichting Zeikenfonds VGZ; Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, para 61.

[477] Case C-8/02 *Leichtle v Bundesanstalt für Arbeit* [2004] ECR I-2641, para 37.

[478] Case C-56/09 *Zanotti v Agenzia delle Entrate* [2010] ECR I-4517, para 42.

[479] Case C-381/93 *Commission v France ('Maritime Transport')* [1994] ECR I-5145, para 17.

with his/her ability to provide such services under his/her *home State* law. By contrast, the second stream of cases seems to rely on a discrimination analysis, comparing the cross-border service provider's position in the host State with a domestic service provider's ability to provide such services in that same *host State*. While the practical relevance of the different formulations has been questioned[480], it does appear that each is based on a different analysis for determining the scope of art 56 TFEU and so would ultimately lead to a different definition of that scope, the first stream having a more deregulatory effect insofar as it could bring a Member State's laws into *prima facie* incompatibility with art 56 TFEU based simply on their being more restrictive that the service provider's home State[481]. It is unlikely, however, that the Court is consciously intending to bifurcate its jurisprudence in this manner, given the similar composition of the bench in cases on both sides of this supposed division and the temporal proximity of these judgements to one another[482], so it is probably better to regard the second stream as merely being a variation of expression[483] and to see its implicit reference to discrimination as being consistent

[480] Lorna Woods and others, *Steiner & Woods's EU Law* (13th edn, OUP 2017) 483-484.

[481] The Court has denied that mere difference of two Member States' laws would be enough to bring the more restrictive law within the scope of the Treaty provision: Case C-379/92 *Criminal Proceedings against Matteo Peralta* [1994] ECR I-3453, para 48; Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, para 27. However, what the Court was specifically denying was that this mere difference of laws amounts to *discrimination*, and it is not clear how this mere difference of national laws affects the question of whether there exists a *trade restriction* (unless, as discussed below, the scope of art 56 TFEU is contained by a remoteness-uncertainty limitation and/or a *de minimis* limitation in which mere difference of national laws is caught).

[482] Most obviously Case C-43/93 *Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803 and Case C-381/93 *Commission v France ('Maritime Transport')* [1994] ECR I-5145 which were handed down with identically composed Grand Chambers (Due P, Mancini, Moitinho de Almeida, Díez de Velasco, Edward, Kakouris, Joliet, Schockweiler, Rodríguez Iglesias, Grévisse, Zuleeg, Kapteyn and Murray JJ) within two months of one another (9 August 1994 and 5 October 1994 respectively) – although the Rapporteurs and Advocates General were different (Díez de Velasco J and AG Tesauro, and Schockweiler J and AG Lenz respectively).

[483] Note, however, Barnard's observations regarding the possibility of a more substantial shift back to discrimination analysis, particularly in Case C-134/03 *Viacom Outdoor Srl v Giotto Immobilier SARL (Viacom II)* [2005] ECR I-1167, para 37 and Joined Cases C-544/03 and C-545/03 *Mobistar SA v Commune de Fléron; Belgacom Mobile SA v Commune de Schaerbeek* [2005] ECR I-7723, para 35: see Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, OUP 2016) 232 and 425-426. Weatherill similarly argues that these cases represent a

with the declaration in *Säger v Dennemeyer*, and in all the cases in the first stream, that the scope of art 56 TFEU certainly *encompassed* discriminatory national measures without being *limited* to such measures[484].

The Court's adoption of the trade restriction analysis for the scope of art 56 TFEU has led to a considerable expansion of the kinds of national measures coming within that scope which would not have done so under the former discrimination analysis. A British law prohibiting the holding of large-scale lotteries in the UK and the importation of advertisements or tickets for such lotteries, wherever they were to be held, was judged to come within the scope of art 56 TFEU because it was an obstacle to the cross-border provision of such services, even though it was not discriminatory against non-British service providers in its form or effect[485]. A Portuguese law restricting the operation of gambling and games of chance to authorised locations was judged to be within the scope of art 56 TFEU[486], as were an Italian law requiring a licence and police authorisation to organise gambling (as an operator or intermediary)[487], a Dutch law requiring private security firms and detective agencies to be authorised by the Dutch Minister[488], an Italian law requiring that patent agents be enrolled on the register of the Italian Central Patent

Keck-style limitation of the scope of art 56 TFEU, without the Court explicitly declaring that discrimination is once again the test for scope: Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 70-71.

484 This argument finds support in the Advocate General's Opinion in Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, Opinion of AG Jacobs, para 49.

485 Case C-275/92 *HM Customs and Excise v Schindler* [1994] ECR I-1039, paras 44-45 and 51-52.

486 Case C-6/01 *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) v Portugal* [2003] ECR I-8621, para 66; a similar Greek law restricting electrical, electromechanical and electronic gaming machines to authorised casinos was judged to be within the scope of art 56 TFEU in Case C-65/05 *Commission v Greece (Greek Gaming Machines Case)* [2006] ECR I-10341, para 53.

487 Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paras 42-44.

488 Case C-189/03 *Commission v Netherlands ('Private Security')* [2004] ECR I-9289, para 17.

Office and be established in Italy[489], and the Swedish law previously discussed in relation to free movement of goods in Chapter III which prohibited television, radio, billboard, direct mail and most forms of print advertising for alcohol products[490]. It is also possible that national and sub-national taxes imposed on the provision of services may fall within the scope of art 56 TFEU where such taxes apply to sufficient forms of service provision and are of sufficient level to prohibit, impede or make less attractive the cross-border provision of services[491].

Taking a step back from the immediacy of the case law, the larger phenomenon at work here is the effect on the EU-Member State balance which is engendered by the ongoing dominance of the trade restriction analysis. Unlike for goods, where a variety of different definitions of scope have competed, and arguably still compete, for dominance, in the field of free movement of services the singular advancement of the trade restriction test since *Säger v Dennemeyer* has meant that Member State legislative autonomy is more constricted in respect of services than in respect of goods. The reason for this may lie in the fact that the internal market for services was later to develop than the market for goods, meaning that limitations of Member States'

[489] Case C-131/01 *Commission v Italy ('Patents')* [2003] ECR I-1659, paras 27 and 42.

[490] Case C-405/98 *Konsumertombudsmannen v Gourmet International Products AB* [2001] ECR I-1795, para 39. Perhaps influenced by its analysis of the free movement of goods question raised in the same case and the *Keck and Mithouard* jurisprudence of selling arrangements not coming within the scope of art 34 TFEU unless they fall more heavily on the cross-border trader than the domestic trader, the Court here referred to the Swedish law having "a particular effect on the cross-border supply of advertising space" as though using a discrimination rather than trade restriction analysis, but, given the wider scheme of case law, this is better regarded as accidental cross-pollination from *Keck and Mithouard* than a deliberate disavowal of *Säger v Dennemeyer* trade restriction analysis.

[491] Case C-134/03 *Viacom Outdoor Srl v Giotto Immobilier SARL (Viacom II)* [2005] ECR I-1167, paras 36-38; the necessary implication of this judgment is that if the tax in question were not as restricted (in terms of coverage and amount) as it was here, then it would come within the scope of art 56 TFEU even though it was judged to be not discriminatory, although as yet no case has explicitly judged a non-discriminatory tax to be within the scope of art 56 TFEU merely on the basis of its trade restrictive effect. National and sub-national taxes which are indeed discriminatory in form or effect against cross-border service provision (i.e. place it at a competitive disadvantage as against domestic service provision) clearly do come within the scope of art 56 TFEU: Case C-381/93 *Commission* v *France ('Maritime Transport')* [1994] ECR I-5145, paras 21-22; Case C-17/00 *De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECR I-9445, paras 33-35.

legislative power in this field resulting from a trade restriction definition did not bite so early and so hard. This cannot be a complete explanation however, given the argument over whether services should experience a *Keck and Mithouard*-style reversal and jurisprudential reversal and re-imposition of discrimination analysis (considered below) – certainly the market for services did not develop so late that it could have missed jurisprudential developments in the mid-1990s.

As shall be seen below, another distinctive aspect of interstate trade in services is that they are less conspicuous than the interstate trade in physical goods, which can be seen displacing local goods on shelves, and the trucks carrying which can be seen and blockaded on the major roads. The subtlety and silence of the growing interstate service trade has made it less controversial at a domestic level (although with notable exceptions such as in *Laval* (2007)[492], considered in Chapter VII), meaning that the inroads against Member State legislative autonomy which the trade restriction definition creates have weighed less strongly against the competing central interest in EU internal market creation.

The Absence of a *Keck and Mithouard*-Style Limitation of Scope:

In contrast to the development of the jurisprudence on the scope of art 34 TFEU (free movement of goods), the Court has not been moved to limit the use of trade restriction analysis for the scope of art 56 TFEU by delivering a *Keck and Mithouard*-style judgment which would re-establish the use of discrimination analysis (and its focus on the inequality of burden suffered by cross-border and domestic trade). The Court explicitly rejected the adoption of such a 'selling

[492] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] I-11767.

arrangements' limitation of art 56 TFEU's scope in *Alpine Investments* (1995)[493], in which the Dutch Minister for Finance imposed a ban on cold-calling as a condition for the licensing of financial intermediaries dealing in off-market commodities futures; the ban prevented such intermediaries from cold-calling both Dutch residents and persons resident outside the Netherlands. Before the Court, the Netherlands advocated the use of discrimination analysis in the interpretation of art 56 TFEU, arguing that the administrative practice in question should not fall within the scope of art 56TFEU because it was akin to a *Keck and Mithouard* selling arrangement which affected the way in which services could be offered but did not create a *differential burden* as between cross-border and domestic trade. The Court disagreed, however, and seemed[494] to reaffirm the principle that even a non-discriminatory national measure would come within the scope of art 56 TFEU if it restricted the cross-border provision of services, as was the case here[495].

The adoption of a *Keck and Mithouard*-style selling arrangements limitation was again advocated by the German public order authority in *Omega Spielhallen* (2004)[496] as a way of exempting from the scope of art 56 TFEU the German police order in question, which prohibited the operation of a laserdrome (by a franchisee of a UK company) in which players engaged in simulated shooting of one another. In her Opinion, AG Stix-Hackl argued against such a

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[493] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141.

[494] See Section 4:'A Different Rule for Export of Services?' below.

[495] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, paras 33-37. The Advocate General also disagreed with the application of a *Keck and Mithouard*-style limitation on the grounds that if it applied to both the home State and the host State, neither State's law would be capable of review by the Court of Justice and double regulation, perhaps even two conflicting regulations, would be imposed upon the cross-border trader: Opinion of AG Jacobs, para 61.

[496] Case C-36/02 *Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

limitation of the scope of art 56 TFEU on the basis that it was not possible to make a logical distinction between requirements for services themselves and the selling arrangement for services (as *Keck and Mithouard* had between product requirements and selling arrangements for products) because the incorporeal nature of services renders any such distinction evanescent[497]. In its judgment, the Court indeed did not adopt a *Keck and Mithouard*-style limitation, and simply decided that prohibiting the offering of the service in question was a restriction on the UK company's freedom to provide, and German consumers' freedom to receive, those services[498]. Prof Catherine Barnard argues[499] that the Court also declined to adopt a selling arrangements limitation in the *Belgian Loyalty Bonus Case* (2005)[500], wherein a Belgian law prohibited vendors from making offers to customers of discounted or free products and services on the basis of customers' past purchases (except for related products and services worth no more than 1/3 of the price of the primary purchase). Such a law did restrict the interstate trade in services, but did not restrict interstate trade any more than purely domestic Belgian trade. The Court decided that the Belgian law did not fall within the scope of art 56 TFEU, but declined to so rule on the basis of a lack of discrimination; rather, the Court judged that the Commission had simply not made out its case for breach of the article[501]. (It bears noting at this point that Barnard does argue that the 'too uncertain and indirect' limitation on the scope of art 56 TFEU effectively achieves the

[497] Case C-36/02 *Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, Opinion of AG Stix-Hackl, para 36.

[498] Case C-36/02 *Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para 25.

[499] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, OUP 2016) 398.

[500] Case C-287/03 *Commission v Belgium ('Loyalty Bonus')* [2005] ECR I-3761.

[501] Case C-287/03 *Commission v Belgium ('Loyalty Bonus')* [2005] ECR I-3761, para 30.

same result as a *Keck and Mithouard*-style selling arrangements limitation anyway; this argument is considered in the following section.)

On the other hand, Prof Stephen Weatherill argues[502] that a *Keck and Mithouard*-style limitation does exist for services as well as for goods, although the Court has not explicitly found as such. In analysing the Court's judgment in *Mobistar* (2005)[503], Weatherill notes that while the Court did indeed reiterate the familiar trade restriction analysis dominant in the case law on art 56 TFEU since *Säger v Dennemeyer*, a mere two paragraphs later[504] it stated that national measures which had no more restrictive effect on interstate trade than domestic trade would *not* fall within the scope of the article. In Weatherill's analysis, "This is '*Keck*-like' sense of restraint. But the Court avoided any explicit embrace of a convergent approach between the freedoms"[505]. In truth, the import of the judgment on this point is unclear at best, and the mutually contradictory statements issued by the Court shows that, at the very least, there is no clear and settled judicial will to impose a *Keck*-style return to discrimination analysis in respect of services. Weatherill acknowledges that the Court has not made any explicit statement in favour of a return to discrimination analysis; the ambiguity (to put it mildly) of the Court's jurisprudence on this point is an incident of the broader ambiguity of 'the internal market' as a legal concept:

[502] Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 68-73.

[503] Joined Cases C-544/03 and C-545/03 *Mobistar SA v Commune de Fléron; Belgacom Mobile SA v Commune de Schaerbeek* [2005] ECR I-7723.

[504] Joined Cases C-544/03 and C-545/03 *Mobistar SA v Commune de Fléron; Belgacom Mobile SA v Commune de Schaerbeek* [2005] ECR I-7723, para 31. These paragraphs, contradictory as they are, are repeated *verbatim* in the recent case of Case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft v Hungary* ECLI:EU:C:2015:386, paras 35-36.

[505] Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 71.

> The internal market as a legal concept is not useful in any practical concrete operational sense here. It is broad and ambiguous. The Court's case law conveys that [*scil.* it] has chosen to treat the free movement rules as *less* than a charter for general review of Member State economic policy but *more* than a mere anti-discrimination rule. This is not in any sense constitutionally right or wrong. The Treaty [on the Functioning of the European Union] offers no such benchmark.[506] (emphasis in original)

In light of the Court's explicit rejection of a selling arrangements limitation in *Alpine Investments*, AG Stix-Hackl's arguments in *Omega Spielhallen* regarding the indistinguishability of services and selling arrangements for those services, and the Court's silence on the possibility of distinguishing primary services and ancillary selling arrangements like loyalty schemes in *Belgian Loyalty Bonus*, it is safe to say that the Court does not appear eager to narrow the scope of art 56 TFEU by explicitly imposing a *Keck and Mithouard*-style selling arrangements limitation on it. However, the question of whether such a limitation nevertheless exists in practice is a more complex one, as Weatherill's argument above shows.

The Remoteness-Uncertainty Limitation:

In *Peralta* (1994)[507], the Court examined the validity of an Italian law prohibiting the dumping of hazardous chemicals by all vessels within Italian waters and by Italian-flagged vessels outside Italian waters. This law was argued to be incompatible with various provisions of the Treaty, including the free movement of goods and the freedom to provide services. In the course of its judgment, the Court stated that the effect of the provisions of the law which prohibited Italian-flagged vessels from dumping hazardous chemicals outside Italian waters was "too uncertain and indirect"[508] to come within the scope of the free movement of *goods*; it also

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[506] Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 76.

[507] Case C-379/92 *Criminal Proceedings against Matteo Peralta* [1994] ECR I-3453.

[508] Case C-379/92 *Criminal Proceedings against Matteo Peralta* [1994] ECR I-3453, para 24.

decided, *without* explicit reference to uncertainty and indirectness of effect, that the law did not come within the scope of the freedom to provide *services*[509]. In his Opinion in *Alpine Investments*, however, AG Jacobs sought to extend *Peralta*'s remoteness-uncertainty limitation from free movement of goods to freedom to provide services: "in *Peralta* the effect of the rules of the Member State of origin on the freedom to provide services was so remote, tenuous and indirect as hardly to constitute a restriction within the meaning of [art 56 TFEU]". In its judgment in *Alpine Investments*, however, the Court did not discuss the application of this remoteness-uncertainty limitation to the scope of art 56 TFEU. Nevertheless, subsequent case law has affirmed that the scope of art 56 TFEU is subject to a limitation on the basis of remoteness-uncertainty where the effect of the law on freedom to provide services is "too uncertain and indirect"[510].

Prof Barnard argues[511] that such an exclusion from the scope of art 56 TFEU of provisions whose effect on freedom to provide services is 'too uncertain and indirect' is effectively equivalent to a *Keck and Mithouard* selling arrangements limitation. The case of *Pelckmans Turnhout NV v Walter van Gastel Balen NV* (2014)[512] is cited as an example: in that case a Belgian law imposing a mandatory weekly 24-hour closed period on most retail shops was

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[509] Case C-379/92 *Criminal Proceedings against Matteo Peralta* [1994] ECR I-3453, paras 49-54.

[510] Case C-231/03 *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [2005] ECR I-7287, para 20 (remoteness-uncertainty is possibly being discussed as a *justification* here, but it operates more logically as a limitation of *scope*); Case C-211/08 *Commission v Spain ('Interstate Hospital Care')* [2010] ECR I-5267, para 72. Advocates General have also taken up the remoteness-uncertainty limitation on the scope of art 56 TFEU: Case C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop arl* [1998] ECR I-3949, Opinion of AG Fennelly, at para 44; Case C-532/03 *Commission v Ireland ('Emergency Ambulance Services')* [2007] ECR I-11353, Opinion of AG Stix-Hackl, paras 87-88 (mentioning the issue of how to draw the boundaries of uncertainty and indirectness).

[511] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, OUP 2016) 398.

[512] Case C-483/12 ECLI:EU:C:2014:304.

challenged as being incompatible with both art 34 TFEU on free movement of goods and art 56 TFEU on services. In the course of disposing of the case, the Court deals summarily with both arguments, dismissing the art 34 TFEU argument on the basis of a lack of discrimination against interstate trade[513], and then dismissing the art 56 TFEU argument with the following words:

> Similarly, as regards Articles 56 TFEU and 57 TFEU governing the freedom to provide services, also referred to by the referring court, suffice it to state that the legislation in question is *applicable to all traders* exercising their activity on national territory; that its purpose is not to regulate the conditions concerning the establishment of the undertakings concerned; and that any restrictive effects which it might have on freedom of establishment are *too uncertain and indirect* for the obligation laid down to be regarded as being capable of hindering that freedom [reference omitted; emphasis added].[514]

The parallel which the Court is drawing between the *Keck and Mithouard*-style discrimination analysis for goods and the too uncertain and indirect jurisprudence for services (and establishment), and the fact that it adverts to the absence of discrimination against interstate service trade, leads Barnard to suggest that the effect of these two sets of jurisprudence is the same. While that is true in this particular instance, there is nevertheless a difference between the *Keck and Mithouard* jurisprudence which turns on the fact of the impugned law being one relating to selling arrangements, and the uncertainty/indirectness jurisprudence which does not turn on the law relating to a selling arrangement but rather whether the effect of the law on service provision (of any kind) is able to be definitively established. Uncertainty/indirectness thus has a broader potential application than merely selling arrangements, and does not tend towards the division of services jurisprudence into different streams as has been seen with goods (product requirements, selling arrangements, conditions of use).

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[513] Case C-483/12 *Pelckmans Turnhout NV v Walter van Gastel Balen NV* ECLI:EU:C:2014:304, para 24.

[514] Case C-483/12 *Pelckmans Turnhout NV v Walter van Gastel Balen NV* ECLI:EU:C:2014:304, para 25.

The Possibility of a *De Minimis* Limitation:

In early case law using a trade restriction analysis to define the scope of art 56 TFEU, the Court did not appear to countenance the idea of a *de minimis* limitation to that scope for restrictions which, although identifiable, have only a minor effect[515]. In his Opinion in *Alpine Investments*, however, AG Jacobs argued that the scope of art 56 TFEU should extend beyond discrimination to any measures *substantially* impeding cross-border service provision:

> Whether a rule of the Member State of origin constitutes a restriction on the freedom to provide services should be determined by reference to a functional criterion, that is to say, whether it *substantially* impedes the ability of persons established in its territory to provide intra-Community services. It seems to me that that criterion is consonant with the notion of an internal market and more appropriate than the criterion of discrimination.
>
> From the point of view of the realization of the internal market, what matters is not whether the rules of a Member State are discriminatory but whether they have an adverse effect on its establishment or functioning. The Court has held that the concept of the common market involves the elimination of all obstacles to intra-Community trade "in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market" [Case C-15/81 *Schul v Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, para 33]. National rules, whether of the "importing" or of the "exporting" Member State, which *substantially* impede the exercise of the freedom to provide services, adversely affect the establishment and functioning of the internal market and therefore fall within the scope of the Treaty.[516] (emphasis added)

In arguing for the scope of art 56 TFEU to extend beyond discriminatory national measures, AG Jacobs was merely affirming the trade restriction analysis established by the Court in *Säger v Dennemeyer*, but the explicit requirement that this restriction of cross-border trade must be 'substantial' was an attempt to construct a *de minimis* limitation to the scope of the article. In the

[515] Case C-49/89 *Corsica Ferries France v Direction générale des douanes françaises (Corsica Ferries II)* [1989] ECR I-4441, para 8.

[516] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, Opinion of AG Jacobs, paras 47-48. As mentioned in Chapter III of this thesis, the Advocate General made the same suggestion regarding the scope of art 34 TFEU (free movement of goods) in Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* [1995] ECR I-179, Opinion of AG Jacobs, paras 42-46.

event, the Court in *Alpine Investments* did not mention the Advocate General's suggested *de minimis* limitation, but in *Viacom II*[517], however, the Court did appear to employ a *de minimis* limitation in judging that the national measure at issue did not fall within the scope of art 56 TFEU, although without labelling it as such. In *Viacom II*, Italian law required that an advertiser pay a municipal advertising tax to the *Comune* (local government) either as a charge for the *Comune*'s posting of advertising bills on the advertiser's behalf or as a tax on advertiser's posting of such bills himself or herself. Giotto Immobilier SARL, a real estate agent established in France, contracted with Viacom Outdoor Srl, an advertising company established in Italy, for Viacom Outdoor Srl to advertise in Italy for Giotto Immobilier SARL's real estate business; Giotto Immobilier SARL was to pay for both this advertising service itself and for charges incurred in the provision thereof. Giotto Immobilier SARL refused to reimburse Viacom Outdoor Srl for the municipal advertising tax incurred, arguing that the Italian law was incompatible with the freedom to provide services. In its judgement, the Court reaffirmed that the scope of art 56 TFEU extended beyond discriminatory measures to include other measures which restricted cross-border service provision, and declared that the municipal advertising tax at issue was not discriminatory against cross-border service provision[518]. On the question of whether the municipal restricted cross-border service provision, the Court did not argue that the effect of the tax was too uncertain or indirect, and indeed conceded that the tax imposed *some* restriction on cross-border service provision, but it decided that the restriction imposed was too small to qualify as restriction for the purposes of art 56 TFEU:

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[517] Case C-134/03 *Viacom Outdoor Srl v Giotto Immobilier SARL (Viacom II)* [2005] ECR I-1167.

[518] Case C-134/03 *Viacom Outdoor Srl v Giotto Immobilier SARL (Viacom II)* [2005] ECR I-1167, paras 35-37.

> ...such a tax is applied only to outdoor advertising activities involving the use of public space administered by the municipal authorities and its amount is fixed at a level which may be considered modest in relation to the value of the services provided which are subject to it. In those circumstances, the levying of such a tax is not on any view liable to prohibit, impede or otherwise make less attractive the provision of advertising services to be carried out in the territory of the municipalities concerned, including the case in which the provision of services is of a cross-border nature on account of the place of establishment of either the provider or the recipient of the services.[519]

Thus, the Court appears to establish a *de minimis* limitation on the scope of art 56 TFEU which is assessed by reference to how wide a range of services the national measure affects and how deep its effect is on those services[520]. It has been argued that *Viacom II* only represents an application of the remoteness-uncertainty limitation discussed above[521], but the Court's judgment appears more consistent with a *de minimis* test than a remoteness-uncertainty test: by referring to the range of services covered and the modest level of the tax, the Court is arguing that the tax would have a *very small* impact on cross-border service provision (minimality), not that it would have an indeterminable or null effect because it was *too far removed* from the provision of services (remoteness) or the effect on services was *difficult to assess* (uncertainty)[522].

[519] Case C-134/03 *Viacom Outdoor Srl v Giotto Immobilier SARL (Viacom II)* [2005] ECR I-1167, paras 38.

[520] This *de minimis* limitation is in fact broader than the limitation suggested in the Advocate General's Opinion, in which she proposed that non-discriminatory domestic duties should be specifically excluded from the scope of art 56 TFEU (and other free movement provisions) on the grounds that various provisions of the Treaty indicate that Member States are assumed to retain the power to impose such non-discriminatory duties as part of their general taxation system: Case C-134/03 *Viacom Outdoor Srl v Giotto Immobilier SARL (Viacom II)* [2005] ECR I-1167, Opinion of AG Kokott, paras 64-65.

[521] Peter Oliver, "Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?" (2010) 33 Fordham International Law Journal 1423, 1430 note 45.

[522] AG Jacobs has observed that a *de minimis* limitation and a remoteness-uncertainty limitation are similar in the sense that a given national measure may avoid the scope of a Treaty freedom either due to its effect being too small or due to its effect being too remote/uncertain, depending on how one views that national measure's effect (Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659, Opinion of AG Jacobs, para 65), but in response Oliver correctly observes the two concepts, however similar their application may end up being in many cases, are nonetheless conceptually distinct: Peter Oliver, "Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?" (2010) 33 Fordham International Law Journal 1423, 1432.

On the assumption that *Viacom II* does indeed represent a *de minimis* limitation, the formulation expressed therein does, however, invite questions as to how the services under consideration are to be defined and when a minimal restriction (outside the scope of art 56 TFEU) will become a substantive restriction (within the scope of art 56 TFEU). As regards the definition of the services under consideration, in *Viacom II* (as quoted above) the Court defined the services under consideration as "advertising services to be carried out in the territory of the municipalities concerned", and so judged the services affected by the tax ("outdoor advertising activities involving the use of public space administered by the municipal authorities") to be merely a very small component of those broader services. Had the Court defined the services under consideration more narrowly, for example defining those services specifically as bill-posting services, the effect of the tax would have been much greater by comparison. Since excessive specificity such as this would end up hollowing out any *de minimis* limitation, it is probably best to take *Viacom II* as an indication that the services under consideration will be defined at the broad sectoral level rather than at the minute level of specific forms, methods or techniques of service provision. As regards the depth of effect which a restriction must have in order to be more than minimal, the Court in *Viacom II* considered that a municipal tax bill amounting to some €226.92[523] was 'modest' compared to the value of the services provided

[523] The bill was 439 385 Italian lire using the currency in everyday use when the contract was agreed in 2000, although the euro had replaced the lira as the sole Italian currency, and the currency of the debt, by the time the case came to the ECJ in 2003.

The euro had technically become the currency of Italy along with Austria, Belgium, Finland, France, Germany, Luxembourg, Ireland, the Netherlands, Portugal and Spain on 1 January 1999, and the their 11 national currencies each became sub-divisions of the euro: Council Regulation (EC) 974/98 of 3 May 1998 on the introduction of the euro OJ L139/1, art 2 and 3. The irrevocable conversion rates (including (€1 = 1936.27 lire) were fixed in Council Regulation (EC) 2866/98 of 31 December 1998 on the conversion rates between the euro and the currencies of the Member States adopting the euro [1998] OJ L359/1, art 1. Greece joined these 11 other EU states when it adopted the euro on 1 January 2001 and established its drachma as a subdivision thereof at a specified rate: Council Regulation (EC) 1478/2000 of 19 June 2000 amending Regulation (EC) No 2866/98 on the conversion rates between the euro and the currencies of the Member States adopting the euro OJ L167/1. Physical coins and notes of which, according to information in *Viacom I*[524], amounted to, on the most generous calculation, €848.46[525]. This 'modest' amount of tax added nearly 27% to the price of the services, so it seems that the Court's *de minimis* exception may allow national measures to have quite a significant price impact of the provision of services before the restriction will become a substantive one and bring the measures within the scope of art 56 TFEU, at least where such a 'deep' effect operates only on a 'narrow' component of the services under consideration. That said, one of the problems which has been argued to inhere to such a *de minimis* limitation is that a decision in any one case may be of little precedential value in future cases, given that the question of whether a burden is 'minimal' must be answered against the background of the size and characteristics of the specific market in question[526]. While this problem should not in itself be fatal to the utility of a *de minimis* limitation – after all, any use of precedent requires the Court to engage in an analogical extension of the circumstances of the previous case to those of the instant case – it does mean that 'minimality' should not be a simple numerical benchmark (such as *Viacom II*'s 27% cost increase). Another potential problem with a *de minimis* limitation is that it would place a heavy evidential burden on the litigant seeking to rely on it, especially

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the euro were introduced on 1 January 2002, and the coins and notes of the old currency ceased to be legal tender on 28 February 2002.

[524] Case C-190/02 *Viacom Outdoor Srl v Giotto Immobilier SARL (Viacom I)* [2002] ECR I-8287, paras 3-4.

[525] On the basis of the figures in *Viacom I*, and ignoring the claim for damages and interest, Viacom Outdoor Srl's total claim under the contract was €1 075.38, including €226.92 of municipal advertising tax and €143.50 of other duties and charges payable to the Municipality of Genova (this last figure appears as €117.67 in the judgment, but this presumably represents a simple conversion error when the Court or its informant was turning Italian lire into euros). This would mean that the price of the core advertising service itself was €704.96 (= €1 075.38 - €226.92 - €143.50). In *Viacom II*, Giotto Immobilier SARL was only disputing payment of the €226.92 of municipal advertising tax (see Opinion of AG Kokott, para 18), meaning that the value of the advertising services against which this tax bill is to be measured is either €704.96 (for the service alone) or, at most, €848.46 (= €704.96 + €143.50, for the service and the other duties and charges).

[526] Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 Common Market Law Review 437, 459.

where that litigant is not a Member State, since the determination of 'minimality' would require a quantitative economic analysis of the market in question, the complexity of which might be beyond the means of the private litigant[527].

Further development of the *de minimis* limitation, however, has not been forthcoming as it has not been relied on in subsequent cases, and if it does indeed apply to the scope of the freedom to provide services, this would mark a clear distinction from the scope of the free movement of goods, in which such a limitation emphatically does not apply[528].

Section 4: A Different Rule for Export of Services?:

The question has arisen whether a different rule from that laid down in *Säger v Dennemeyer* applies in the case of the export of services, that is, where the impugned measure is a national law applying to service providers established in that State, including those who are providing services into other Member States[529]. In *Alpine Investments*, the Dutch prohibition on cold-calling applicable to Dutch financial intermediaries (including those trading into other Member States), was decided to come within the scope of art 56 TFEU because it applied to such Dutch service exporters, which "directly affects access to the market in services in other Member States and is thus capable of hindering the intra-Community trade in services"[530]. On the one hand, this

[527] Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 Common Market Law Review 437, 459.

[528] Joined Cases C-177/82 and C-178/82 *Criminal Proceedings against Jan van de Haar and Kaveka de Meern BV* [1984] ECR 1797, para 13; Case 16/83 *Criminal Proceedings against Karl Prantl* [1984] ECR 1299, para 20; Case C-44/98 *BASF AG v Präsident des Deutschen Patentamts* [1999] ECR I-6269, Opinion of AG La Pergola, para 18; Case C-67/97 *Criminal Proceedings against Ditlev Bluhme* [1998] ECR I-8033, Opinion of AG Fennelly, paras 18-19. See also Alan Dashwood and others, *Wyatt and Dashwood's European Union Law* (6th edn, Hart Publishing 2011) 428-430.

[529] See Lorna Woods and others, *Steiner & Woods's EU Law* (13th edn, OUP 2017) 483.

[530] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, para 38.

may be interpreted as a straightforward application of the trade restriction analysis early expounded in *Säger v Dennemeyer* if the Court is taken to be deciding simply that the Dutch law restricts Dutch service providers from providing their services into other Member States' markets and thus comes within the scope of the Treaty. On the other hand, it may be read as an implicit application of a discrimination analysis, if the Court is taken to be comparing the situation of a Dutch service provider and a service provider established in another Member State in the market of that Member State: the Dutch service provider is being hindered in a way in which the home service provider is not, and it is this disparity of treatment which enlivens the Treaty provisions. This second reading may be bolstered by the fact that the Court may be seen to be distinguishing the instant case from the facts in *Keck and Mithouard* on the basis that the French law in *Keck and Mithouard* did apply equally to domestic and interstate traders whereas the Dutch law did not (and could not) apply in the same way to Dutch interstate traders and to domestic traders in other Member States beyond the jurisdiction of Dutch law[531].

The distinction between these two understandings of the Court's judgment is probably more theoretical than real, though, since the only situation in which it would manifest itself would be where, to adapt the facts of the instant case, another Member State into which the Dutch service provider wished to trade *also* had the same prohibition on cold-calling; only then would the Court have to decide whether the mere restriction on trade imposed by the Dutch law was enough to bring it within the scope of art 56 TFEU or whether the fact that Dutch traders were not placed in an unequal position compared to domestic traders in that Member State would keep the law outside art 56 TFEU's scope. Given that the interpretation of the case is ambiguous, and

[531] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, paras 36-37 discusses *Keck and Mithouard*.

that the theoretical difference is of little practical relevance, it seems that *Alpine Investments* should not be regarded as establishing a different rule for export of services, and should instead be treated as being consistent with the principle earlier laid down in *Säger v Dennemeyer* that a trade restriction analysis is used to identify the scope of art 56 TFEU.

<u>Section 5: Conclusion:</u>

In summary, the present state of the case law on the scope of art 56 TFEU displays a clear preference for trade restriction analysis. Since *Säger v Dennemeyer*, the Court has clearly adopted and maintained the principle that not only discrimination against interstate trade but also mere hindrance of interstate trade can constitute *prima facie* incompatibility with the Treaty and require a Member State to prove that its law is justified. This trade restriction analysis circumscribes Member State regulatory autonomy to a much greater degree than in the case of art 34 TFEU described in Chapter III where at least one major category of cases, selling arrangements, is subject to the narrower discrimination analysis for scope (and indeed all cases concerning export of goods under art 35 TFEU are subject to discrimination analysis). It is also notable that despite the increasing fragmentation of the art 34 TFEU jurisprudence, first with the creation of the category of product requirements automatically within the article's scope, then selling arrangements subject to discrimination analysis and lately limitations on use of goods seemingly subject to trade restriction analysis, the Court has explicitly chosen (as in *Alpine Investments*) *not* to fracture the art 56 TFEU case law in the same manner, maintaining one clear preference for trade restriction analysis throughout. Nonetheless, the Court has moderated the breadth of the trade restriction analysis by placing a remoteness-uncertainty limitation on it and, in *Viacom II* at least, appeared to apply a *de minimis* limitation to it as well, although the existence of such a *de minimis* limitation would mark another sharp divergence from the case law on free movement of goods. Even with these limitations, trade restriction analysis significantly diminishes State regulatory autonomy in respect of services, both in the formal sense of declaring incompatible specific laws that come to the ECJ and, it must be assumed, in encouraging the legal advisors of Member State legislatures and executive governments to counsel caution in the exercise of regulatory power over services lest they provoke legal challenge under the Treaty.

PART 1: SCOPE

SUBPART 3: AUSTRALIA & THE EUROPEAN UNION COMPARED

CHAPTER V: THE USE OF DISCRIMINATION AND TRADE RESTRICTION ANALYSES IN THE DEFINITION OF SCOPE

With Chapters I to IV having described the present state of the law on free movement of goods and services in Australia and in the European Union and the way in which each system seeks to strike a balance between internal economic integration and the maintenance of a degree of State autonomy, the present Chapter will seek to identify the similarities and differences between these two sets of jurisprudence and, more importantly, to consider how and why the federal balance achieved in each system differs.

As has been seen in the previous Chapters, the law on free movement of goods and services in both Australia and the European Union is structured around the identification of relevant restrictions and subsequently the identification of valid justifications for any such restrictions. The broader the definition of relevant restrictions (that is, the broader the scope of the free movement provisions), the more State laws will be caught by them and the greater the preference for internal economic integration. As will be examined in Chapters VI to VIII, the broader the definition of valid justifications, the more State laws will escape invalidity (or, in the EU context, incompatibility) and the greater the preference for State regulatory autonomy.

At the outset it is worth observing a salient comparison between the technical legal role of the High Court in the Australian legal order and the Court of Justice within the EU legal order, and the difference between the concepts of *invalidity* and *incompatibility*. As was seen in Chapters I and II, the High Court is empowered to declare laws which are incompatible with s 92 of the Constitution to be *invalid*, that is, void and inapplicable by the High Court's own decision. This results from the High Court's position as the apex court of both Commonwealth and State law; when it decides that a certain State (or Commonwealth) law is incompatible with the Constitution, the Court itself makes a final determination on its validity. In the European Union, by contrast, Chapter II showed that the role of the Court of Justice is different: from a legal point of view, when it operates on a preliminary reference, it functions in a manner akin to a specialist tribunal on matters of EU law to which a national court refers a specific question of EU law and receives a specific answer in return, namely that the national law is *compatible or incompatible* with EU law; the ECJ decision only goes so far as to require the disapplication of the impugned law by the national court in the specific context of EU free movement law. It is for the national court, in most cases, to decide the subjacent factual questions (which the Australian High Court also often leaves to a lower court), and crucially it is also for the *national* court, not the ECJ, to declare a Member State law *invalid* after the preliminary reference has been returned. Even when the ECJ is hearing a direct action initiated by the Commission against a Member State, the Court does not declare the impugned Member State law to be *invalid* but rather finds that the Member State has *failed to fulfil its obligations* under the Treaty by legislating in a manner *incompatible* with EU law; it is then for the Member State itself to dis-apply the offending law.

In practice, of course, whether on preliminary reference or direct action, it is the ECJ decision on *incompatibility with EU law* which is the motive force behind the Member State's acceptance that the law is *invalid*, but the technical legal role of the ECJ nevertheless reveals a meaningful difference in the Australian and EU legal orders, specifically in how they manage the delicate balance between central and State power and how far the central court itself directly intrudes upon State legislative autonomy.

Section 1 – Automatic Qualification:

As was seen in Chapter I, Australian law does not observe any distinction between different categories of State laws which may be invalidated under s 92, and thus it is immaterial whether the law in question establishes product standards (such as the minimum crayfish sizes in *Cole v Whitfield*) or selling arrangements (such as the mandatory barley marketing scheme in *Barley Marketing Board (NSW) v Norman*) or restricts or prohibits the use of certain products within the State (such as, *mutatis mutandis,* the services of a betting exchange in *Betfair Pty Ltd v Western Australia*), or whether the law relates to goods (as in the previous examples) or services (such as banking services in *The Bank Nationalisation Case*). Goods or services, product requirements, selling arrangements or restrictions on use – the same test of discriminatory burdens of a protectionist kind applies to all. Moreover, even the historical, pre-*Cole v Whitfield,* case law displays this same unity of jurisprudence, such that even when there were significant disagreements between different members of the Court as to how to define the scope of s 92, there was never any suggestion that goods and services should be treated differently under that provision, neither from a textual point of view nor from a principled point of view. Likewise, no distinction was historically drawn between different kinds of laws relating to product requirements, selling arrangements, or restrictions on use – nor, for that matter, between import and export of goods. EU case law, on the other hand, has adopted a multi-pronged jurisprudence, separating the treatment of restrictions on the free movement of goods and of services (even despite suggestions that the Treaty Freedoms, though dealt with in separate provisions of the TFEU, should be treated as part of an integral whole), adopting different tests for import and export of goods or services and, a different test for scope for each of the three categories of laws on free movement of goods: automatic qualification for laws on product standards, discriminatory practical effect for laws on selling arrangements and trade restriction for laws on product use.

Australian law subjects all impugned legislation to the same test, and does not identify any particular category of laws as automatically establishing a *prima facie* discriminatory burden of a protectionist kind. In EU law, regardless of whether recent cases may have adopted a trade restriction test of general application, laws on product standards will continue to qualify automatically as relevant restrictions[532]. The difference here is a stark one, as EU law's automatic inclusion of a very large category of legislation which has traditionally played an important role in national market regulation creates a significant impetus towards EU-wide market integration which Australian law, analysing on a case-by-case basis, does not. The reason for this difference is probably more a matter of legal interpretation and economic history than philosophical preference for economic integration or State autonomy as such. The Court of Justice seems to be more willing to read into the TFEU concepts which are not explicitly addressed therein, compared to the High Court's unwillingness to provide glosses on the

[532] If discriminatory effect is the test for relevant restrictions: Joined Cases C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, para 15. If trade restriction is the test for relevant restrictions: Case C-110/05 *Commission v Italy ('Motorcycle Trailers')* [2009] ECR I-519, para 35.

Constitution. This is readily apparent in the Court of Justice's creation – from no textual basis in art 34 TFEU, it should be remembered – of different categories of national laws with different tests for each[533], as compared to the High Court's laborious efforts to discover the drafters' intent behind the phrase 'absolutely free' rather than simply devising their own preferred interpretation. Additionally, as a matter of economic history, product regulation in Australia came to be handled by the central government relatively early on in its history, compared to the regulatory situation in the European Union, meaning that there was less impetus for the Court to create a principle of mutual recognition in Australia[534].

Section 2 – Interstate Element:

Chapter I showed that the early Australian jurisprudence placed some store in whether or not the trade in question had the requisite interstate character to be subject to the effect of s 92. The careful parsing out of which contractual relationships in *W & A McArthur Ltd v Queensland* (1920) were invested with a necessarily 'interstate' character and which ones were not is an example of the significance that this question had at this early stage of the law's development. By the time of the modern Australian jurisprudence in Chapter II, it was seen that this question of what sort of trade properly qualified as 'interstate trade' had become less important as a limiting factor on the definition of scope as the discrimination test had more firmly established itself. Indeed, the very notion of a division between interstate and intrastate trade has been

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[533] In addition to a doctrine of justification based on 'mandatory requirements in the general interest' as an extension of the grounds of justification in art 36 TFEU, as shall be seen in Chapter VII.

[534] Damien Geradin and Raoul Stewardson, 'Trade and Environment: Some Lessons from *Castlemaine Tooheys* (Australia) and *Danish Bottles* (European Community)' (1995) 44 International & Comparative Law Quarterly 41, 64.

questioned in the most recent cases of *Betfair Pty Ltd v Western Australia* (2008) and *Betfair Pty Ltd v Racing New South Wales* (2012), on the basis that a market operating by means of the internet and without reference to State borders cannot be meaningfully split into interstate trade on the one hand and purely intrastate trade on the other.

Chapters III and IV showed that EU law has been less concerned with the distinction between interstate trade and purely intrastate trade as a limitation on the scope of artt 34, 35 and 56. The broad definition given to the scope of the free movement provisions in the Treaty rendered the 'interstateness' question of little relevance, as there would be little trade that could be cordoned off as solely domestic in the sense that it could not at least *potentially indirectly hinder* trade between Member States (as the *Dassonville* formula would have it). Indeed, recent case law shows just how low this bar is set, as the scope of art 56 TFEU (and implicitly artt 34 and 35 TFEU, for that matter) extends to situations where it is 'conceivable' that interstate traders may be affected by a restrictive Member State law[535].

In this sense, Australian and EU law have undergone a convergent evolution, although for different reasons: in Australia, the diminished relevance of the 'interstate element' is explicitly linked to economic and practical developments in the market, whereas in the EU it emerges from the accretion of the case law and the tendency of the Court to implement an expansive understanding of what kind of transactions constitute the 'internal market' (at least, absent

[535] When Hungary objected that the Court lacked jurisdiction to hear a request for a preliminary ruling due to the absence of a cross-border element, the Court responded that "it is far from inconceivable that operators established in Member States other than Hungary have been or are interested in opening amusement arcades in Hungary [references omitted]. In those circumstances, the Court has jurisdiction to answer the questions referred": Case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft v Hungary* ECLI:EU:C:2015:386, paras 27-28. To this point, see Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 61.

justification)[536]. Accordingly, in the contemporary jurisprudence of each system the question of what kind of trade constitutes 'interstate' trade which is subject to the free movement provisions of the Constitution or Treaty as distinct from purely local, domestic 'intrastate' trade is not one which is meaningfully used to limit the scope of the free movement provisions in question. Instead, the definition of scope is much more importantly influenced by the question of whether trade restriction analysis or discrimination analysis is the proper interpretation of the free movement provisions.

Section 3 – Discriminatory Effect:

The modern, post-*Cole v Whitfield* Australian test for discriminatory burdens of a protectionist kind and the EU test for discriminatory practical effect are very similar, as they both focus on the real practical effect of the law in question on interstate trade and how that compares to the real practical effect on domestic trade. There is, admittedly, a difference of emphasis between the two tests in that the Australian test is focussed on economic analysis, whereas the EU test is focused on equality of treatment, but this does not create any substantial difference between the two tests because the differential treatment identified by the *Keck and Mithouard* test will naturally create a competitive or market disadvantage (in Australian terms) anyway[537].

[536] As a result of which, argues Weatherill, "the limits of the internal market are close to vanishing…[and] the expectation of a restriction to inter-state trade throws a wide-mouthed net over national practices": Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 61.

[537] It is worth mentioning at this point that the historical, pre-*Cole v Whitfield* Australian jurisprudence espousing discrimination analysis, particularly that of Evatt J in *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266 and following cases, is even more similar to the EU jurisprudence inasmuch as it focuses on the question of equality of treatment as a legal matter rather than performing an economic analysis of the differential impact of the legislation as in the modern Australian jurisprudence. It is an open question whether the economic reasoning which started to be incorporated into the Australian jurisprudence from the late 1980s onwards will also manifest itself in EU jurisprudence in time, although the notable tendency of EU jurisprudence to simply reiterate past reasoning

On this subject matter, then, both Australia and the EU show a considerable level of deference to State legislatures, only calling the validity/compatibility of laws into question when they would undermine the economic integration of the system by operating in a protectionist fashion. EU law shows a greater amount of deference to national autonomy in respect of selling arrangements than it does in respect of laws on product standards or laws on use. While arguments have been made about why product standards should qualify automatically as relevant restrictions, there does not seem to be any sound reason why laws on selling arrangements and laws on use should be treated differently with Member States enjoying greater control over the former. This leads to the conclusion that the recently restored trade restriction test cannot logically remain confined to laws on use but may expand to cover laws on selling arrangements too, becoming again the dominant test for artt 34 and 35 TFEU.

Section 4 – Trade Restriction (or 'Limitation of Market Access'):

There is a real distinction between the modern Australia jurisprudence's test of discriminatory burdens of a protectionist kind and EU law's trade restriction test in respect of laws on product use and provision of services. Australian law will not identify a law which limits the access of interstate trade to the State market as a relevant restriction under s 92 unless that market restriction is greater than what applies to intrastate trade, whereas the trade restriction test, as adopted in recent Court of Justice case law (at least in respect of some kinds of laws) will identify not only laws of the kind caught by the Australian test but also any other law which limits imported goods' or services' access to the domestic market.

(resulting from the requirement for *in banco* decisions) and the diversity of legal (and academic and economic) traditions from which the Justices of the CJEU are drawn would complicate the emergence of any such trend.

A specific example of this distinction which is worth considering is how Australian and EU law treat State laws imposing licence or registration requirements on traders (including interstate traders). Australian jurisprudence regards a requirement to obtain a licence to conduct certain economic activities as coming within the scope of s 92 only if this requirement is discriminatory in the sense of falling more heavily on interstate providers, for example because the specific kind of economic activity is predominantly or solely engaged in by interstate traders[538]. EU jurisprudence, on the other hand, regards a State law which imposes a requirement to obtain a licence in respect of *any economic activity already licensed in another State* as a *prima facie* restriction of interstate trade[539]. Indeed, EU law goes so far as to say that even a requirement for an interstate trader to register their presence and economic activity within the host State is a *prima facie* restriction of free movement law[540]. Of course, in both Australia and the EU, such findings then invite consideration of whether such *prima facie* restrictions are nevertheless justified (as shall be discussed in Chapters VI-VIII). EU law is thus more forthright in subjecting licence and registration requirements to judicial scrutiny, in parallel to its embrace (or at least semi-embrace) of trade restriction analysis on the question of scope, as compared to modern Australian law's more moderate discrimination analysis for scope. This has the consequence of creating a greater erosion of State legislative capacity in the EU than in Australia in respect of such licence and registration laws.

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[538] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 478.

[539] Case C-6/01 *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) v Portugal* [2003] ECR I-8621, paras 65-66. Both this case and *Betfair Pty Ltd v Western Australia* cited immediately above happen to be cases on gambling, an economic activity increasingly subject to legal controls, and, particularly so in the EU where the national legal traditions vary more widely than those between the several Australian States, likely to be regulated quite differently in different States.

[540] Case C-577/10 *Commission v Belgium ('Limosa')* ECLI:EU:C:2012:814, para 42.

The effect of this is that in EU law the scope of the free movement provisions is much wider than in Australian law and so, with a wider range of national laws caught within that scope, economic integration is advanced at the expense of national autonomy, and the second element of the analysis (valid justification) becomes the more significant for the determination of the scope of Member States' legislative autonomy.

That said, as was seen in Chapter I, the historical Australian jurisprudence did for much of the 20th Century employ a trade restriction test in the form of the trade restriction analysis of scope favoured by Dixon CJ and his successor Barwick CJ. It is worthwhile analysing how the historical Australian jurisprudence compares to the EU jurisprudence, in case any conclusion may be drawn about how the former evolved and why it moved away from the trade restriction (market access) definition of scope.

The historical Australian jurisprudence, as was seen in Chapter I, employed a trade restriction test during much of the first nine decades of s 92's existence. By the time of *The Airlines Nationalisation Case* (1945)[541] and *The Bank Nationalisation Case* (1948)[542], s 92 was thought (by the majority of the High Court) to be infringed whenever State or Commonwealth law imposed a restriction on interstate trade in goods or services, regardless of the absence of any discrimination against that trade compared to its intrastate counterpart. Although there was, as Chapter I has shown, a lively and ongoing jurisprudential struggle between this conception of s 92 and the discrimination analysis which at certain times (and definitively, after *Cole v Whitfield*) held sway, during the periods when the trade restriction analysis was dominant it was

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[541] *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945) 71 CLR 29.

[542] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1.

a test very similar in its form and effect to the trade restriction analysis employed in EU law. Even the shifting emphasis from the face of the law and its formal operation under Dixon CJ to the practical effect of the law under Barwick CJ in the later cases of *Samuels v The Readers' Digest Association Pty Ltd* (1969)[543] and *Clark King & Co Pty Ltd v Australian Wheat Board* (1978)[544] serves to more closely assimilate Australian law to its EU counterpart on this matter, as the EU test for trade restriction has never been limited to the mere words of the legislation to the exclusion of its practical effects (although the much less discursive nature of Court of Justice judgments does not allow for such distinctions to be mulled over). For instance, in the signal case of *Säger v Dennemeyer* (1991)[545], the Court's declaration that art 56 TFEU was infringed by "any restriction, even if it applies without distinction to national providers of services and to those of other Member States, [which] is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State"[546] does not admit of any distinction between impediments to free movement which appear on the face of the law as distinct from its practical effect, and the decision in that case that a law restricting patent monitoring services to those licensed as patent advisors is evidence that the Court was willing to acknowledge the economic competition that existed in practice between patent monitors and patent advisors. The same is true in respect of the EU jurisprudence on free movement of goods, where the cases on usage restrictions, in which trade restriction analysis has recently re-emerged, acknowledge the practical effect of the laws under consideration by recognising that usage restrictions can render

[543] 120 CLR 1.

[544] 140 CLR 120.

[545] Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221.

[546] Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221, para 12.

a product unusable *in practice* without formally banning the product on the face of the law[547]. (Likewise, the earlier EU case law in the Sunday Trading Cases[548] and Weekly Rest Day Cases[549], overruled in *Keck and Mithouard* (1993)[550], did not limit its definition of trade restriction to the mere face of the law.)

However, it is important to note that the philosophical rationale behind this trade restriction analysis, particular during the Dixonian era, was the conception of s 92 as protecting an individual's right to engage in interstate trade without undue interference from State or federal government[551]. This contrasts with the EU trade restriction (a.k.a. market access) test for art 34, 35 and 56 TFEU, which was based on the economic motive of creating an EU-wide internal market for goods and services[552]. These two different rationales are not *contradictory* of one

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[547] Case C-265/06 *Commission v Portugal ('Car Window Tinting')* [2008] ECR I-2245, Case C-110/05 *Commission v Italy ('Motorcycle Trailers')* [2009] ECR I-519 and Case C-142/05 *Åklagaren v Percy Mickelsson and Joachim Roos* [2009] ECR I-4273.

[548] Case 145/88 *Torfaen Borough Council v B & Q Plc* [1989] ECR 3851 and Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q Plc* [1992] ECR I-6635.

[549] Case C-312/89 *Union Départementale des Syndicats CGT de l'Aisne v SIDEF Conforama, Société Arts et Meubles and Société Jima* [1991] ECR I-997 and Case C-332/89 *Criminal Proceedings against André Marchandise, Jean-Marie Chapuis and SA Trafitex* [1991] ECR I-1027.

[550] Joined Cases C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

[551] "…The right to conduct inter-State business "absolutely free" from State interference" *James v South Australia* (1927) 40 CLR 1, 18, subsequently extended to include federal interference by *James v Commonwealth* [1936] AC 578; see also *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266 and *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945) 71 CLR 29.

[552] Indeed, the text of the Treaty on the Functioning of the European Union makes clear the economic purpose of the free movement provisions in art 26:

> 1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.
> 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

This is reflected throughout the case law, e.g. Joined Cases 60/84 and 61/84 *Cinéthèque SA v Fédération Nationale des Cinémas Français* [1985] ECR 2605, para 21 "the application of such a system may create barriers to intra-Community trade…[which is] not compatible with the principle of the free movement of goods provided for in the Treaty", Case C-142/05 *Åklagaren v Percy Mickelsson and Joachim Roos* [2009] ECR I-4273, para 26 "[e]ven if the national regulations at issue do not have the aim or effect of treating goods coming from other Member States less another as such, but they are pursuing different objects: the former pursues the object of a trader free from government interference with his or her trade, the latter pursues the object of a market operating without internal borders. The former places its emphasis on the role of the individual and his or her relationship with the state, the latter on the role of the constituent states within the complex polity throughout which the market is to operate. The kernel of the former is a sort of libertarianism, the kernel of the latter, an economic concept of free trade.

In contradistinction to that historical Australian jurisprudence, it was seen in Chapter II that the Court in *Cole v Whitfield* entrenched a discrimination analysis in the form of 'discriminatory burdens of a protectionist kind', basing its preference for this analysis of the scope of s 92 on the drafting history of that section. While the arguments for and against the trade restriction test in the EU context were posited in Chapters III and IV, it is instructive to consider why Australian law has not, in its modern jurisprudence, adopted a trade restriction test as this will serve to indicate some of the profound distinctions between the two systems.

Although there is an element of speculation about the matter since there has not been a case suggesting the use of a trade restriction test for s 92 since *Cole v Whitfield* was decided, against the background of the pre-*Cole v Whitfield* jurisprudence there would seem to be two strong reasons why Australian law does not now employ a trade restriction test: firstly, the text of s 92 *when seen against the background of its drafting history* does not support the trade restriction test, and secondly, the federal constitutional context of s 92 argues against such a test.

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favourably. [they may] have a considerable influence on the behaviour of consumers, which may, in turn, affect the access of that product to the market of that Member State", and Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221, para 12 "the Treaty requires...the abolition of any restriction…when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services".

The Text of s 92:

Firstly, the analysis conducted by the Court in *Cole v Whitfield*, and supported in all subsequent case law, indicated that the elliptical reference in s 92 to trade among the States being "absolutely free" was meant to prohibit State protectionism. This is what drove the adoption of the protectionism test for scope in that case, and the consequent rejection of other previous tests, including those deriving from a *laissez-faire* (or trade restriction) interpretation of free trade.

However, without doubting the Court's historical analysis of the legislative intent behind s 92, it might be argued that the modern interpretation of s 92 should not be limited by the concept of protectionism as it existed in the late 19th Century. Certainly, in *Cole v Whitfield* it was acknowledged[553] that the *means* by which protectionism might be achieved under s 92 are not limited to traditional means such as tariffs and quotas[554], which indicates that the means by which protectionism is achieved under s 92 are not limited to those which would have been familiar in the late 19th Century. The question remains, however, whether the very interpretation given to "absolutely free", namely that it prohibits *protectionism*, should also be subject to change over time. Dr Christopher Staker, for example, has argued that since the drafting of the Constitution in the 1890s, governmental regulation of commerce has increased significantly, and so protectionism is no longer the proper measure of s 92[555]; instead, he suggests, the legislative intent of s 92 should be interpreted more broadly as the prohibition of

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[553] *Cole v Whitfield* (1988) 165 CLR 360, 408-409.

[554] The five traditional means listed in *Cole v Whitfield* at 393 are tariffs, quotas, differential transport rates, domestic subsidies and more burdensome regulations.

[555] Christopher Staker, 'Section 92 of the Constitution and the European Court of Justice' (1990) 19 Federal Law Review 322, 341-343.

"impediments to interstate trade"[556], rather than only those impediments to interstate trade which create State protectionism. In the same vein, Prof Gonzalo Villalta Puig has argued that the test of discrimination of a protectionist kind should be amended to merely discrimination, with discrimination so defined as to capture any State law which falls more heavily in practice on out-of-State traders, regardless of whether it advantages any domestic traders with whom they are in competition, with the result that "a non-discrimination norm, ultimately, translates into a trade restriciton test for s 92, that is, a kind of mutual recognition whereby products that are lawful in one State warrant full access to the markets of other States"[557]; this is partially inspired by the trade restriction test applying in parts of EU law[558]. Nevertheless, the Court does not appear likely to adopt these suggestions, as it seems to be satisfied with the strength of the evidence given in *Cole v Whitfield* that protectionism was the specific focus of s 92, not a more general prohibition of government interference: none of the cases subsequent to *Cole v Whitfield* has given any suggestion of a move away from the test of discrimination of a protectionist kind[559]. Thus, part of the reason why Australia maintains a higher degree of deference to State autonomy

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[556] Christopher Staker, 'Section 92 of the Constitution and the European Court of Justice' (1990) 19 Federal Law Review 322, 341.

[557] Gonzalo Villalta Puig 'Betfair and Sportsbet: The Remains of the Federal Purpose of s 92 of the Australian Constitution' (2013) 87 Australian Law Journal 178, 179; see also Gonzalo Villalta Puig 'Section 92 since Betfair Pty Ltd v Western Australia' (2009) 11(4) Constitutional Law & Policy Review 152, and the lengthier discussion of Prof Villalta Puig's arguments in footnote 310 above in Chapter II.

[558] Gonzalo Villalta Puig 'Betfair and Sportsbet: The Remains of the Federal Purpose of s 92 of the Australian Constitution' (2013) 87 Australian Law Journal 178, 191.

[559] *Contra* Gonzalo Villalta Puig 'Section 92 since Betfair Pty Ltd v Western Australia' (2009) 11(4) Constitutional Law & Policy Review 152, 153-155, who seemed to detect in that case "a hopeful inclination to do away with the criterion of protectionism that articulates the *Cole v Whitfield* test for s 92" (at 155). However, by the time of the subsequent cases, even Prof Villalta Puig had conceded that the Court had given no meaningful indication of abandoning protectionism as an element of the s 92 test, labelling the Court's judgments therein "a lacklustre restatement of discriminatory protectionism": Gonzalo Villalta Puig 'Betfair and Sportsbet: The Remains of the Federal Purpose of s 92 of the Australian Constitution' (2013) 87 Australian Law Journal 178, 178.

is that the intention of s 92 is accepted to be limited to that lesser form of interference with State power[560].

Thus, one reason for the difference between how Australian and EU law define the scope of their respective free movement provisions is the text itself of the Constitution and the Treaty on the Functioning of the European Union. Whereas the Constitution's declaration that interstate trade should be "absolutely free" has been interpreted as relating to freedom from the protectionism that vexed the authors of that document in the late 19th Century, the TFEU's prohibition of "quantitative restrictions on imports" and "restrictions on freedom to provide services" has been interpreted in a more complex fashion, with a less clear and consistent view of the legislative intent behind those sections. The fact that "quantitative restrictions on imports" has sometimes been interpreted as prohibiting discrimination (selling arrangements) and sometimes as prohibiting all trade restriction (usage restrictions), not to mention the fact that "quantitative restrictions on exports" has been consistently interpreted as relating only to discrimination, evidences a more unsettled view of the purpose of the provisions on free movement of goods. The more straightforward intent of the text of art 56 TFEU, "restrictions on freedom to provide services", may in turn contribute to the more consistent modern interpretation of the scope of that article as relating to trade restriction rather than just discrimination, and also provides a contrast with the more elliptical language of s 92 of the Australian Constitution.

[560] See also Amelia Simpson, 'Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone' (2005) 33 Federal Law Review 445, 477-478 in which it is argued that the High Court was presumably aware of EU law at the time of the decision in *Cole v Whitfield* and deliberately chose not to follow it.

The Constitutional Context of s 92:

Secondly, the constitutional context of s 92 discourages the adoption of a trade restriction test. The effect of the adoption of a trade restriction test, as stated above, is that it catches a wider range of State laws within the scope of potential invalidity and indeed, in the manner in which it has been used in recent EU law, any law which restricts or prohibits the use of a product will be, absent justification, invalid. Even if justification were relatively easy to prove, a trade restriction interpretation still creates a significant limitation of State legislative competence because *every* law which is capable of making interstate trade more difficult will be open to challenge, and the State in question will be required to justify *every* such law lest it be declared invalid. The reality, of course, is that every law regulating trade in the State, whether directly or incidentally, will impose some sort of burden on trade. That is the reason why laws are passed in the first place: to impose a legal order on what would otherwise be unregulated, and this is achieved by placing some burden on the subject of the regulation. Furthermore, interstate trade is a component of trade affected by State trade laws and so, unless the law privileges interstate trade by specifically exempting that form of trade from its effect (which was rejected in *Cole v Whitfield* as mere protectionism in reverse[561]), the access of interstate trade to the State market will be limited. Thus, under a trade restriction interpretation, *every* State law on commerce is invalid unless proven by the State to be justified, and while the possibility of justification must be borne in mind when assessing the impact of the trade restriction test, it is this *prima facie* invalidity of all State trade regulations which has immediate significance for the constitutional

[561] It cannot be consistent with s 92 to require that State laws exempt interstate trade from their effect as this would simply put interstate trade in a privileged position and work protectionism in reverse: *Cole v Whitfield* at 403-403.

context in which s 92 appears. Firstly, the trade restriction test seems to be inconsistent with the intention of s 107, which specifies that:

> Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

While there would not be a *technical* inconsistency with s 107 if s 92 required the use of the trade restriction test (since s 92 is encompassed within powers "withdrawn from the Parliament of a State"), it seems completely inconsistent with the *intent* of s 107 for s 92 to adopt a test which effectively renders *prima facie* invalid any State law on trade[562]. Surely, the more limited protectionism test for s 92 is more consonant with s 107's intention that State legislative power should continue unless necessarily altered by the Constitution. Secondly, in a long series of cases[563] the federal nature of the Constitution has been accepted by the Court as a relevant consideration in interpreting the provisions of that document. The decided cases on this issue have concerned limitations on Commonwealth legislative power under s 51 which are derived from the federal nature of the Constitution, but the principles of federalism therein identified must also apply to the construction of s 92, which is equally part of that federal Constitution. Of

[562] This argument is distinct from the doctrine of reserved State powers rejected in *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129, in that it does not advocate a presumption that States have reserved all powers not explicitly surrendered, but rather a presumption that the surrender of powers by States was not so complete as to undermine their capacity to function as legislative units.

[563] *The Lord Mayor, Councillors and Citizens of the City of Melbourne v Commonwealth ('The State Banking Case')* (1947) 74 CLR 31, *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, *Victoria v Commonwealth ('The Payroll Tax Case')* (1971) 122 CLR 353, *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 5, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, *Commonwealth v Tasmania ('The Tasmanian Dam Case')* (1983) 158 CLR 1, *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, *Re Australian Education Union; Ex parte Victoria* (1994) 184 CLR 188, *Austin v Commonwealth* (2003) 215 CLR 185.

relevance for present purposes is the principle that the federal character of the Constitution guarantees the continued existence of the States:

> The foundation of the Constitution is the conception of a central government and a number of State governments separately organized [*sic*]. The Constitution predicates their continued existence as independent entities.[564]

Furthermore, the States are not preserved as mere shells, but as bodies politic capable of exercising real legislative control over their own affairs: the federal nature of the Constitution prohibits Commonwealth action which "curtails or interferes in a substantial manner with the exercise of constitutional power by [the States]"[565]. Early indications were that the federal nature of the Constitution preserved State power only to the extent of preserving States' power to regulate their own constitutional identity[566] (including State legislatures, executives and judiciaries[567]), but in principle it can hardly be said that the federal nature of the Constitution guarantees the right of States to regulate their parliaments without guaranteeing some legislative power for those parliaments, since the federal nature of Australia is in no way maintained by having State-regulated parliaments which have no real legislative power. It is the maintenance of the States (and the Commonwealth) as effective legislative polities which the federal principles of the Constitution require, and those federal principles should protect the existence of the States not only from loss of power to the Commonwealth but also from the loss of power that would result from expansive reading of s 92 because this would result in diminution of the

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[564] *The Lord Mayor, Councillors and Citizens of the City of Melbourne v Commonwealth ('The State Banking Case')* (1947) 74 CLR 31, 82.

[565] *The Lord Mayor, Councillors and Citizens of the City of Melbourne v Commonwealth ('The State Banking Case')* (1947) 74 CLR 31, 75.

[566] *The Lord Mayor, Councillors and Citizens of the City of Melbourne v Commonwealth ('The State Banking Case')* (1947) 74 CLR 31, 82-83.

[567] *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329, 362.

States' ability to function as legislative polities. Moreover, it must surely be the case that a reading of s 92 which would render a State's power to regulate trade entirely dependent on justification would be a loss of State power sufficient to undermine the ability of States to function as legislative polities. In light of this, it is argued that the adoption of the trade restriction test for relevant restrictions under s 92 would so diminish State legislative power as to undermine the federal principles of the Constitution or, equally impermissibly, to create reverse-protectionism by mandating the exemption of all interstate trade from State laws. Thus, the constitutional context of s 92 is a bar to the adoption of the trade restriction test.

Against this background, it is interesting to consider how the context of the Treaty on the Functioning of the European Union, together with the Treaty on European Union, has operated differently on the interpretation of its free movement provisions from how the context of the Constitution on has operated on s 92. Quite obviously, the EU Treaties do not intend to completely hollow out the legislative authority of the Member States and leave them as mere empty shells – quite the opposite, as the European Union's power is formally limited to those areas where power has been conferred on it by the Member States (the 'principle of conferral' under art 5 (2) TEU). Moreover, unless a power is completely and exclusively granted to the EU, the Union can only act "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States" (the 'principle of subsidiarity' under art 5 (3) TEU), and even then its actions "shall not exceed what is necessary to achieve the objectives of the Treaties" (the 'principle of proportionality' under art 5(4) TEU)[568]. The context of the TFEU's

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[568] For all that subsidiarity is presented as one of the essential principles of the EU, it has proven to be non-justiciable in practice, operating rather as a political signal and a formal requirement of the EU legislative process. As a political signal, the insertion of the subsidiarity provision into the Treaty by the Treaty of Maastricht in 1992 was an indication to Member States (and Eurosceptic interest groups therein) that the creation of the 'Political Union' engendered by that Treaty would not create an unchecked centripetal force within the EU, progressively drawing all legislative power to Brussels – it was "a political response to ongoing anti-integration

free movement provisions within the wider scheme of EU Treaties would tend to militate very strongly against an interpretation of those provisions which would unduly widen their scope at the expense of Member States' legislative capacity. In a strict sense, the principles of subsidiarity and proportionality embodied in art 5 TEU are addressed to the exercise of executive and legislative power by the EU institutions rather than the exercise of judicial power by the Court of Justice, but in a broader sense they can be considered to be principles which go to the heart of how Member State legislative autonomy is to be preserved and thus to hold relevance for judicial declaration of Member State laws' incompatibility with free movement provisions[569]. With that being acknowledged, quite obviously the scope of the free movement provisions of the TFEU has, in the past and at present, been interpreted in certain contexts through a trade restriction analysis which, on its face, is quite contradictory to the principle of subsidiarity. Part of the reason for the trade restriction analysis being adopted, despite the existence of the subsidiarity principle, is the fact that the establishment[570] and functioning[571] of the internal

sentiment in Europe" (Michael Longo, 'Co-Operative Federalism in Australia and the European Union: Cross-Pollinating the Green Ideal' (1997) 25 Federal Law Review 127, 164), and was intended "to reassure public opinion throughout the EC that the Brussels bureaucracy ha[d] been tamed" ('Scapegoat passes buck', *The Economist* (London, 3 October 1992)). As a formal requirement of the EU legislative process, after the Maastricht Treaty the Commission (which initiates all EU legislation) must explain in the recitals of any proposed Regulation or Directive how the new law complies with the subsidiarity provisions of the Treaty. Whether the insertion of this subsidiarity provision has had a significant practical effect in limiting the growth of centralised EU decision making and preserving Member State legislative power is open for debate, but there is some indication that it did at least have a quantifiable effect in reducing the volume of legislation proposed by the Commission in the years immediately following its adoption (down from 651 proposals in 1992 to 558 in 1994, a fall of more than 14%; see Longo, cited above in this note, at 154). The principle of proportionality, on the other hand, is the subject of judicial enforcement, as Chapter VII explores in detail.

[569] Article 1 of the TEU's Protocol on the Application of the Principles of Subsidiarity and Proportionality establishes that "Each institution shall ensure constant respect for the principles of subsidiarity and proportionality"; presumably the Court of Justice of the European Union included within the phrase 'each institution', but the remainder of the Protocol addresses the application of subsidiarity (and proportionality) in the EU legislative process. Where the Court is mentioned, it is in the context of its jurisdiction to hear complaints against the EU legislature for infringement of subsidiarity or proportionality (art 8).

[570] Art 2 TEU.

[571] Art 26 (1) TFEU.

market as "an area without internal frontiers in which the free movement of goods, services, persons and capital is ensured"[572] is also a principle of the EU, indeed one of the most basic and enduring principles of the entire 'European project', which tends to colour the more recently recognised[573] principle of subsidiarity (and indeed the principles of conferral and proportionality) so as to render it consistent with the foundational internal market principle. This primacy of the internal market provisions within the EU Treaties is very similar to the Australian Constitution, although the Constitution notably lacks any such subsidiarity provisions, the concept of subsidiarity being fairly unfamiliar within Australian politics[574] and indeed contrary to the indication of s 109 of the Constitution, which guarantees that where a power is shared between the Commonwealth and the States, in the case of conflict of laws, the *Commonwealth* law prevails over State law to the extent of any inconsistency between the two and the State law is to that extent invalid – almost the opposite of subsidiarity. The greater difference between the EU and Australian legal orders lies in the way in which the TFEU describes the free movement of goods and of services. In the case of both freedoms, the Treaty proclaims the relevant freedom and then explicitly creates justifications for *prima facie* breaches of that freedom. The free movement of goods enshrined in artt 34 and 35 TFEU is immediately qualified by the stipulation

[572] Art 26(2) TFEU.

[573] The principles of subsidiarity and proportionality were only formally added to the EU Treaties as principles of general application by the Maastricht Treaty, which came into effect in 1993. Prior to that, however, they had been enshrined in certain provisions relating to specific areas of EU-level legislative competence, e.g. environmental protection following the adoption of the Single European Act in 1987.

[574] The term 'subsidiarity' is not one used in Australian jurisprudence, although there have been occasional suggestions that the Commonwealth should refrain from exercising power in favour of State power instead: Michael Longo, 'Co-Operative Federalism in Australia and the European Union: Cross-Pollinating the Green Ideal' (1997) 25 Federal Law Review 127, 155. Nevertheless, where there is an exercise of 'Co-Operative Federalism' between the Commonwealth and the States, it tends to involve a co-ordinate exercise of power whereby the Commonwealth takes the lead as much as possible to ensure uniformity of legislation across Australia, and the States then supplement and 'back-fill' the agreed joint scheme in areas where the Commonwealth does not have power.

in art 36 TFEU that the previous articles do not prohibit laws which restrict free movement but are justified on any of a range of public interest grounds listed therein. In respect of the freedom to provide services in art 56 TFEU, the Treaty actually declares the justification *before* it even proclaims the freedom itself, as art 52(1) establishes that nothing in the subsequent articles is to be taken as prohibiting restrictions on service provision which are justified on the listed public interest grounds. The details of justification of *prima facie* infringements under artt 36 and 52(1) TFEU, in addition to other grounds for justification, will be examined in Chapter VII, but for present purposes the relevant point is that the Treaty itself stipulates the existence, and the grounds, of justification of laws which would otherwise fall within the scope of the Treaty Freedoms and be rendered incompatible with EU law. This contrasts with the silence of the Australian Constitution on the subject of justification, and is a clue as to why the EU jurisprudence (partially) embraces the wider, trade restriction definition of scope with its constrictive impact on Member States' legislative capacity. The explicit existence of these listed grounds of justification sets up a jurisprudential architecture of scope and justification, which lends itself to the notion that these two elements balance one another out – a broader definition of scope being counter-balanced by a broader definition of justification. As will be elucidated in Chapters VI, VII and VIII, this is true enough in a jurisprudential sense, within the limits of the courtroom, but in a practical sense, in the larger legal environment running all the way from government policy-making and legislation to the lengthy and expensive process of litigating an impugned law and the ultimate judgment of its validity/compatibility by the apex court, this is not true. For present purposes, however, the salient point is that the explicit existence of justification within the articles of the TFEU provides a context within which a broader definition of scope (the trade restriction analysis) can flourish, as compared to the context of the Australian Constitution.

General Arguments:

Turning to more general arguments, it has been suggested that a protectionism test for scope is economically unsupportable because it would leave valid a State law which created a very heavy burden on trade as long as the weight of that burden is equal on interstate and intrastate trade, but on the other hand it would invalidate such a law if the burden on interstate trade were only *slightly* heavier than that on intrastate trade[575]. True though this observation may be, the economic counter-argument to it, of course, is that which was made above, namely that the text and context of s 92 impose the protectionism test and it is mistaken to measure the efficacy of s 92 by a broader *laissez-faire* standard which the section simply does not seek to attain. Moreover, it should also be added that there is a political counter-argument, and it is one which underlies all anti-protectionist policy: the reason why protectionism is particularly obnoxious – and the reason why the scope of s 92 is defined by an anti-protectionist (discrimination) analysis – is that protectionist legislation places a heavier burden on interstate trade, which is almost certain to affect persons who are not citizens of the State in question and so are not represented in the State legislature which passed that protectionist law. Such non-citizens are thus being singled out for the imposition of burdens to which they have no democratic means of consenting[576]. If a State legislature chooses to pass a law creating a very heavy burden on

[575] Christopher Staker, 'Section 92 of the Constitution and the European Court of Justice' (1990) 19 Federal Law Review 322, 343.

[576] The non-citizens's free decision to engage in interstate trade in the State in question might be argued to be consent to be governed by State law, but it is a poor substitute for the active consent in which citizens engage when they vote for the legislature which makes the laws in the first place.

intrastate trade, then that is an expression of the will of the people of that State, and the law derives its validity therefrom; furthermore, it must be accepted that the State legislature can place *equal* burdens on intrastate and interstate trade, as this burdening of interstate trade is the natural incident of the State's legislative power over trade within its jurisdiction, and requiring the exemption of interstate trade from the effect of all State trade laws would undermine this power of the State to control its own jurisdiction[577]. The same principle must also apply even if the regulating State does not actually have an industry of the kind regulated, provided that the burden falls equally on imported products and the domestic products with which they are in actual or potential competition (as in *Betfair Pty Ltd v Western Australia*)[578]. Thus, even though there appears to be only a small difference between a State law *heavily but equally* burdening interstate and intrastate trade and a State law heavily burdening intrastate trade but *slightly more heavily* burdening interstate trade, the is a real economic and political difference between these two situations which justifies the continued adherence to a protectionism test for relevant restrictions under s 92. The same economic and political arguments apply in respect of the use of discrimination analysis within EU, arguably more strongly given the greater variation between the legislation governing the Member States' several markets to begin with. In respect of both Australia and the EU, this argument does not *invalidate* the use of trade restriction analysis, it simply confirms that discrimination analysis is also (and perhaps preferentially) a valid definition of the scope of the free movement provisions.

[577] Not to mention any negative economic consequences by distorting competition with the creation of reverse protectionism: *Cole v Whitfield* at 402-403.

[578] *Contra* Christopher Staker, 'Section 92 of the Constitution and the European Court of Justice' (1990) 19 Federal Law Review 322, 343-344.

As a concluding point, it has been observed that with Australia using a protectionism test to define the scope of free movement and the EU using a trade restriction test, the freedom with which goods and services may move from one Member State to another within the European Union, a collection of separate nations, is actually greater than that with goods and services may move from one State to another in Australia, which is but one nation[579]. While this is true, the emphasis on whether the area in question is one sovereign state or twenty-eight sovereign states is mistaken, as the freedom with which goods may move from one State to another is not, as a matter of law, determined by whether each of those States has its own seat in the United Nations or not. From a legal perspective, the degree of freedom with which goods may move across the area in question will be determined by the text and legislative context of the legal provisions which govern the movement of goods and services. The Australian provision that 'trade, commerce and intercourse among the States shall be absolutely free', when interpreted in light of its anti-protectionism origin, is significantly different from EU law's prohibition of 'quantitative restrictions and measures having equivalent effect' and 'restrictions on freedom to provide services', which are more readily reconcilable with a trade restriction test because such restrictions are themselves a *limitation of trade*, and the separate and specific existence of provisions on justification allow for a wider initial definition of the scope of the freedom in question. Seen in light of the legal provisions in each jurisdiction, it is not so surprising that there should be a difference between the two systems, and that the Australian system should be

[579] Christopher Staker, 'Section 92 of the Constitution and the European Court of Justice' (1990) 19 Federal Law Review 322, 347. See also James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 195, in which it is argued that the discrimination analysis employed in contemporary Australian jurisprudence gives a much broader legislative power to the States and Commonwealth than had obtained under the previous trade restriction analysis of the scope of s 92, and under the old Evatt school of thought's definition of discrimination which looked only to legal form rather than economic effect: "[*Cole v Whitfield*] is an interpretation that increases the legislative power of the Commonwealth and of the States, but particularly of the Commonwealth…This has the effect of ensuring that many more issues involving interstate trade will be required to be resolved politically rather than judicially".

more reluctant to invalidate State laws. The fact that goods and services may move more freely in the European Union than in Australia is certainly a relevant consideration to bring to the attention of the Australian people when encouraging them to alter the Constitution at referendum, but this is a matter of policy, relating to what the law perhaps *should be*, not what it presently *is*. As has been seen above, the text and constitutional context of s 92 both show that the trade restriction test is not justified under the Constitution in its present form, and this explains why the existing protectionism test was preferred by the Court in *Cole v Whitfield* and is likely to remain the test for identifying the scope of that section.

Section 5: Conclusion:

Thus, it can be seen that there are many similarities between the jurisprudence in the Commonwealth of Australia and the European Union on the question of the scope of the free movement of goods and of services, but there are important differences which continue to exist.

The most general and fundamental comparison to be observed is the basic fact that the use of discrimination analysis tends to preserve more State legislative power, and the use of trade restriction analysis tends to erode more State legislative power and thereby create a more integrated internal market. The oscillation between these two forms of analysis of the scope of free movement provisions in the constitutional documents of Australia and the European Union can be seen as representing the birth contractions of the Australia-wide and EU-wide internal markets, but can equally be seen as the flickering diminution of the flame of State legislative competence. It would be a gross overstatement to pretend that Australian States and EU Member States have been stripped of sovereignty or general law-making power, but there has been a real constriction of the range of laws which will escape the scope of free movement jurisprudence where trade restriction analysis has commanded the support of the Court, and both systems have seen judicial decisions significantly determine the role of the State within the larger Union.

Firstly, in Australia there is one jurisprudence for both goods and services, whereas in the EU the jurisprudence is not only split between goods on the one hand and services on the other, but it has been seen that within goods there exists a tripartite split between product requirements, selling arrangements and usage restrictions. At a surface level, the fact that the Australian Constitution has one provision (s 92) for both free movement of goods and services whereas the Treaty on the Functioning of the European Union has two separate provisions (art 34 and 56 TFEU) *enables* this difference of jurisprudence to develop it, but it does not positively *require* it. It can be seen that there have been suggestions within the historical Australian jurisprudence (such as *Hospital Provident Fund Pty Ltd v Victoria* (1953)) that services might be treated differently from goods, but such a distinction was deliberately rejected by the Court. Equally, while the ECJ allowed the jurisprudence of art 34 TFEU and art 56 TFEU to develop separately in the early decades of the EU's existence, in more recent decades the Court has made efforts to try to assimilate the treatment of goods and services under a more generalised 'economic free movement' paradigm. Moreover, the tripartite division of the EU jurisprudence on free movement of goods, particularly the difference between discrimination analysis for selling arrangements and trade restriction analysis for usage restrictions, is clearly not a product of the text of art 34 TFEU, but rather the Court's attempt to 'settle' differences within its own accrued judgments; it finds no parallel, contemporary or historical, in the Australian jurisprudence.

Similarly, Australian jurisprudence does not entertain the concept of a certain class of restrictions automatically coming within the scope of the free movement guarantee, as the EU does in respect of product requirements for free movement of goods.

Looked at in the broader historical and philosophical context, in Australia, differing philosophical approaches by members of the High Court throughout the 20th Century saw the prevailing definition shift from trade restriction analysis to discrimination analysis in the early decades, then back to trade restriction analysis for much of the middle decades of the century and then finally, and decisively, back to discrimination analysis again in the contemporary era. The European Union jurisprudence does not evince quite such clear prevailing moods, not least because the mandatory *in banco* judgments are opaque as to individual judges' own views, and the uniformity of such rulings masks the gradual change that may (or may not) be going on underneath, as judges change their minds or newly appointed judges with different points of view gradually change the balance of the Court. It is worth bearing in mind the point articulated by Prof Weatherill[580] in respect of the EU, but equally applicable to Australia, that the 'internal market' (or in the Australian context, interstate trade and commerce being 'absolutely free') is an inherently ambiguous term, and thus the competing definitions of the scope of the economic freedom therein are in a certain sense neither 'right' nor 'wrong', but are different approaches to the definition of that freedom. Seen in that context the oscillation between the discrimination and trade restriction analyses in each system of jurisprudence represents the growth and development, rather than the error and correction, of the politico-economic systems of the European Union and the Commonwealth of Australia.

[580] Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 76.

An interesting and instructive feature which emerges from the comparison of the Australian and EU jurisprudence is the degree to which 'interstateness' of a transaction – that is, the presence of an 'interstate element' in a movement of goods or services – has diminished in relevance in both systems. For much of the 20th Century, Australian jurisprudence required the presence of some identifiable interstate element to a transaction to enliven the protection of s 92, particularly so in the early decades when the Court would parse out various different kinds of transactions which were the subject of dispute and rule that some possessed this interstate element while others did not, as in *W & A McArthur Ltd v Queensland* (1920). This diminished as the century wore on, and while cases in the contemporary jurisprudence such as *Barley Marketing Board (NSW) v Norman* (1990) have been careful to insist that the relevant form of discrimination is discrimination which operates against specifically *interstate* traders (and so there is a necessary interstate element to a law which may come within the scope of s 92), nevertheless the Court has been ever more clear in the most recent cases (*Betfair Pty Ltd v Western Australia* (2008), *Betfair Pty Ltd v Racing New South Wales* (2012)) that the rise of internet commerce has effectively rendered almost all trade 'interstate trade', meaning that any requirement for an 'interstate element' is now a dead letter, as all but the most limited, physical trade would satisfy this requirement.

The European Union jurisprudence reached effectively the same position, although for different reasons, decades earlier with the decision in *Dassonville* (1974): with the scope of free movement encompassing Member State laws which are "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade", there is, in effect, very little chance that a Member State law which does indeed restrict trade would fail to indirectly potentially restrict interstate trade. Thus, the convergence between the Australian and EU jurisprudence has rendered the requirement for an ‘interstate element’ all but moot in each system.

Both Australian and EU jurisprudence on the question of scope also show that the courts have an increasing hunger for economic data to prove the nature of the market in which the party reliant on s 92 trades, the substitutability between the affected interstate product or service and its intrastate competitors, and the actual restrictive effect of the impugned law on the party. It is not enough to assert these claims, they must be demonstrated with objective evidence in the form of economic and other scientific data[581].

Another feature of the jurisprudence which the different structures of the Australian and EU provisions on free movement produce is a difference in how clearly (and how early on in the history of the jurisprudence) a clear distinction is made between the *scope* of the provision on free movement and the *justification* of laws which are *prima facie* invalid/incompatible for falling within that scope. Such justification is the subject of Part 2 of this thesis.

[581] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217; Catherine Barnard, "Derogations, justifications and the four freedoms: Is State interest really protected?" in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009) 295; Niamh Nic Shuibne and Marsela Maci, ‘Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law’ (2013) 50 Common Market Law Review 965, 974.

PART 2:

JUSTIFICATION

PART 2: JUSTIFICATION

SUBPART 1: AUSTRALIA

CHAPTER VI: JUSTIFICATION OF LEGISLATION COMING WITHIN THE SCOPE OF FREE MOVEMENT OF GOODS AND SERVICES IN AUSTRALIA

Throughout the history of the interpretation of s 92 of the Constitution, the Court has recognised that legislation which comes within the scope of that section may nevertheless be justified by reference to some legitimate purpose, thus rendering the legislation, in the final analysis, compliant with the declaration that interstate trade is to be "absolutely free". The possibility of justification has persisted whether the prevalent test for scope was some form of trade restriction analysis or discrimination analysis, and, as will be seen, there has been more consistency in the jurisprudence on the matter of justification than in that of scope. It will also be seen that there is a connexion between the two issues of scope and justification – the 'pipe system with two pressure release valves' described in Chapter I, where the closing off of one valve increases pressure on the other – such that differing judicial philosophies in the middle of the 20th Century would either express themselves through different scope tests (as seen in Chapter I) or, when the scope test seemed to be 'settled' for the time being, these significant differences would instead express themselves through disagreements as to the proper test for justification. Nevertheless, even despite this interconnexion between justification and the vexed question of scope, there has still been much more judicial unanimity on the issue of justification.

By way of further contrast with the issue of scope, the seminal case of *Cole v Whitfield* (1988)[582] did not effect the same clean and complete break with past jurisprudence on the issue of justification. While that case, and those following it over the next decade, did tend to examine justification hermetically, without reference to the earlier jurisprudence[583], in the more recent cases the Court has employed the concept of "reasonable necessity"[584], explicitly quoting from pre-*Cole v Whitfield* case law on this issue[585]. On that basis, the jurisprudence on justification is here presented in this chapter as an ongoing development, unlike the split presentation of scope in Chapters I (pre-1988) and II (1988 to present). Nevertheless, the significance of *Cole v*

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[582] [1988] HCA 18, (1988) 165 CLR 360.

[583] The only significant discussion of pre-*Cole v Whitfield* case law is in *Barley Marketing Board (NSW) v Norman* [1990] HCA 50, (1990) 171 CLR 182, 198-201 (*per curiam*) where those cases are dismissed as irrelevant to the modern era because they rested on the now-rejected individual rights theory of s 92 (which had manifest itself in the trade restriction analysis of scope, as discussed in Chapter I).

[584] *Betfair Pty Ltd v Western Australia* [2008] HCA 11, (2008) 234 CLR 418, 477 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[585] This started with the declaration in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 that "Nevertheless, it would be an error to read what was decided in *Cole v Whitfield* as a complete break with all that had been said in this Court respecting the place of s 92 within the scheme of the Constitution" (at 451, per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). In this case, Their Honours were merely adverting to the fact that the economic consequences of an Act were relevant to determining its constitutionality, and that this concept had been recognised in some elements of pre-*Cole v Whitfield* case law. Even this meagre suggestion that pre-*Cole v Whitfield* jurisprudence might have some ongoing relevance was enough to raise the spectre of the knotty issues of the first nine decades of s 92 jurisprudence being re-litigated, and, as one commentator put it, it would "no doubt attract a collective sigh from students and enthusiasts of constitutional law alike" (Eli Ball 'Section 92 and the Regulation of E-Commerce: A Casenote on Betfair Pty Ltd v Western Australia' (2008) 36 Federal Law Review 265, 267). Much was made of Their Honours' words in some commentary, including the suggestion that it might herald a departure from the *Cole v Whitfield* doctrine that s 92 prohibited 'discrimination of a protectionist kind' (Gonzalo Villalta Puig 'Section 92 since Betfair Pty Ltd v Western Australia' (2009) 11(4) Constitutional Law & Policy Review 152, 154), although the Court's subsequent case law has made clear that there has been no such significant redefinition of s 92 away from that *Cole v Whitfield* formulation, to the disappointment of those who had hoped for it after the first *Betfair* case (Gonzalo Villalta Puig 'Betfair and Sportsbet: The Remains of the Federal Purpose of s 92 of the Australian Constitution' (2013) 87 Australian Law Journal 178).

Whitfield for the jurisprudence of s 92, and the aforementioned connexion between scope and justification, means that is convenient to identify 1988 as the beginning of the contemporary jurisprudence of justification under s 92, and accordingly this has been done later in the Chapter. It remains to be seen just how much of this pre-*Cole v Whitfield* jurisprudence on justification will indeed be taken up by the Court, however, as the volume of judicial exegesis of the question of justification has always been much lower than for scope – after all, justification is, by its nature, always a secondary question.

Historical Jurisprudence of Justification:

An early case which started to evolve a concept of justification for legislation falling within the scope of s 92 was *Duncan v Queensland* (1916)[586], which concerned a Queensland Act which expropriated all the meat and livestock in that State from its owners and transferred title to the government, for use in the prosecution of the Imperial war effort. In declaring that the Act was not contrary to s 92, Gavan Duffy, Rich and Powers JJ justified the Act by reference to the fact that its 'real object' was not the control of interstate trade in meat and livestock, but the effectual conduct of the war effort[587]. The concept of justification of a law *prima facie* within the scope of s 92 was furthered in *W & A McArthur Ltd v Queensland* (1920)[588], where the majority set out a test for justification which would allow interstate trade to be regulated (i.e. restricted) in the public interest provided that the regulation in question was not one 'on the subject of trade'[589] – a concept somewhat elliptically explained as meaning that trade could not be restricted *as trade*[590].

586 [1916] HCA 67, (1916) 22 CLR 556.

587 *Duncan v Queensland* (1916) 22 CLR 556, 641-642 (Gavan Duffy J and Rich J) and 647 (Powers J).

588 [1920] HCA 77, (1920) 28 CLR 530.

589 *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 551 (Knox CJ, Isaacs and Starke JJ; Rich J concurring).

590 *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 550 (Knox CJ, Isaacs and Starke JJ; Rich J concurring).

In practical terms, this would justify, for example, a law restricting the interstate trade in dangerous, stolen or offensive goods[591] (which would have been within the scope of s 92 under the then-ascendant trade restriction analysis), but it did not justify the legislation in the instant case, which imposed maximum prices on the sale of types of goods as a way of limiting profiteering, because the legislation was thus 'on the subject of trade'. This concept of justification by regulation in the public interest was to be called upon, in some formulation or other, in all the subsequent case law, and formed the bedrock reason for why a *prima facie* breach of s 92 would nevertheless be allowed to stand. In early case law, the public purpose used to justify legislation was usually one which could be characterised as a matter of necessity or emergency, going to the heart of the basic responsibilities of government, such as national defence (the maintenance of the war effort in *Duncan v Queensland*) or the maintenance of public health (the prevention of the spread of livestock diseases in *Ex parte Nelson (No 1)* (1928)[592]). Indeed, the formulation used in *Peanut Board v Rockhampton Harbour Board* (1933)[593] was "necessity"[594] or "war, famine, pestilence or other emergency"[595]. Nevertheless, the Court did not set nearly as high a threshold for legitimate public purpose as these early cases suggest. Starke J was careful to note in *James v Cowan* (1930)[596] that, provided that the purpose of the impugned Act was not to restrict interstate trade as such, the Court would not question the

[591] *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 551 (Knox CJ, Isaacs and Starke JJ; Rich J concurring).

[592] [1928] HCA 33, (1928) 42 CLR 209. The case concerned a NSW Act which limited the free flow of cattle into the State in an attempt to prevent the entry and spread of disease.

[593] [1933] HCA 11, (1933) 48 CLR 266.

[594] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 276 (Rich J; Gavan Duffy CJ concurring).

[595] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 287 (Dixon J).

[596] [1930] HCA 48, (1930) 43 CLR 386.

wisdom of the legislature's purpose and would accept its assessment of what was in the public interest[597]. As time wore on, His Honour's statement of the law was proven to be correct, as the list of legitimate public purposes in the case law expanded to include consumer protection from fraud[598], regulation of commercial transport by road[599], economic stabilisation of specific industries[600], the protection of public health by ensuring food sanitation[601] or preventing the spread of disease[602], the prohibition of socially harmful activities such as lotteries[603], the protection of public safety by regulation of passenger airline services[604], prohibition of unfit persons from conducting certain kinds of trade[605] and the promotion of competition within an industry[606].

The 'Real Object' of Legislation:

In *James v South Australia* (1927)[607], Isaacs ACJ and Powers J sought to bring the formulation of the test for justification back to the question of the 'real object' of the legislation,

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[597] *James v Cowan* (1930) 43 CLR 386, 393.

[598] *Roughley v New South Wales; Ex parte Beavis* [1928] HCA 48, (1928) 42 CLR 162 and *Samuels v The Readers' Digest Association Pty Ltd* [1969] HCA 6, (1969) 120 CLR 1.

[599] *R v Vizzard; Ex parte Hill* [1933] HCA 62, (1933) 50 CLR 30.

[600] *Milk Board (NSW) v Metropolitan Cream Pty Ltd* [1939] HCA 28, (1939) 62 CLR 116.

[601] *Milk Board (NSW) v Metropolitan Cream Pty Ltd* (1939) 62 CLR 116.

[602] *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* [1949] UKPC 37, (1949) 79 CLR 497, 641.

[603] *R v Connare; Ex parte Wawn* [1939] HCA 18, (1939) 61 CLR 596 and *R v Martin; Ex parte Wawn* [1939] HCA 39, (1939) 62 CLR 457.

[604] *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* [1945] HCA 41, (1945) 71 CLR 29.

[605] *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 641.

[606] *Samuels v The Readers' Digest Association Pty Ltd* [1969] HCA 6, (1969) 120 CLR 1.

[607] [1927] HCA 32, (1927) 40 CLR 1.

that is, the actuating purpose of the legislation[608] . They distinguished the instant case, wherein the South Australian legislation had established quotas for the trade of dried fruits in the Australian domestic market and had seized the fruit which James had attempted to sell in excess of those quotas, from *New South Wales v Commonwealth ('The Wheat Case')* (1915)[609], in which NSW legislation had compulsorily acquired the entire wheat crop grown in the State in the service of the Imperial war effort. Whereas the legislation in *The Wheat Case*

> was made without reference to inter-State trade or inter-State contracts as a criterion or as influencing the operation of expropriation, and without discrimination....Here, as shown, the purpose for which the goods were seized was direct interference with inter-State trade, and inter-State contracts not only influenced the governmental action but formed its criterion.[610]

When the South Australian government subsequently tried to achieve its aim of controlling how much dried fruit was sold into the Australian market by compulsorily acquiring James's crop, Isaacs J took the opportunity in *James v Cowan* (1930)[611] to provide a gloss on his earlier statement, making clear that the real object of an Act (otherwise called its purpose, intention or necessary effect) was "the necessary *legal* effect, not the ulterior effect economically or socially"[612] (emphasis in original). It was this necessary legal effect which distinguished a permissible governmental action from an impermissible governmental action, even though the economic effect of each of each might be the same[613]. Of note here is that, in the jurisprudence of Isaacs J, 'real object' did not draw a distinction between the *purpose* and the necessary *effect*

608 *James v South Australia* (1927) 40 CLR 1, 35.

609 [1915] HCA 17, (1915) 20 CLR 54.

610 *James v South Australia* (1927) 40 CLR 1, 34.

611 [1930] HCA 48, (1930) 43 CLR 386.

612 *James v Cowan* (1930) 43 CLR 386, 409.

613 *James v Cowan* (1930) 43 CLR 386, 419.

of legislation, on the basis that the purpose was revealed in its necessary (and so, presumably, intended) effect. Likewise, it was a jurisprudence which focussed on the legal form of the impugned legislation, and did not stray into economic analysis beyond the field of legal analysis. While Isaacs J had dissented as to the result in this case, James's successful appeal to the Privy Council was to see Isaacs J's views endorsed by that higher court.

In *James v Cowan* (1932)[614], the Privy Council quoted approvingly from the judgment of Isaacs J in the High Court decision below, to the effect that the expropriation in *The Wheat Case* had been justified because the real object of that action was not interference with interstate trade as such[615], whereas the expropriation in the present case was not justified because the real object was indeed to interfere with interstate trade as such by forcing much of the dried fruit crop onto the international market and thereby keep interstate prices higher[616]. The real object of legislation is, according to Lord Atkin, its primary object, rather than any secondary or incidental effect which it might have, and so an incidental effect on interstate trade in pursuit of a primary object of some other area of governmental concern (e.g. defence, security of food supply, disease prevention) would not render such legislation contrary to s 92[617]. Importantly, in line with the argument that the legal form adopted by the legislation was not decisive of its real object, evidence for the real object of legislation is not confined to what appears on the face of the law itself, as in the instant case the real object was determined by examining the Ministerial

[614] [1932] UKPC 43, [1932] AC 542.

[615] *James v Cowan* [1932] AC 542, 558.

[616] *James v Cowan* [1932] AC 542, 557 and 559.

[617] *James v Cowan* [1932] AC 542, 559.

statement on the acquiring of James's dried fruit and the minutes of the Dried Fruits Board setting the quantity limits for trade within Australia[618].

By this point in the jurisprudence, the question of justification was starting to become distinct from the question of scope, and justification of *prima facie* invalid legislation was to be determined by looking to its 'real object'. The 'real object' was the purpose or intended effect of the legislation, and was found by examining its primary legal effect, not any secondary legal effect or its ultimate economic or social effect. The sources that could be used to determine the nature of this primary legal effect were not limited to the text of the legislation itself, but extended to other legal and official sources such as politico-legal documents (Ministerial statements) and administrative documents (records of the body administering the legislation). If the real object of the legislation were to restrict or control interstate trade, it would not be justified; if the real object were some other aspect of public policy, then the law would be justified. In short, justification at this point in the jurisprudential history of s 92 contained the concepts of 1) legitimate purpose, and 2) a method for discovering whether the legislation had such a legitimate purpose (by looking to its 'real object'). While the first concept remained stable (though its list was ever-expanding), as the jurisprudence evolved over the coming decades, the Court was to develop the second concept by exploring the nuances of how justification applied to various kinds of legislative schemes relating to trade.

Direct Restriction:

This deferential early attitude to the power of parliaments to legislate in the public interest also found expression in the requirement that, for an impugned law to be within the scope of s 92, it must be one which *directly* restricted interstate trade. At this stage in the evolution of the

618 *James v Cowan* [1932] AC 542, 559.

jurisprudence, the questions of scope and justification were not neatly parsed, and still tended to be run together when declaring that legislation was or was not compatible with s 92. Thus, although directness of restriction, like the 'real object' test referred to above, tended to be presented as part of the scope of s 92, in light of later developments it is better understood as justification of legislation already found to be within the scope of that section: restrictive legislation was within the scope of s 92 and *prima facie* invalid, unless it was justified because it only restricted interstate trade *indirectly*.[619] In *Roughley v New South Wales; Ex parte Beavis* (1928)[620], Roughley was a farm produce agent who operated in NSW, selling produce on behalf of farmers located in other States; the contracts under which he operated stipulated that the goods were to be delivered from interstate and sold in Sydney (presumably seeking to engage the protection of *W & A McArthur Ltd v Queensland* by ensuring that the sale in Sydney should constitute genuinely 'interstate' trade). New South Wales legislation sought to impose certain restrictions on farm produce agents, requiring them to be registered in that State, to submit their accounts for inspection, to pay money received from purchasers into a trust account, and to render written accounts to their principals with 7 days of sale; it also effectively imposed a maximum wage on them by preventing them from suing their principals for any unpaid remuneration beyond the limit established by NSW law. Although the Court was of the opinion that Roughley was indeed engaged in interstate trade and that the provisions of the NSW Act did restrict that interstate trade (which would have satisfied the prevailing definition of the scope of s 92), nevertheless the majority decided that the restriction was merely *indirect*. By way of

[619] It is worth remembering that the dominant test for scope during most of this early period was the trade restriction analysis: such a broad definition of scope needed to be qualified in some significant way to avoid invalidating too wide a range of legislation.

[620] [1928] HCA 48, (1928) 42 CLR 162.

contrast with *W & A McArthur Ltd v Queensland*, in which the Queensland Act had regulated prices at which goods could be sold and thus restricted interstate trade itself, in the instant case the NSW Act did not restrict interstate trade itself because it had merely the restricted operation of farm produce agents in NSW. Thus, any restriction of interstate trade in the present case was not direct but was merely *indirect or consequential to the pursuit of a legitimate legislative aim*[621], in this case the aim of ensuring honest dealing and preventing fraud[622], and so the Act was not obnoxious to s 92. In effect this decision amounted to 'justification by indirectness'[623]. The indirectness of an impugned law's effect on interstate trade, or more to the point, the fact that the effect on interstate trade was merely *consequential to the pursuit of some other legitimate legislative aim unrelated to the restriction of interstate trade*, will be seen to have echoes in the contemporary test for justification expounded in *Castlemaine Tooheys Ltd v South Australia* (1990)[624] below.

The Synthesis of Direct Restriction, 'Real Object' and Incidental Effect:

As the Court's jurisprudence evolved, 'real object' and 'indirectness' started to be merged together as a form of justification, with the *indirectness* of the trade restriction indicating that the *real object* of the law was not in fact to restrict trade in this way but rather to pursue some other public purpose. A case that demonstrates this convergence is *Peanut Board v Rockhampton*

[621] *Roughley v New South Wales; Ex parte Beavis* (1928) 42 CLR 162, 181 (Knox CJ, with whom Gavan Duffy J concurred); 193-194 and 199 (Higgins J, with whom Powers J concurred).

[622] *Roughley v New South Wales; Ex parte Beavis* (1928) 42 CLR 162, 177 (Knox CJ).

[623] As with so many concepts relating to s 92 in the turbulent history of that section, indirectness justification was not universally accepted by the members of the Court. In *Ex parte Nelson (No 1)* (1928) 42 CLR 209, 234-235 Isaacs J criticised the distinction between direct and indirect restrictions arguing that question was simply whether the Act was or was not on the subject of interstate trade as such (harkening back to the majority decision in *W & A McArthur Ltd v Queensland*), but he was in alone in doing so.

[624] [1990] HCA 1, (1990) 169 CLR 436.

Harbour Board (1933)[625]. As discussed in Chapter I, this case concerned a Queensland law which established a compulsory single-desk marketing scheme for peanuts grown in that State. The majority, having applied the trade restriction analysis for scope and determined that the Act was *prima facie* invalid, decided that it could not be justified by reference to its real object. The majority determined that the real object of the Act was the complete control of the peanut trade, particular proof of which was the fact that it restricted the interstate peanut trade *directly* by the State-wide divesting of growers' peanuts and the prohibition on anyone but the Peanut Board trading in that commodity[626]. It is to be noted that, given the prevailing trade restriction definition of scope at the time, the condition which would cause an Act to fail the justification test was if its real object were restriction of trade *including interstate trade*; it was not necessary that the real object be restriction *only of interstate trade* or restriction of interstate trade *more severely than intrastate trade* in order for the Act to fail the justification test. The danger of a concept such as an Act's 'real object' is that it involves a degree of legislative characterisation which, in seeking to discern the 'real' object of the Act from other 'unreal' or merely colourable objects of the Act, ultimately rests on the subjective opinion of the judge. In order for such a test to operate with certainty, it would need to be formulated in such detail that the process of identifying the 'real object' is, as much as possible, an objective process – and the dissent of Evatt J in the instant case shows that it was not. Applying the same principle that the real object of the legislation could save it from unconstitutionality, Evatt J concluded that the real object of the Act was not to control the peanut trade by restricting growers' economic freedom but rather to develop the peanut industry by ensuring higher returns to growers through collective

[625] [1933] HCA 11, (1933) 48 CLR 266.

[626] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 287-288 (Dixon J).

bargaining (and prevent ruinous competition which could drive smaller growers out of business); that is, the real object of the Act was "to set up for the growers themselves a representative selling authority or agency, with expert backing, in order to enable them to reap a greater benefit from the marketing of their product *in whatever locality a demand for it might arise*"[627] (emphasis in original). By way of evidence, His Honour relied on the fact that the compulsory marketing scheme had been initiated at the request of peanut growers, the Peanut Board was controlled by peanut growers, the scheme had succeeded in stabilising income for peanut growers in the time since its inception, and it was one amongst many such compulsory marketing schemes which were in widespread use across Australia[628]. In the event, the law was indeed held to be unconstitutional by the majority because in their view it failed the justification test, but it is clear that the process of identifying the real object of legislation was insufficiently objective to avoid rational judicial minds differing – not an ideal situation where the continued existence of a major feature of Australian economic life, the single-desk marketing system, was concerned.

As the struggle between the Dixon and Evatt schools of thought on the question of scope continued, where they did start to coalesce was on the relevance of certain legislative purposes which might save a law from invalidity under s 92. However, because they had divergent views on the proper scope of s 92, the precise relevance of these legislative purposes was different. For Dixon J, who defined scope by a trade restriction analysis, once a law was caught in the (relatively wide) net of being one which restricted interstate traders' freedom of trade, if the law's real object were not the restriction of interstate trade but some other public purpose, then

[627] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 301 (Evatt J).

[628] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 293 (Evatt J).

the law could be justified[629]. For Evatt J, who defined scope by a discrimination analysis, the existence of some legislative purpose other than the restriction of interstate trade was enough to remove the law from the category of laws which s 92 caught in the first place (i.e. remove it from the scope of his narrower, discrimination-defined, net). In Evatt J's words, the relevance of some real object other than the restriction of interstate trade:

> …is not, e.g. because the law of husband and wife and legislation as to pure foods, gambling, quarantine, health, hygiene and property generally are exceptions to be carved out of s 92; but because, in applying s 92, one must "ascertain the relationship between the State enactment and that 'trade, commerce and intercourse among the States' which alone is given constitutional protection".[630]

In this sense, Evatt J was treating legitimate purpose not as a matter of justification, but as a matter related to scope. Nevertheless, in the end, the result was the same: the saving of the law from constitutional invalidity. Thus, there was an emerging consensus (in effect, if not in form) that a law which had as its real object a purpose other than the restriction of interstate trade was not in breach of s 92[631].

What then of the secondary, or incidental, restriction of interstate trade which a law might engender? Judicial comments had suggested for some years that this was not germane to the determination of the 'real object' of the law, and the Court in *R v Vizzard; Ex Parte Hill*

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[629] *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 287 (Dixon J).

[630] *Milk Board (NSW) v Metropolitan Cream Pty Ltd* [1939] HCA 28, (1939) 62 CLR 116, 150 (Evatt J), quoting his own judgment in *R v Vizzard; Ex parte Hill* [1933] HCA 62, (1933) 50 CLR 30, 79.

[631] The House of Lords, in one of its rather unhelpful appeal judgments, proceed to cast some doubt over whether such a public policy-based justification could really be located in the wording of s 92 of the Constitution: *James v Commonwealth* [1936] UKPC 52, [1936] AC 578, 624-625 (Lord Wright MR, for the Court). Lord Wright MR did entertain the possibility that the Constitution might have been relying on an implied assumption of *salus populi est suprema lex*, which would justify laws which were *prima facie* in breach of s 92 (i.e. within its scope) if they were necessary to preserve, for instance, public health in the event of an outbreak of disease. (On this point, see the discussion of *Gratwick v Johnson* (1945) below.) In the event, Their Lordships declined to overrule the existing case law, on the basis that the question was not actually at issue in the proceedings.

(1933)[632] came to address the issue in detail. New South Wales legislation which required that vehicles being operated on NSW roads be licensed in NSW was challenged in respect of its application to vehicles which were solely engaged in interstate trade. As Evatt J (with the support of Gavan Duffy CJ and McTiernan J) declared, where the restriction on interstate trade was merely incidental to the pursuit of some legitimate real object, this incidental effect was of no more significance than, say, the effect which arresting a criminal for murder would have on interstate trade, if that criminal happened to be an interstate trader, or setting a domestic bridge toll or carriage restrictions on certain domestic roads at certain times of the day, if some of the people passing that way happened to be interstate traders[633]. In the instant case, restriction of interstate road transport was not the real object of the legislation: the real object was, in fact, "regulation, control and co-ordination of commercial transport upon the roads of the State"[634] so as to set up "a better and more economical system of public transport by land within New South Wales, the scheme of organization [*sic*] being to compel co-operation between the transport services provided by the Government railways and road transport services"[635]. The relevance of the railways to road transport vehicle licensing was that the railways were, at the time, owned by the various States; they were an important source of State government income and a major security against which the States borrowed money. The economic model under which the States operated the railways was that they would carry bulk items (such as grain) at a lower cost per tonne and cross-subsidise this carriage by carrying smaller volume, higher value items at a higher cost per tonne; since these small volume, higher value items could also be easily

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[632] [1933] HCA 62, (1933) 30 CLR 30.

[633] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 79-80 (Evatt J).

[634] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 76 (Evatt J).

[635] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 93-94 (Evatt J).

transported by road, the licensing scheme was set up to ensure that the top end of the transport market would not be drained away by road transport and undermine the economic viability of the State-owned railways[636]. The fact that protection of State-owned railways was part of the real object of the NSW licensing legislation was not seen as constituting discriminatory protectionism against interstate trade, because the real object was not to hit at interstate trade (in this case, by truck) but to ensure a State-wide balance between road and rail transportation so as "to protect the utility of the public facilities for transport, to save the publicly owned railways of the State from the destructive effect of the uncontrolled or unrestricted use of the facilities for travelling provided by the State out of public moneys and to protect the public finances of the State"[637], given that "the very solvency of the State is wrapped up in the successful maintenance of their own governmental railway systems"[638]. Noteworthy here is that the concept of the real object of legislation, used in *Peanut Board v Rockhampton Harbour Board* as *justification* by Dixon J but as part of *scope* by Evatt J, is used by Evatt J in the instant case both as a way of uncovering disguised protectionism[639] (as in that earlier case), but also as a potential means of justification for discriminatory treatment on the face of the law[640]. This shows that, despite the difference

[636] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 81 (Evatt J); Robert Garran, *Prosper the Commonwealth* (Angus & Robertson 1958) 187-188.

[637] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 104 (McTiernan J).

[638] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 83 (Evatt J). In retrospect, in light of *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 (discussed later in this Chapter) it may be questioned whether the protection of railways from competition, including from interstate road transport, so as to maintain State revenue would indeed be judged to be protectionist discrimination within the scope of s 92; by analogy with the pricing of a deposit on single-use beer bottles in the later case, the answer may ultimately depend on the pricing of road licenses and whether it is calculated merely to even out the cost differential between road and rail transport for low volume goods (by including an unpriced externality), or it is set at a level significantly higher so as to provide an unfair commercial advantage to the State-owned railway.

[639] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 82.

[640] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 92.

between the Dixon school and the Evatt school as to the test for the *scope* of s 92, both were coalescing around the idea that the real object was part of the *justification* of legislation which has already been judged to come within that scope (however one judge or the other defined it). While Dixon, Starke and Rich JJ all adopted the trade restriction analysis, they differed as to whether the legislation was justified. Rich J characterised the real object of the Act as being "an attempt not to suppress but to regulate transportation and to do so in such a way as to help rather than to retard or obstruct the movement of commercial goods throughout New South Wales"[641], a characterisation supported by the fact that the licensing scheme did not regulate trade itself directly but merely the instruments used in trade which, while important to trade, were distinct from commercial dealings as such[642]. As seen above, although Rich J was adopting a different definition of scope from Gavan Duffy CJ, Evatt and McTiernan JJ by adhering to the Dixon school, his characterisation of the Act as a regulatory, co-ordinating Act in respect of land transport in NSW was the same as that given by those Justices, and he similarly viewed such regulation and co-ordination as a real object distinct from the restriction of trade as such. To his mind, this real object justified the Act, and so preserved its validity in respect of interstate traders.

Dixon and Starke JJ agreed that the real object of the Act was regulation and co-ordination of land transport within NSW, but they disagreed that this real object was meaningfully distinct from restriction of trade: Rich J's distinction between trade and the instruments used to effect trade was rejected as insubstantial because it was the commercial usage of vehicles that was at

[641] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 51.

[642] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 51.

the very heart of the licensing scheme[643]; more fundamentally, regulation is, by its nature, restriction of the regulated activity backed up the threat of penalty[644]. Since the heart of s 92, according to the Dixon school, was the protection of an individual's right to engage in interstate trade, regulation of that trade (even as part of a general scheme) must qualify as a restriction of it and must be obnoxious to s 92[645]. Any restriction of an individual's right is, to use Rich J's word, a 'suppression' of interstate trade, so all 'regulation' is 'suppression'. As regulating (and thereby restricting) trade was the real object of the licensing scheme in the present case, in the opinion of Dixon and Starke JJ it should have been held to be invalid in its application to interstate traders such as Hill. Thus, although Rich, Dixon and Starke JJ all adhered to the Dixon school of thought that the test for the scope of s 92 is restriction of interstate trade regardless of equivalent restriction of intrastate trade, Rich J was prepared to tolerate State-wide transport regulation as a justificatory real object, whereas Dixon and Starke JJ rejected it in a pure adherence to the individual rights approach to s 92 that characterised the Dixon school. The larger point that emerged from this somewhat confusing period, where the opinion of the Court was shifting back and forth between discrimination and trade restriction analysis for scope, was that the concepts of scope and justification were becoming ever more clearly separated, such that a judge's view on the vexed question of scope did not necessarily lead them to a particular conclusion on the separate question of justification. Furthermore, justification under the rubric of the 'real object' of the legislation encompassed the subsidiary and indicative issues of whether

643 *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 56 (Starke J) and 68 (Dixon J).

644 *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 54 (Starke J).

645 *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 59 (Dixon J).

the legislation directly or merely indirectly restricted interstate trade and whether its restrictive effect on interstate trade was intended or merely incidental to some other intended purpose.

Justification and Heavily Regulated Markets:

With a unified jurisprudence of justification steadily emerging, the Court came to consider how justification should apply to particular kinds of legislative schemes which involved considerable restriction of interstate trade. One such legislative scheme was that which was applied to the processing, handling, selling and inspection of milk in NSW, and in *Milk Board (NSW) v Metropolitan Cream Pty Ltd* (1939)[646] this legislation came under challenge, with the Milk Board responding that the real object of the legislation was in fact the protection of public health and the stabilisation of the milk industry. The purported protection of public health manifested itself as a legislated scheme of inspections, testing and grading of milk, rules as to storage and transport of milk, limitation of the number of traders allowed to deal in milk at different stages of its processing and distribution, and the Milk Board's ability to certify specific traders to operate at different stages in the milk industry[647]. The purported stabilisation of the milk industry manifested itself as the legislative fixing of minimum prices per gallon for milk producers, and maximum prices for the transport, storage, treatment, wholesale and retail of milk so as to prevent profiteering at any stage in the industry and ensure a reliable supply of affordable, good quality milk for end consumers[648]. In pursuit of both of these objects, the Act also allowed for the compulsory acquisition by the government of all milk within a given area. The majority (Latham CJ, Rich, Evatt and McTiernan JJ) accepted that these purposes were

[646] [1939] HCA 28 , (1939) 62 CLR 116.

[647] *Milk Board (NSW) v Metropolitan Cream Pty Ltd* (1939) 62 CLR 116, 134 (Latham CJ) and 153 (Evatt J).

[648] *Milk Board (NSW) v Metropolitan Cream Pty Ltd* (1939) 62 CLR 116, 133-134 (Latham CJ) and 153 (Evatt J).

legitimate and that they were the real object of the NSW milk legislation, and upheld the validity of the scheme[649]. It was noted that this characterisation of the Act as being concerned with health and economic stabilisation rather than the discriminatory restriction of interstate trade was bolstered by the fact that there was only a very small volume of interstate trade actually affected by it[650]; this anticipated the development of a *de minimis* strand of justification in subsequent case law. How then did it come to pass that milk could be so tightly regulated in New South Wales, but an Act trying to achieve much the same thing in respect of peanuts in Queensland had just 6 years earlier been declared unconstitutional? The answer to this lies in the characterisation of the real object of the Act: although the *Milk Act* 1931-1936 (NSW) did include an expropriation provision, just as the *Primary Producers' Organization and Marketing Act* 1926-1930 (Qld) had in *Peanut Board v Rockhampton Harbour Board*, it contained many other provisions relating to sanitation of milk and price control. Thus, while the majority had focussed on the expropriation provision in the Qld Act and characterised the real object of that Act as being the complete control of the peanut trade through compulsory marketing, the majority in the later case were prepared to characterise the NSW Act as being something other than complete control of the milk industry, namely the protection of public health and the stabilisation of the milk industry. Ironically, perhaps, it seems to have been the very presence of these additional elements of regulatory control that preserved the validity of the NSW Act, whereas the Queensland Act, which contained no such restriction on how peanuts could be stored or the

[649] As described in Chapter I, the majority of the Court at this point in time (and in the temporary absence of Dixon J) viewed the Privy Council's decision in *James v Commonwealth* (1936) as having supported an Evatt-style discrimination analysis, so these legitimate purposes were used in the characterisation of the Act as one not within the scope of s 92 in the first place. Questions of scope and questions of justification do tend to bleed together at this point in the Court's jurisprudence, but since 'real object', when used in conjunction with the discrimination analysis, does in retrospect function much like justification, it is useful to see it as a part of the evolution of the jurisprudence of justification as well.

[650] *Milk Board (NSW) v Metropolitan Cream Pty Ltd* (1939) 62 CLR 116, 154 (Evatt J).

prices at which they could be sold, was declared invalid. Whatever the irony of this position, it was clear that legislation which imposed significant regulation on an industry, going as far as limiting who could trade at what stage and how much they could be paid, was capable of justification under the real object doctrine.

Justification and Compulsory Marketing Schemes:

The effect of *Milk Board (NSW) v Metropolitan Cream Pty Ltd* was not limited to legislative schemes of licensing and price-fixing, but in time its effect was even felt on schemes imposing compulsory marketing. Whereas the compulsory marketing scheme for peanuts had been declared unconstitutional in *Peanut Board v Rockhampton Harbour Board* in 1933, in *Andrews v Howell* (1941)[651], in the midst of the Second World War, the Court upheld the validity of a similar scheme of regulation instituted under the *National Security Act* 1939-1940 (Cth) which compulsorily acquired the entire apple and pear crop of Australia and subjected any dealing therewith to the approval of the Australian Apple and Pear Marketing Board (which Board was required to pay compensation to those who had owned the fruit hitherto). The Act and the regulations thereunder expressly cited national defence and the effectual prosecution of the war effort as their purpose. Accordingly, it was argued before the Court that the legislation was necessary to prevent the disorganised marketing of apples and pears, as shipping had been severely disrupted due to the War and the sudden dumping of the entire crop into the domestic market would cause a price collapse, and potentially drive many growers out of the industry. Evidence for this was found in the fact that the Act made no reference to interstate trade[652] and

[651] [1941] HCA 20, (1941) 65 CLR 255.

[652] *Andrews v Howell* (1941) 65 CLR 255, 274 (Starke J).

the fact of the War's disruption of shipping[653]. On this basis, the Court was prepared to decide that the real object of the Act was indeed the defence of the Commonwealth through the stabilisation of the economy[654]. While wartime makes necessary many restrictions and privations that would not be tolerated in the midst of peace, the larger importance of *Andrews v Howell* was that it indicated that it was possible, in some circumstances at least, for a compulsory marketing scheme to be justified.

That being said, the claim that 'national defence' was the real object of the legislation was not automatically accepted by the Court, even in wartime. Even in wartime, the government did not enjoy unfettered power to regulate trade, commerce and intercourse between the States: at all times, whether at peace or at war, Commonwealth and State legislation must still comply with the Federal Constitution. In *Gratwick v Johnson* (1945)[655], for instance, regulations made under the same *National Security Act* as in *Andrews v Howell* forbade persons to travel between one State and another by rail without a permit, which Miss Dulcie Johnson had contravened by travelling, unpermitted, by train from NSW to Western Australia to visit her fiancé. (While this case concerned freedom of *intercourse* between the States, on this point there is no distinction in the case law between freedom of interstate intercourse and freedom of interstate trade and commerce.) As in the previous case, the recitals of both the Act and the subsidiary regulations referred to the necessity of national defence, but unlike in that case, the Court was not convinced that this was the real object of the regulations. The key factor here was that the regulations were judged to be *directed against* intercourse between the States, because they fixed on the specific

[653] *Andrews v Howell* (1941) 65 CLR 255, 275 (Dixon J), 286 (McTiernan J).

[654] *Andrews v Howell* (1941) 65 CLR 255, 273-274 (Starke J), 281 (Dixon J, expressing at 279 and 281 that he considered himself bound to decide so after *Milk Board (NSW) v Metropolitan Cream Pty Ltd*), 288 (McTiernan J).

[655] [1945] HCA 7, (1945) 70 CLR 1.

act of interstate movement as the point which was rendered illegal, absent official permission[656]; additionally, there was no legal structure given to the decision of whether or not to grant permission, and it remained essentially an arbitrary one[657]. Thus, even in the midst of war[658], the High Court upheld its jurisprudence that where legislation fell within the scope of s 92, it could only be justified if its real object were some other purpose that the restriction of interstate trade (or intercourse, as the case was here). While the context of a national emergency was relevant, on its own it was not decisive, and the Court would be more likely to judge the real object harshly where the legislation imposed a restriction specifically on interstate movement and where any exemption from this restriction was not subject to a well-structured decision-making process.

Justification and the Prohibition of Certain Trades:

What then of an Act which simply banned a certain trade outright? Could that Act be characterised as pursuing a legitimate public purpose and thus be justified, or must a prohibition necessarily be characterised as a complete control (and elimination) of a certain trade? The

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[656] *Gratwick v Johnson* (1945) 70 CLR 1, 14-15 (Latham CJ).

[657] *Gratwick v Johnson* (1945) 70 CLR 1, 15 (Latham CJ).

[658] Latham CJ forcefully rejected the suggestion of Lord Wright MR in *James v Commonwealth* (1936) that there was some implied concept of *salus populi est suprema lex* within the Constitution, or that it could have any application outside the direst of national emergency: “The maxim…is a wise political observation – not a legal criterion of constitutional validity. From a legal standpoint, the maxim really represents a doctrine of political necessity which in times of crisis may justify extraordinary action – as, for example, under the royal prerogative in time of imminent national danger. But the royal prerogative is itself part of the common law. The view that *salus populi* can abrogate all law belongs to the world of war and revolution, not to that of law. The maxim, so understood, becomes indistinguishable from *silent leges inter arma*. If such a rule does find any place in the legal system of Australia, it can apply only in times of the gravest crisis and emergency, when the necessity of preserving the community and the lives of the people take precedence over all other considerations. In such circumstances, ordinary laws are in fact and as a matter of necessity in abeyance. The present circumstances of Australia, fortunately, are such that no decision upon this question is necessary in this case, and I do not express an opinion upon the possible application of such a rule in other circumstances. I do however point out that the *Commonwealth Constitution* contains no special provision dealing with national emergency which enables the Commonwealth Parliament or the Commonwealth Government in effect to repeal the Constitution *pro tempore*, even to meet such an emergency.” *Gratwick v Johnson* (1945) 70 CLR 1, 11-12.

answer was given in the two similar cases of *R v Connare; Ex parte Wawn* (1939)[659] and *R v Martin; Ex parte Wawn* (1939)[660], in which the Court considered the validity of a NSW Act which had prohibited the selling of tickets to out-of-State lotteries[661]. On the face of it, this was an Act which clearly came within the scope of s 92 (whether that scope was understood as trade restriction or as discrimination against interstate trade), and could only then survive if justified. The majority of the Court (Starke, Dixon, Evatt and McTiernan JJ) upheld the validity of the Act in both cases, and while McTiernan J decided the case on other grounds[662], Starke, Dixon and Evatt JJ all addressed the question of how to characterise the real object of the Act. In Their Honours' view, the real object of the Act was the general suppression of lotteries, which was demonstrated by the fact that it did not merely forbid the selling of tickets for out-of-State lotteries but also the selling of lottery tickets in general[663] (the only exception being the official NSW State-controlled lottery and small charity raffles). This was evidence enough that the real object of the Act was not the control of interstate trade but the general prohibition of an economic activity viewed as harmful to the public weal[664]. However, as with all questions

[659] [1939] HCA 18, (1939) 61 CLR 596.

[660] [1939] HCA 39, (1939) 62 CLR 457.

[661] In *Connare*, Mr Wawn had sold two tickets to the Tasmanian lottery Tattersall's Consultation and had offered to sell tickets to the Queensland lottery the Golden Casket. In *Martin*, Mr Wawn, despite the judgment going against him in *Connare* earlier in the year, had gone and sold another ticket to Tattersall's Consultation (this time by organising for it to be sent from Tasmania to the purchaser on request) and once again been caught and prosecuted.

[662] Namely, that the selling of lottery tickets did not qualify as 'trade and commerce' under s 92 because it was nothing more than the exchange of money (the purchasing of the ticket) for a chance to win a larger sum of money (entry into the lottery), the ticket itself being a worthless piece of paper: *R v Connare; Ex parte Wawn* (1939) 61 CLR 596, 631-633.

[663] Although the general penalty for sale of a lottery ticket was A£5 but rose to A£20 in respect of out-of-State lotteries, both were rendered illegal by the Act and Dixon J dismissed the difference in penalties as insubstantial: *R v Martin; Ex parte Wawn* (1939) 62 CLR 457, 461.

[664] *R v Connare; Ex parte Wawn* (1939) 61 CLR 596, 616 (Starke J), 618 (Dixon J), 621 and 627 (Evatt J). All three reiterated their positions in *R v Martin; Ex parte Wawn* (1939) 62 CLR 457.

dependent on characterisation, the facts of the case would decisively influence whether the Act's real object were characterised as the suppression of interstate trade or the pursuit of some other legitimate aim.

Justification and Government Monopolies:

In the wake of the Second World War and the extraordinary, co-ordinated effort needed to mobilise the nation for total war, new attitudes towards the social responsibility of the state were developing. Beyond the earlier compulsory marketing schemes for agricultural products, which sought to benefit specifically the growers in the relevant industry by keeping prices relatively high and stable, social policy now moved to the establishment of government monopolies in areas of the market deemed essential to national growth, with such monopolies being conceived of as beneficial to *the nation as a whole*. So it came to pass in the mid-1940s that the Labor governments of John Curtin and Ben Chifley adopted legislation which attempted to nationalise interstate air services and banking services, and so did the question of the justification of such government monopolies come to the High Court. In the signal case of *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945)[665], Commonwealth legislation sought to monopolise interstate air transport in the hands of the National Airlines Commission by prohibiting the operation of interstate air services by private entities, and the legislation was held to have control of interstate air transport as its real object rather than the establishment of a reliable and safe airline industry whose profits were returned to public coffers. It was acknowledged that ensuring the safety of passengers and the airworthiness of aeroplanes were legitimate objects[666], as might be the prevention of "unregulated, disorderly,

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[665] [1945] HCA 41, (1945) 71 CLR 29.

[666] *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945) 71 CLR 29, 61 (Latham CJ), 110 (Williams J).

possibly foolishly competitive, and therefore inefficient services"[667], and almost certainly also the pursuit of the expedient provision of postal services and the defence of the Commonwealth[668]. However, the fact that the Act completely forbade the operation of private air services where the Commission provided 'adequate' service, rather than just requiring that private airlines comply with rigorous safety standards, tended to indicate that its real object went beyond these legitimate purposes. This question of legislative form was not in and of itself decisive of the real object of the *Australian National Airlines Act* 1945 (Cth), because the jurisprudence of s 92 contained cases of licensing legislation which had been held valid (*R v Vizzard; Ex parte Hill*) and licensing legislation which had been held invalid (*James v Commonwealth*), and also, somewhat similar to a monopoly, a heavily regulated market scheme which had been held valid (*Milk Board (NSW) v Metropolitan Cream Pty Ltd*) and a compulsory marketing scheme which had been held invalid (*Peanut Board v Rockhampton Harbour Board*)[669]. Despite claims in the preamble of the *National Airlines Act* that it was passed not only pursuant to the regulation of interstate trade but also pursuant to the need to keep up the air defence of Australia and to facilitate the operation of the postal service, defence and mail carriage were rejected as real objects of the Act, as there was nothing in its provisions that

[667] *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945) 71 CLR 29, 61 (Latham CJ).

[668] The Postal & Telegraph Power in s 51(v) of the Constitution and the Defence Power in s 51 (vi) are separate heads of Commonwealth power from the Interstate Trade & Commerce Power in s 51 (i); the suggestion that the Act in this case could have rested on either the Postal & Telegraph or the Defence Powers was rejected: *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945) 71 CLR 29, 52 (Latham CJ), 75 (Starke 75) and 80 (Dixon J).

[669] As mentioned above, in the Dixon school of thought the real object of legislation can potentially act as a sort of justification, by demonstrating that the restriction on interstate trade (entering the scope of s 92 as Dixon J conceived it) was in fact only imposed in pursuit of some goal unrelated to interstate trade. It is worth noting, however, that Dixon J had not actually decided to hold legislation valid on this basis in any of the previous cases.

substantively related to either of these supposed purposes[670]. With these supposed purposes laid aside, in the opinion of the Court the only real object of the Act was the creation of the Commission's interstate air services monopoly, which had already been judged to be tantamount to the restriction and control of interstate trade, and thus the Act was not capable of being justified and was held to be unconstitutional.

The result was the same in *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948)[671], where an Act empowered the government-owned Commonwealth Bank to compulsorily acquire shares and assets of private commercial banks and terminate their directors' appointments, and empowered the Treasurer to direct private banks to cease trading; the stated goal of the Act was to create a monopoly on banking services in the hands of the Commonwealth Bank, so that banking would be "conducted in the interests of the people of Australia and not for private profit"[672]. In the opinion of the majority (Rich, Starke, Dixon and Williams JJ), the Act, which they judged to be within the scope of s 92 under their preferred trade restriction analysis, could not be justified because its real object was nothing less than the monopolisation of banking throughout Australia (including, though not limited to, interstate banking): even though the Act did not limit itself to interstate banking, it restricted the trade directly[673], did so to a substantial degree[674], and was not pursuing some other legitimate public

[670] *Australian National Airways Pty Ltd v Commonwealth (No 1) ('The Airlines Nationalisation Case')* (1945) 71 CLR 29, 80 (Dixon J). See also Latham CJ at 52, Starke J at 75 and Williams J at 99.

[671] [1948] HCA 7, (1948) 76 CLR 1.

[672] *Banking Act* 1947 (Cth) s 3.

[673] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 290 (Rich and Williams JJ), 311 (Starke J).

[674] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 310 (Starke J).

purpose – as its own terms had made clear[675]. There are a number of issues elucidated by these judgments. Firstly, any outright prohibition of interstate trade (whether or not equally falling on intrastate trade), will automatically qualify as direct restriction[676]; this much is unsurprising. Secondly, the concept of a restriction being 'substantial' imports a notion of *de minimis* justification, whereby a restriction (even if direct) may be justified if its effect on interstate trade falls below a certain minimum threshold of interference. In the instant case, interstate banking services only constituted about 10%[677] of the activities of the private banks subjected to the Act (the other 90% of their activities being intrastate banking), but 10% was enough to clear this *de minimis* hurdle and qualify as a 'substantial' restriction[678] – although Rich and Williams were careful to declare that whether a restriction is substantial "is not a mere calculation of percentages"[679]. Thirdly, a new terminology for justification was developing which brought

[675] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 292 (Rich and Williams JJ), 324-325 (Starke J). On the other hand, Latham CJ (at 235-236 and 238) characterised the 1947 Act (including the provisions to prohibit private banking under s 46) as having the regulation of the banking sector as a whole, throughout Australia, as its real object; this was evidenced by the fact that it applied to all activities by private banks, whether as instruments of trade and commerce or just ordinary personal banking, it applied without distinction to intrastate and interstate activities by such banks, and was not covertly directed against interstate trade in particular as had been the Commonwealth legislation in *James v Commonwealth*. McTiernan J explicitly agrees at 398, asking how legislation imposing nation-wide bank holidays could be valid if the test were mere restriction of interstate trade, even if part of a general scheme applied to all trade.

[676] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 291 (Rich and Williams JJ), 324-325 (Starke J) and 384 (Dixon J).

[677] 10% is the figure employed in the High Court. On appeal, the House of Lords used a figure of 15%.

[678] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 291 (Rich and Williams JJ). Dixon J focuses not on the percent of an individual bank's services, but the total volume of all banks' interstate services in aggregate to declare that the restriction on interstate trade was here 'substantial' (at 380).

[679] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 291. This is because the volume and proportions of trade will necessarily be difficult to predict when hypothesising as to how interstate trade would have proceeded in the absence of restrictive legislation, and because doing so would improperly render the operation of s 92 an economic, rather than legal, question. Such an exercise was inconsistent with the trade restriction analysis of s 92, since it would turn s 92 into an abstract question of interstate trade volumes rather than a protection of an individual's right to engage in such trade free of government restriction: "[s 92] treats inter-State traffic and intercourse, not as a mere economic phenomenon, but as an activity, and as such sets it free for people to engage in" (at 388, per Dixon J). (As was seen in Chapter II, in *Cole v Whitfield* (1988) 165 CLR 360 and

together the concepts of the real object of the legislation and the directness of its restriction on interstate trade: legislation could be justified if it constituted 'reasonable regulation'[680].

This concept of 'reasonable regulation' was endorsed by the Privy Council in *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949)[681]. In seeking to clarify the case law on reasonable regulation, Lord Porter (writing for the Privy Council) acknowledged the abiding difficulty associated with characterising the real object of legislation, and that this had led judicial minds to differ on whether or not certain legislation was justified or not:

> In this labyrinth there is no golden thread. But it seems that two general propositions may be accepted: (1) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, and (2) that s 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse *directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote*. In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social or economic. Yet it must be solved by a court of law.[682] (emphasis added)

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subsequent cases, the Court would prove much more willing to engage in economic analysis, having readopted the trade restriction analysis of s 92.)

[680] It is worth pointing out that Dixon J expressed criticism of the concept of reasonable regulation, doubting (at 387) that it had any meaningful formulation: 'directness' merely obscured the question by focusing on the specific operation of the legislation, and 'real object' involved going behind the face of the legislation to attempt to determine the intent of the legislature, which His Honour viewed as immaterial to the terms of s 92 inasmuch as it was an attempt to read a requirement of *mens rea* into that section. Nevertheless, His Honour acceded to the prevailing jurisprudence and applied judged the Act to be unjustified due to the directness of its restriction of the interstate banking trade (at 384 and 389). (In later jurisprudence, as shall be seen, legislative intent was to be determined by looking to the preparatory legislative materials such as government reports, Second Reading Speeches and Explanatory Memoranda.)

[681] [1949] UKPC 37, (1949) 79 CLR 497, [1950] AC 235.

[682] *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 639. The possibility that reasonable minds may differ on this question of whether a restriction is direct or indirect is, Lord Porter argues, what led Latham CJ to declare the interstate air services monopoly invalid in *The Airlines Nationalisation Case* but the banking monopoly valid in the instant case: *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 640.

In the opinion of the Privy Council, this question of directness was indeed to be answered by characterising the real object of the legislation[683], which was to be found in its objective terms, not the subjective will of the legislature[684]. As a general guide to characterisation, legislation which prohibited interstate trade outright was invalid (save where the trade was one deemed harmful to the public good, as in the lotteries cases above); legislation which was 'directed at' (i.e. directly restricted) interstate trade was also invalid; but legislation which merely prescribed the means by which interstate trade may be carried out was not invalid[685]. While these general comments would seem to spell the end of compulsory single-desk marketing schemes and government monopoly service schemes (since they both rely on the prohibition of individual trading), the Privy Council explicitly derogated from the generality of the earlier comments to declare that monopoly marketing schemes were *not necessarily invalid* under s 92:

> Yet about this, as about every proposition in this field, a reservation must be made. For their [*sic*] Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade, commerce and intercourse thus prohibited and thus monopolized [*sic*] remained absolutely free.[686]

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683 The oft mentioned 'pith and substance' of legislation is merely a synonym for its 'real object': *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 641-642.

684 *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 639. This is an implicit reply to Dixon J's argument in the High Court judgment that the subjective will of the legislature should not be relevant to s 92 and to any justification of otherwise invalid legislation.

685 *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 640.

686 *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 640-641. This eagerness not to render a whole class of economic legislation totally unconstitutional mirrors Dixon J's comments in the High Court that new legislative forms not in use at the time when the Constitution was drafted, such as socialised monopolies, may indeed be employed by the States and the Commonwealth provided that they are in accordance with the Constitution, which must be broadly construed: *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1, 631.

The Privy Council upheld the High Court's decision that the banking monopoly created in the instant case was invalid, but declined to delineate a valid monopoly scheme (such as they contemplated in the abstract) from an invalid monopoly scheme (such as they were confronted with in the present case)[687]. It may be inferred that the kind of monopoly which the Privy Council intended to preserve as valid was one which was instituted at an early stage in the development of that industry or of society as whole ("in regard to some economic activities and at some stage of social development"), and which was the only, and thus the least restrictive, way of regulating the industry in question ("the only practical and reasonable manner of regulation")[688]. Furthermore, the invalidating of the banking monopoly in the instant case implied that a monopoly would not be justified where it was instituted in respect of an already fairly well developed and long established industry that had operated for a considerable time without monopolisation, nor would such a monopoly be justified where it was instituted pursuant to a clear political and economic choice amongst alternative methods of regulation (rather than as the only reasonable manner of regulating the industry).

One final aspect of justification addressed by the Privy Council was the relevance of discrimination against interstate trade. Lord Porter explained that the presence of discrimination against interstate trade tended to reveal that the real object of the legislation was merely the suppression of interstate trade, thus precluding the possibility of justification. Where such discrimination was not present, it was more likely that the legislation could then be justified as reasonable regulation, although His Lordship was careful to declare that, in the case of outright *prohibition* of trade as distinct from mere *regulation of the means* of trade, the absence of such

[687] *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 641.

[688] This latter concept of 'least onerous burden on interstate trade' will be seen to be taken up as an element of justification in post-*Cole v Whitfield* case law later in this Chapter.

discrimination (i.e. the generality of such a prohibition) was irrelevant, and the legislation would still struggle to be justified[689]. The upshot of the Privy Council's decision, then, was that it drew together the various strands of argument on directness of restriction, the real object of legislation and the relevance of discrimination against interstate trade in an attempt to lay down a clearer jurisprudence of justification by reasonable regulation, and to deal with the vexed question of whether and how monopoly schemes could be justified under s 92.

By the end of the 1940s, it was thus established that *prima facie* unconstitutional legislation could be justified if it constituted reasonable regulation of the trade concerned. Reasonable regulation was that which pursued a legitimate public purpose (essentially, anything other than simple restriction and control of trade) as its 'real object'. Determining the real object of legislation was a matter of characterisation on which reasonable minds could (and did) differ, but it was clear at least that the real object was determined by examining the objective terms of the legislation rather than the subjective will of the legislature, and related to the primary legal effect of the legislation not its secondary social or economic effect. Relevant to this characterisation was whether interstate trade were restricted directly and immediately, rather than indirectly or remotely, and if interstate trade had been singled out for harsher restriction than intrastate trade (discrimination). The exact line whereat direct and immediate restriction faded into merely indirect or remote restriction was not elucidated, and reasonable minds could apply this same directness criterion and come to different conclusions in respect of a particular legislative scheme. Likewise relevant to characterisation was whether or not the legislation's effect on interstate trade was above some (admittedly very vaguely defined) minimum threshold, and whether the restriction of interstate trade was arbitrary or subject to well-structured

[689] *Commonwealth v Bank of NSW ('The Bank Nationalisation Appeal')* (1949) 79 CLR 497, 640.

administrative determination. Outright prohibition of interstate trade was generally unconstitutional (unless the very trade itself had been determined by the legislature to be noxious to public welfare). Nevertheless, in certain circumstances monopoly marketing and service provision could potentially escape invalidity, seemingly where the industry was at an early or precarious stage of development – much to the frustration of the incumbent Commonwealth government, this did not apply in respect of its signature economic policies of creating government monopolies over banking and interstate air services.

The major issue of contention in this jurisprudence of justification was obviously the vexed question of characterisation, within which one of the linchpins was the issue of whether the legislation restricted interstate trade directly or mere remotely. The Court had occasion to consider what exactly constituted 'direct' restriction of interstate trade in the case of *Hospital Provident Fund Pty Ltd v Victoria* (1953)[690]. As will be recalled from Chapter I, the case concerned Victorian legislation which sought to extend the existing scheme of regulation of insurance provision by trade unions and friendly societies to insurance provision by corporations and other entities as well; such regulation included a registration requirement for insurance providers, the requirement that insurers meet certain trusteeship and accountancy standards, and limitations on payouts to insured parties. Hospital Provident Fund Pty Ltd had offices in various States, and not only moved staff and documents between such offices fairly regularly, but also provided insurance to parties who were resident outside Victoria, or where payments were due at an office outside Victoria, or where hospital benefits were claimable outside Victoria, or some combination of all these – thus involving itself in interstate trade. Having determined that the Victorian legislation was *prima facie* invalid under the prevailing trade restriction definition of

[690] [1953] HCA 8, (1953) 87 CLR 1.

the scope of s 92, the Court turned to the question of whether the legislation was nevertheless justified, which involved considering whether such restrictions as the legislation imposed were direct restrictions on the interstate insurance trade. In the opinion of the Court, the legislation did not impose a direct restriction on interstate trade, as it intended only to regulate insurance provision in the State of Victoria and was directed only to that subject matter, not to the interstate commerce which may happen to occur around it[691]; such interstate commerce "is not a necessary part of the business to which the law refers. It is not a thing contemplated by the Act."[692]. As to businesses like Hospital Provident Fund Pty Ltd which mainly operated intrastate but had some elements of interstate trade, the question was "whether the inter-State trade of a particular business is so much an integral part of the business carried on as to invest the whole business with the character of inter-State trade, or so as to render any restriction on its intra-State activities a *direct* interference with its trade or commerce among the States"[693] (emphasis in original). The answer of the Court was that the element of interstate commerce involved in Hospital Provident Fund Pty Ltd's business was not so integral to its dealings as a whole as to invest its entire business with an interstate character[694]. On the larger theoretical question of how 'direct restriction' of interstate trade was to be defined, Dixon CJ laid down the following test:

[691] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 17 (Dixon CJ), 36 (Fullgar J) and 45-46 (Taylor J).

[692] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 18 (Dixon CJ).

[693] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 44 (Taylor J).

[694] Williams J dissented on the question of whether the provision of the Victorian Act which allowed an existing insurance provider (as distinct from a new market entrant) to be wound up for failure to comply with the requirements of the Act was genuinely regulatory, and so justified. In His Honour's view, that provision did not ensure that the insurance provider's request for regulation be dealt with promptly and so did not guarantee that, in the event of a negative assessment by the regulator, the insurance provider would have time to take remedial action and reapply for registration. Moreover, Williams J thought that this provision could not be read down to exclude interstate insurance providers without fundamentally altering the effect of the Act, so he would have declared it inseverable and thus wholly invalid: *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 30-31. His Honour agreed with the other members of the Court on the validity of the rest of the Act (at 28-29), provided that the level at which maximum payout limits were set should not be so low as to be "palpably insufficient under modern

> If a law takes a fact or an event or a thing itself forming part of trade, commerce or intercourse, or forming an essential attribute of that conception, essential in the sense that without it you cannot bring into being that particular example of trade, commerce or intercourse among the States, and the law proceeds, by reference thereto or in consequence thereof, to impose a restriction, a burden or a liability, then that appears to me to be direct or immediate in its operation or application to inter-State trade, commerce and intercourse, and, if it creates a real prejudice or impediment to inter-State transactions, it will accordingly be a law impairing the freedom which s 92 says shall exist. But if the fact or event or thing with reference to which or in consequence of which the law imposes its restriction or burden or liability is in itself no part of inter-State trade and commerce and supplies no element or attribute essential to the conception, then the fact that some secondary effect or consequence upon trade or commerce is produced is not enough for the purposes of s 92.[695]

This 'criterion of operation' test – which focused on whether the legislation took interstate trade as the criterion by which it legally operated – was a fairly legalistic definition of directness, emphasising that it was the operation of the law on its face which was relevant, not its practical economic effect. This formulation, however, did not escape the problem that afflicted the jurisprudence of justification at this time, namely the difficulty of objectively characterising an Act: in shifting the focus to the question of whether the Act restricted something 'essential' to interstate trade or not, the criterion of operation test effectively just kicked the can down the road a little, and made the 'essentiality' of restriction a question of characterisation subject to differing judicial opinion.[696]

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conditions to provide reasonable cover for the events insured against [which] would go beyond the bound of regulation and become a burden on inter-State trade" (at 31-32).

[695] *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 17-18.

[696] Williams J would have articulated the difference between genuine regulation and direct (and unjustifiable) restriction of interstate trade differently. Attempting to reconcile the present case with the series of cases concerning road and rail transport restrictions (such as *R v Vizzard; Ex parte Hill*), Williams J would have cast a restriction on the *manner* by which interstate trade was carried on as regulation, but a restriction on the *number of individuals* engaged in such interstate trade as a direct restriction. This distinction was not to prove as influential in later case law as the 'criterion of operation' test enunciated by Dixon CJ.

The emphasis on the legal operation of the legislation, rather than its economic effect, as the key question for justification was reiterated in *Wragg v New South Wales* (1953)[697]. The *Prices Regulation Act* 1948-1949 (NSW) and regulations thereunder set maximum prices for the sale of potatoes in NSW at the retail level and at the wholesale level, including sales within NSW by those who had imported potatoes from outside the State; it did not, however, extend to the price which could be paid by an importer to an out-of-State grower in the first place. Wragg was a Tasmanian potato grower who sold his produce into NSW, and complained that the NSW legislation was a direct restriction of his interstate trade contrary to s 92 because even though it did not formally apply to the price at which he could sell his potatoes into NSW, the fact that the legislation fixed maximum prices at the retail and wholesale levels within NSW had economic consequences up the supply chain and effectively limited what NSW purchasers would be financially capable of paying him for his crop in the first place. The Court did not agree that this limitation on interstate trade was 'direct':

> The substance of the plaintiff's argument on this point was that the prescription of maximum prices at any stage of the marketing in New South Wales of Tasmanian potatoes directly burdens or interferes with inter-State trade as such. But it is important again to observe that both the Act and the order made thereunder deal generally with goods, whether locally produced or imported from any other country, and any effect which the prescription of a general price for intra-State sales may have on the business of importing potatoes from Tasmania is not a *direct effect* but an economic consequence *too remote* to constitute an impairment of the freedom which s 92 assures.[698] (emphasis added)

Accordingly, the restriction on interstate trade, such as it was, was justified. This decision is unsurprising, given that the effect felt on import prices from a price regulation applying several steps down the supply chain at the wholesale or retail level lends itself to characterisation as, at

[697] [1953] HCA 34, (1953) 88 CLR 353.

[698] *Wragg v New South Wales* (1953) 88 CLR 353, 398-399 (Taylor J, with whom the rest of the Court agreed).

best, an indirect restriction of prices at the import stage. What is important is that it confirmed the strict formality of the ‘criterion of operation’ jurisprudence, as the Court did not deny that a restriction at the retail stage must have a domino effect causing a *de facto* restriction at the import stage, it simply dismissed the relevance of this domino effect because the restriction did not formally apply, on the face of the legislation, to the import stage. As a rider, however, the Court added that if the *purpose* of the legislation had been to restrict interstate trade, this would trump the indirectness of the restriction and thus prevent justification: “The conclusion might well be different if it were established in any particular case that a Prices Regulation Order relating to intra-State sales had been promulgated for the purpose of preventing or impeding or otherwise burdening the business of importing such goods into New South Wales from another State”[699]. Thus, however indirect the formal restriction on interstate trade might be on the face of the law, if the purpose of the law was not a legitimate one in the first place (because that purpose was merely to restrict interstate trade), the law could not be justified.

Arbitrariness of Restriction:

It was seen earlier in *Gratwick v Johnson* that the arbitrariness of a restriction on interstate trade (or in that case, interstate intercourse) tended to argue against the restriction being a justified. How arbitrariness undermined ‘reasonable regulation’ was examined further in *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955)[700]. The *State Transport (Co-ordination) Act* 1931-1954 (NSW) forbade any person to operate a motor vehicle “in the course of and for the purposes of inter-State trade” unless the vehicle were licensed. The Act allowed the Commissioner to refuse to license a vehicle if the licensee were not a fit and proper person, the

[699] *Wragg v New South Wales* (1953) 88 CLR 353, 399 (Taylor J).

[700] [1955] HCA 28, (1955) 93 CLR 127.

vehicle were not properly constructed or equipped, or the vehicle would give rise to unreasonable damage to the roads, danger to other persons or vehicles on the roads, or interference with traffic flow. Unless these circumstances applied, the Act required the licence to be granted[701]. Conditions could also be attached to the grant of the licence. There was a charge associated with the licence, which was to be on a scale set by the Commissioner taking into account the recommendations of an advisory committee, and the cost of road construction and maintenance (set against the monies already set aside for such purposes by the government) and the wear-and-tear caused by different kinds of vehicles. The charge had to be the same for all licensees for a given route and vehicle class, and could not exceed the charge for an equivalent *intrastate* trading vehicle licence. Hughes & Vale Pty Ltd, a Queensland-based company engaged in such interstate trade, objected to the provisions of the Act which required the licence and those which imposed the charge for the licence.

The Court upheld the company's complaint, and declared both sets of provisions to be unjustified restrictions of interstate trade and so unconstitutional under s 92. The fundamental reason why these provisions were incapable of justification was that they were so wide and so vague as to be effectively non-justiciable, since there was no basis on which a court of law could

[701] In *Hughes & Vale Pty Ltd v New South Wales (No 1)* [1954] UKPC 39, (1954) 93 CLR 1 the Privy Council had already declared unconstitutional an earlier version of the Act which had imposed the motor vehicle licence requirement on all commercial vehicles (not just interstate transport) and had given the Commissioner absolute discretion to approve or reject a licence application after consideration of "all such matters as [the Commissioner] may think necessary or desirable", as well as certain specific considerations (s 17 (3) of the Act). This unfettered discretion to reject a licence application was viewed by the Privy Council as tantamount to a prohibition of trade, which Their Lordships viewed as being inconsistent with *The Airlines Nationalisation Case* and *The Bank Nationalisation Appeal*: "It is quite impossible, in my opinion, to distinguish the present case from the case of a simple prohibition. If I cannot lawfully prohibit altogether, I cannot lawfully prohibit subject to an absolute discretion on my part to exempt from the prohibition. The reservation of the discretion to exempt by the grant of a licence does not alter the true character of what I am doing" (*Hughes & Vale Pty Ltd v New South Wales (No 1)* (1954) 93 CLR 1, 26-27 (Lord Morton, for the Privy Council)). This overruled the line of 'Transport Cases' (including *R v Vizzard; Ex parte Hill*) inasmuch as it had upheld States' ability to subject road transport to arbitrary licensing, and thus made such State laws fall back on the doctrine of 'reasonable regulation' if they were to be justified.

meaningfully examine them and issue a writ of mandamus in respect of the administrative granting of the licence. In order for restriction of interstate trade to constitute 'reasonable regulation' it was important that the legislation provide for judicial review (as it did here), but also that the justiciable conditions be "defined with sufficient particularity, precision and intelligibility"[702] as to allow the Court to engage in such review; there can be no 'reasonable regulation' of interstate trade if the regulation imposed by the impugned legislation is effectively beyond the jurisdictional supervision of the Court. As a general proposition, the fact that an Act prohibits interstate trade subject to allowance by licence tends to argue against such a scheme qualifying as 'reasonable regulation', although properly-formulated legislative conditions for the granting of such a licence would indeed allow the scheme to constitute 'reasonable regulation' and be justified under s 92[703]. Such conditions must be more than just speciously reasonable, and any such superficially-reasonable conditions which would actually render interstate trade practically impossible would not qualify as reasonable[704]. A genuine compensatory charging scheme which accounts for the wear-and-tear created by the licensee would constitute 'reasonable regulation', and the *indicia* of such a compensatory scheme would be that licensees are charged according to their level of road use, the licence income is devoted to road upkeep, and interstate trade bears no greater burden than intrastate trade[705].

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[702] *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 165 (Dixon CJ, McTiernan and Webb JJ; Williams, Fullagar and Taylor JJ concurring).

[703] *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 162 (Dixon CJ, McTiernan and Webb JJ; Williams, Fullagar and Taylor JJ concurring).

[704] *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 163 (Dixon CJ, McTiernan and Webb JJ; Williams, Fullagar and Taylor JJ concurring).

[705] *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 175-176 (Dixon CJ, McTiernan and Webb JJ; Williams, Fullagar and Taylor JJ concurring).

In specific terms, the fact that the licence could be refused where the applicant would "create or give rise to" unreasonable damage to the roads, danger to road users or unreasonable interference with traffic flow was too vague[706], as was the scope for imposing conditions on the licence if it were granted[707]. As regards the licence charge, this was vitiated by the fact that the calculation of the charge bore little logical connection to the effect with the interstate trader had on the roads. While it was significant that the revenue raised thereby was allotted to road maintenance and not just general consolidated revenue, the Act failed to evince a "necessary connection [*sic*]" between the charge paid by an interstate licensee and the actual road maintenance impact of interstate traders (much less the individual licensee in particular)[708]; likewise, it was illogical to calculate the licence fee by reference to the capital expenditure on the construction of *new* roads as distinct from the maintenance costs for *existing* roads[709]. While the licence charge did contain many of the *indicia* of a reasonable regulation, this was only speciously so, because of the vagueness of the Act's provisions. In the end, the Court was of the opinion that the vagueness of the conditions for the grant of the licence, the fact that these conditions related to the decision-maker's subjective opinion rather than objective fact, and the illogical basis for the calculation of the fee were enough to prevent them from constituting 'reasonable regulation':

> The result of the…[Act] is to forbid the use of motor vehicles for the carriage of goods in the course of trade between New South Wales and another State except by the licence of

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[706] *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 157 (Dixon CJ, McTiernan and Webb JJ; Williams, Fullagar and Taylor JJ concurring).

[707] *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 158 (Dixon CJ, McTiernan and Webb JJ; Williams, Fullagar and Taylor JJ concurring).

[708] *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 170 (Dixon CJ, McTiernan and Webb JJ; Williams, Fullagar and Taylor JJ concurring).

[709] *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 176 (Dixon CJ, McTiernan and Webb JJ; Williams, Fullagar and Taylor JJ concurring).

> an administrative agency of New South Wales whose only duty to allow it is in practical effect unenforceable and in any case does not arise unless the agency does not regard any of a number of very wide indefinite and sometimes intangible objections as existing and if and when it arises it is not a duty to license the vehicle as asked but only subject to any conditions (falling within certain very wide descriptions) which the agency may choose to impose, conditions which may or may not be consistent with the inter-State trade or transaction in view.
>
> It is difficult to understand how it could be affirmed that, while governed by statutory provisions of such a kind, the inter-State transport by road is free.[710]
>
> ...
>
> If legislation is framed so that its consistency with s 92 would depend upon the opinion of an administrative officer as to fact or law it cannot be upheld…Probably it would be necessary to define with some particularity the factual conditions in which such a power became exercisable.[711]

Consequently, these provision of Act were declared unconstitutional[712].

The effect of *Hughes & Vale Pty Ltd v New South Wales (No 2)* was to establish that if a *prima facie* breach of s 92 were to be justified as ‘reasonable regulation’, the legislation must establish clear, precisely-formulated and logical conditions for the operation of such restriction of interstate trade. Arbitrariness and effective non-justiciability of any such conditions would prevent such a restriction from being justified, and thus render it constitutionally valid. However, it remained unclear what level of particularity was necessary in structuring the administrative decision maker’s discretion so as to avoid arbitrariness and the potential for infringement of interstate traders’ right to trade: “even if a more stringent view were taken of

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[710] *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 159 (Dixon CJ, McTiernan and Webb JJ; Williams, Fullagar and Taylor JJ concurring). The Court also dismissed the argument that roads could be regarded as State property to be dealt with however the State likes, or as utilities of which users voluntarily chose to avail themselves for a fee, because the roads were “one of the established every-day means of carrying on trade and commerce” which s 92 assumed would continue to exist as generally-available highways (at 171).

[711] *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 166 (Dixon CJ, McTiernan and Webb JJ; Williams, Fullagar and Taylor JJ concurring).

[712] McTiernan J accepted the authority of the Privy Council in *Hughes & Vale Pty Ltd v New South Wales (No 1)* and joined in the result, although he personally disagreed that this approach to vehicle licensing is what the framers of s 92 intended: *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 183.

Acts on the subject of trade, it would be an absurd situation to invalidate other federal or State provisions granting discretionary power merely because the donee of the power might use it to, say, discriminate against interstate traders"[713]. The criteria of decision could not be so closely specified that there was in effect no discretion to be exercised, as the nature of administration is that it must deal with complex human issues for which complete legislative provision cannot be made in advance, and this necessarily limits judicial oversight to some degree. Likewise, the criteria could not be so lose as to essentially enable arbitrary decision making under which interstate traders' constitutional rights could be infringed. Where, then, to draw the line?

The best answer was given in *Buck v Bavone* (1976)[714], concerning compulsory registration requirements for South Australian potato growers. Section 18 of the *Potato Marketing Act* 1948-1973 (SA) prohibited a potato grower from selling his or her product unless he or she was registered with the South Australian Potato Board. Under s 12, such registration was conditional upon the grower 'satisfying the Board' that he or she was indeed growing potatoes. Bavone was a potato grower in South Australia, but was not registered under the Act; he attempted to sell part of his potato crop to a purchaser in New South Wales, and when Inspector Buck from the Potato Board laid charge against him under s 18, Bavone advanced the defence that the law could not constitutionally apply to interstate potato sales. When the case came to the High Court on appeal, the majority (Gibbs, Stephen, Mason, Jacobs and Murphy JJ) found the provisions of the Act valid, thus stymieing Bavone's attempt to sell his crop interstate without registration. The key difference, as explained by Gibbs J, between the instant case and *Hughes & Vale Pty Ltd v New South Wales (No 2)* two decades earlier was that the earlier case concerned a discretion to

[713] James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 349.

[714] [1976] HCA 24, (1976) 135 CLR 110.

grant or refuse a licence based on the decision maker's "opinion or policy or taste"[715], whereas this later case was concerned a discretion to grant or refuse registration based on the decision maker being satisfied of "the existence of particular matters of objective fact"[716], viz. that the applicant was actually growing potatoes. It is the *justiciability* of such objective facts, as distinct from subjective opinions, which allows them to ground the exercise of a restrictive, but justifiable, discretion under s 92.

The Expansion of 'Directness':

Samuels v The Readers' Digest Association Pty Ltd (1969)[717] marked the origin of a broader understanding of what it meant for legislation to 'directly' restrict interstate trade, and an expansion of the concept of directness beyond the 'criterion of operation' test laid down in prior cases. Particularly from this point, it is worth keeping conceptually separate this idea of indirectness from the idea of reasonable regulation (also described as 'mere regulation'). While the Court's fragmented jurisprudence and the lack of clear doctrinal leadership over the middle decades of the 20th Century makes such a distinction better observed in retrospect, with the benefit of hindsight we can distinguish considerations which relate to how immediately State legislation strikes at the act of interstate trade (directness) from considerations which relate to whether State legislation has a proper public purpose (reasonable regulation).

As seen above in *Hospital Provident Fund Pty Ltd v Victoria*, Dixon J's formulation of directness was that a law directly restricted interstate trade if it took an essential quality of that trade and used that as the criterion by which the restrictive law operated; this test only looked to

[715] *Buck v Bavone* (1976) 135 CLR 110, 118.

[716] *Buck v Bavone* (1976) 135 CLR 110, 119.

[717] [1969] HCA 6, (1969) 120 CLR 1.

the legal operation of the impugned provisions to find such restriction of interstate trade, not to the economic consequences of the legislation. Barwick CJ's judgment in *Samuels v The Readers' Digest Association Pty Ltd*, although in dissent as to the ultimate validity of the South Australian Act, showed a decisive move away from the Dixonian 'criterion of operation' formulation:

> It is sometimes said that the economic consequences of the operation of an Act do not come within the purview of the constitutional guarantee. But…[it is] only consequential and remote effects which ought not to be regarded as material for the purposes of applying the constitutional guarantee. In particular, I am unable to accept the view that the operation of the Act to which attention is to be limited is its operation upon some aspect of inter-State trade and commerce which it has made the criterion of that operation. Such a view, in my respectful opinion, is neither warranted by nor consistent with the decisions of the Privy Council [*The Bank Nationalisation Appeal* etc]: nor is it, in my opinion, compatible with the terms of the Constitution.
>
> …The economic consequence of a law cannot be disregarded and such a law is in no different case to a law designed to limit competition.[718]

This view was not universally shared amongst the members of the Court[719], but in the following years it came to be accepted that a direct restriction of interstate trade could encompass restrictions which manifested themselves in the economic effect of the legislation, not merely in its legal operation.

'Reasonable Regulation' Develops and Frays:

The issue of reasonable regulation was revisited and developed further in *Samuels v The Readers' Digest Association Pty Ltd*, which marked the growth of the jurisprudence of

[718] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 18-19.

[719] Taylor J, for instance, specifically rejects the relevance of ulterior economic or social effect, although adds "It is important not to confuse this distinction with the distinction between the legal effect of the law upon the conduct or other subject-matter to which the law applies according to its express terms and a legal effect which is only to be seen by a process of reasoning from the express terms…[A] legal effect of the latter description is, no less than one of the former description, a matter of the direct operation of the law and is not, in the relevant sense, merely consequential or remote": *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 29.

justification beyond the examination of merely the formal legal operation of the impugned legislation, and into the examination of its practical effect as well. As will be recalled from Chapter I, this case concerned South Australian legislation which forbade the offer of any free gift with purchase, and the Readers' Digest Association Pty Ltd had done just that when it offered an 11th record free if one purchased the "magnificent 10 record album" of the 120 Greatest Hit Songs from Broadway[720] All Justices of the Court were agreed that this legislation was *prima facie* invalid under the then-prevalent trade restriction definition of the scope of s 92, but the Court was split on the question of whether the legislation was nevertheless justified, and if so, on what basis. The majority, constituted by McTiernan, Kitto, Taylor and Menzies JJ, declared that the Act was justified as 'mere regulation'[721], but their reasons for so declaring varied somewhat. For McTiernan, and Menzies JJ, the Act qualified as 'mere regulation' on the basis that it merely restricted the *manner* of trade by prohibiting one particular selling arrangement (namely, offering a free gift with purchase), but did not restrict trade as a whole[722]. For Kitto and Taylor JJ, the Act qualified as 'mere regulation' on the basis that it merely restricted interstate trade indirectly, as it did not regulate the actual cross-border trading in

[720] The Act also forbade the use of any 'trading stamp' in the course of business, which was, in simplified terms, any document which entitled the holder to a free gift or discounted purchase when the document was surrendered. On the facts of the case, the majority of the Court ruled that none of Readers' Digests Association's advertising material was properly characterised as a 'trading stamp'; nevertheless, the same considerations would apply to the constitutionality of those provisions of the Act, since the prohibition of the use of a 'trading stamp' would also be a *prima facie* breach of s 92. See the judgment of Taylor J, who alone believed that one of the pieces of advertising material constituted a 'trading stamp' but proceeded to declare the Act justified nonetheless: *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 34.

[721] Barwick CJ agreed that the prevention of fraud and the promotion of competition were legitimate purposes for legislation and could be used to justify *prima facie* restrictions of interstate trade, but in His Honour's view the legislation in the instant case did not actually serve to achieve such purposes and so should be held to be unjustified and unconstitutional: *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 19-21.

[722] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 23 (McTiernan J) and 39-40 (Menzies J). Barwick CJ argues against any notion that legislation restricting selling arrangements should be justified because interstate traders are free to just choose another selling arrangement: in principle, freedom of trade, to His Honour, means freedom to choose one's form of trade without the government closing off certain selling arrangements (at 18).

records by the Readers' Digest Association Pty Ltd, only something ancillary to that interstate trade (namely, the selling arrangement of offering a free gift with purchase)[723]. The end result of all these judgments is the same, of course, but McTiernan and Menzies JJ's reasoning would carve out selling arrangements as a category of law wherein restrictive legislation would nevertheless be justified, provided that it were of general application and non-discriminatory as between interstate and intrastate trade[724]. Kitto and Taylor JJ's reasoning, being more squarely based on the issue of directness, suggested that legislation restricting selling arrangements would need to be examined on a case-by-case basis against this standard of directness. In the event, selling arrangements did not end up becoming a distinct category in the jurisprudence of justification; unlike in EU law, Australian law has proven resistant to the establishment of distinct categories of legislation and the consequent canalisation of the jurisprudence[725]. Nonetheless, *Samuels v The Readers' Digest Association Pty Ltd* did indicate that, whatever the precise steps of reasoning, legislation prohibiting certain selling arrangements was likely to be justified if it applied in a non-discriminatory manner and pursued a genuine public policy goal.

By the time of *Samuels v The Readers' Digest Association Pty Ltd*, the Court's jurisprudence of justification had come to rest on the concept of justifiable restrictions being those which qualified as 'mere regulation' of interstate trade. This 'reasonable regulation' justification was the evolution of the earlier jurisprudence of the 'real object' of the legislation, but whereas the 'real object' enquiry was an expansive one which was seen to metastasise and include concepts such as directness of restriction, 'reasonable regulation' was more strictly

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[723] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 28-31 (Kitto J) and 36-38 (Taylor J).

[724] *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 23 (McTiernan J).

[725] For further discussion, see Chapters V and VIII.

focused on protecting a legitimate public purpose in a reasonable manner, leaving directness as a separate enquiry. Also, whereas 'real object' looked to the primary legal effect of the impugned State legislation, 'reasonable regulation' looked beyond this to the secondary economic effects of the legislation. ('Reasonable regulation' can thus be seen as a forerunner of the contemporary jurisprudence of justification.)

The basic concept underlying justification as 'reasonable regulation' is that the restriction on interstate trade is outweighed by the countervailing public interest which the restrictive State legislation is protecting. It thus requires some balancing of free trade against other social and economic interests[726]. The question then arises what social and economic interests may legitimately be protected. During the period in which the 'reasonable regulation' jurisprudence was employed by the Court, Barwick CJ tended to countenance only a limited set of social and economic interests, whereas Mason J entertained a broader understanding of what interests could function by way of justification. This parallels the different judicial views as to the proper *scope* of s 92, examined in Chapter I, in which it was seen that Barwick CJ favoured the trade restriction analysis whereas Mason J favoured the discrimination analysis. Just as with scope, in the case of justification by 'reasonable regulation' the jurisprudence was actuated by two fundamentally different views of the kind of internal market which s 92 was to create, either a market based on the freedom of individual interstate traders from overbearing regulation (Barwick CJ) or the protection of interstate traders merely from discriminatory regulation (Mason J).

[726] James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 155.

In Barwick CJ's view, only a limited range of social interests could be used in determining what qualified as reasonable regulation, because the purpose of such reasonable regulation was only to ensure the freedom of all traders to trade in the market; this was a view that saw s 92 as having a 'private' character, in the sense that it protected the individual rights of traders to trade[727]. Mason J, on the other hand, entertained a much wider range of social and economic interests as reasonable regulation, in furtherance of the view "that s 92 has a predominant public character and that the protection which it gives to the rights of the individual is incidental to and consequential upon the protection which is given to the entire concept of interstate trade…s 92 should be seen as a provision whose operation may fluctuate as the community develops and as the need for new and different modes of regulation of trade and commerce become apparent"[728].

These views continued to compete during the period from *Samuels v The Readers' Digest Association Pty Ltd* until the delivery of the *Cole v Whitfield* decision in 1988, with neither commanding a decisive majority, as the jurisprudence of reasonable regulation was stymied by this fundamental disagreement as to how to define what interests could legitimately be protected by restrictive State laws. Thus, the concept of reasonable regulation began to fray by the end of the 1970s, as its definition started to be vitiated by the same problem that had bedevilled the earlier characterisation tests: insufficient precision in its definition led to different judges coming to different conclusions as to whether a given piece of restrictive legislation was 'reasonable' or not, and thus whether it qualified as 'regulation' as distinct from simple impermissible restriction. Unsurprisingly, these questions would come to a head in another pair of cases

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[727] See Barwick CJ's judgments in *Samuels v The Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* [1975] HCA 45; (1975) 134 CLR 559 and *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120.

[728] *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559, 614-615 (per Mason J); see also 621 (per Jacobs J).

concerning a compulsory single-desk marketing scheme, in this case the Old Reliable of Australian constitutional and agricultural life, the Australian Wheat Board.

In *Clark King & Co Pty Ltd v Australian Wheat Board* (1978)[729], Clark King & Co Pty Ltd was a Victorian miller which contracted with New South Wales wheat growers to sell and transport their crop across the border for milling. A joint Commonwealth-State scheme imposed a compulsory single-desk marketing scheme for wheat, as part of which NSW law empowered the Australian Wheat Board to compulsorily acquire all wheat grown in the State and require delivery to itself of said wheat; the NSW Act made it an offence to deal with such wheat without the permission of the Board. Clark King & Co Pty Ltd complained that the NSW Act was contrary to s 92 inasmuch as it applied to the interstate trade in wheat, and given that the majority of the Court accepted the trade restriction definition of the scope of that section and decided that the Act was *prima facie* invalid, the judgment of the Court ultimately came down to the question of whether or not the NSW Act was justified. Barwick CJ and Stephen J (in the minority as to the validity of the Act) were of the opinion that the Act did not qualify as 'reasonable regulation' and was not justified; Mason and Jacobs JJ (in the majority as to the validity of the Act) believed that the Act did constitute 'reasonable regulation' and was justified. Although a bare majority held the Act to be valid[730], the even split on the question of justification evinced the unsatisfactory state of the jurisprudence of justification.

[729] [1978] HCA 34, (1978) 140 CLR 120.

[730] Murphy J applied a different definition of scope (viz. the discrimination analysis) and decided that the Act was not a *prima facie* breach of s 92 in the first place as it applied equally to the intrastate and interstate wheat trade; accordingly, His Honour was of the opinion that the Act was not invalid under s 92. Thus, the majority of the Court (Mason, Jacobs and Murphy JJ) upheld the validity of the Act, although without a majority line of reasoning, particular on the question of justification, where there was an even split between Barwick CJ and Stephen J against justification on the one hand and Mason and Jacobs JJ for justification on the other.

Turning first to the judgments against justification, the Chief Justice himself admitted that 'reasonable regulation' was a term of imprecise definition, and His Honour attempted to ground it in a concept of restriction that was *compatible with* freedom of trade, rather than an interest *balanced against* freedom of trade: "…elusive as sometimes both the connotation and the denotation of the description "regulatory in nature" may be, its distinctive features are generally recognizable, particularly if it is remembered that what is sought is something which must be compatible with freedom of interstate trade and commerce"[731]. For both Barwick CJ and Stephen J, the proper understanding of 'reasonable regulation' was not that it effected an accommodation of the needs of the individual trader to the needs of the community, but rather "an accommodation of individual relationships in trade"[732] such that a law which was justified as 'reasonable regulation' was one "which, while restricting or burdening particular conduct in trade, nevertheless serves the purpose of fitting individuals into society, of providing that framework of an ordered community without which none can enjoy any real freedom to trade"[733]. Their Honours rejected the idea that 'reasonable regulation' was a public interest to be weighed against the competing public interest of absolute freedom of interstate trade, on the basis that s 92 of the Constitution by its very terms had already established that absolute freedom of interstate trade was the overriding public interest, and it was not the job of the Court to perform some sort of balancing act between the public benefit of the restrictive legislation to the community and the public benefit of freedom of interstate trade to the individual trader: "The decision whether or not a community or some part of it benefits from legislation involves social

[731] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 152 (Barwick CJ).

[732] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 154 (Barwick CJ).

[733] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 172 (Stephen J).

and political theory and must inevitably involve passage down a slippery path, better suited to the feet of legislators than to those of judges"[734]. On this basis, Barwick CJ and Stephen J were of the opinion that the present legislation did not qualify as reasonable regulation, because the complete prohibition of private trade in wheat could not be characterised as accommodating one trader to another within the market; in coming to this conclusion, Their Honours learnt heavily on the Privy Council's decision in *The Bank Nationalisation Appeal,* which they argued stood for the proposition that prohibition of private trade was generally not compatible with freedom of trade under s 92, no matter what the public policy objective being pursued by the legislation in question[735]. In doing so, they deliberately played down the Privy Council's acknowledgment that, at some stage of development, a government monopoly might be the only practical form of regulation, arguing that this was merely a hypothetical comment rather than an indication that this phenomenon would be a pressing and active part of modern Australian economic life[736]. In declaring that the NSW Act was unjustified (and inapplicable to interstate trade in wheat), it was of no relevance that this NSW Act was part of a joint Commonwealth-State scheme covering the whole of the Australian economy[737], nor that the scheme had existed for some decades[738]. On the specific facts of the case, Stephen J in particular was unconvinced that the NSW Act was actually achieving its purported goal of industry stabilisation (which His Honour agreed was a legitimate goal of public policy[739]), resting on the evidence that the draft report of the Industries

[734] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 153-154 (Barwick CJ).

[735] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 155 (Barwick CJ).

[736] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 173-174 (Stephen J).

[737] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 157 (Barwick CJ).

[738] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 160 (Barwick CJ).

[739] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 169-171 (Stephen J).

Assistance Commission had concluded that the single-desk marketing scheme, insofar as it extended to Australian domestic trade (i.e. interstate trade), was economically inefficient, had failed to achieve any substantial price increase for growers and any such benefits had been outweighed by the costs of administering the scheme; the Commission had actually recommended that the single-desk scheme be discontinued in respect of domestic wheat sales[740]. Moreover, Stephen J argued that the Act went further than was necessary to achieve stabilisation of the wheat industry, because other primary products were subject to legislative schemes which did not include a prohibition on private interstate trading, and this tended to show that the goal of industry stabilisation could be achieved in a less restrictive way than that adopted by the NSW Act[741].

On the other hand, for Mason and Jacobs JJ, the NSW Act did indeed qualify as 'reasonable regulation' and was justified. Their Honours did not doubt that the restriction on interstate trade was a direct one[742], but this was not decisive of the question of whether it qualified as 'reasonable regulation'. The test which Their Honours proposed for whether a prohibition of private trade qualified as 'reasonable regulation' was whether it were "the only practical and reasonable manner of regulation of trade and commerce (including interstate trade and commerce)"[743]. Mason and Jacobs JJ examined whether the NSW Act, as part of the wider Commonwealth-State legislative scheme, passed this test and whether it had been effective in achieving its legitimate public policy goal of stabilising the wheat industry, and Their Honours

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[740] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 175 (Stephen J).

[741] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 177 (Stephen J).

[742] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 186 (Mason and Jacobs JJ).

[743] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 193 (Mason and Jacobs JJ).

came to a very different conclusion from Stephen J: the scheme had succeeded in smoothing out year-to-year variations in the wheat price (which had swung between $50 and $150 per tonne in the past five years) and had stabilised growers' incomes by the imposition of the compulsory $3 per tonne contribution to the Stabilization Fund in years of high prices which had then supplemented growers' incomes in the lean years, and such a scheme could not have succeeded if it were not mandatory[744]. Thus, in the opinion of Mason and Jacobs JJ, the NSW Act was 'the only reasonable and practical manner' of stabilising the wheat industry, and was justified as reasonable regulation.

In the end, then, the NSW Act survived constitutional challenge, but it was by no means clear how 'reasonable regulation' was to be interpreted, particularly when the impugned legislation imposed a complete prohibition on private interstate trade, as in the service of a single-desk marketing scheme. This result was obviously unsatisfactory, as it lacked a clear line of reasoning subscribed by the majority of the Court, so two years later the question was effectively re-litigated in *Uebergang v Australian Wheat Board* (1980)[745]. As will be recalled from Chapter I, the NSW Act was once again the subject of constitutional challenge after Uebergang, a NSW wheat grower, traded wheat across the border to a Queensland poultry feed producer. As in the previous case, the Court was not able to deliver a clear and unified line of reasoning: Barwick CJ and Aickin J would have declared the NSW Act unjustified and inapplicable to interstate trade, Stephen, Mason and Murphy JJ would have declared the Act justified and valid, and Gibbs and Wilson JJ declined to make a judgment on the validity of the Act. Reading across these disparate judgments, however, it is possible to pick out a line of

[744] *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 191 (Mason and Jacobs JJ).

[745] [1980] HCA 40, (1980) 145 CLR 266.

reasoning which commanded the support of a majority of the Court on the specific question of what test should be applied to assess ‘reasonable regulation’.

Barwick CJ, Gibbs, Wilson and Aickin JJ all supported the proposition that restrictive legislation should qualify as ‘reasonable regulation’ if it is “the only reasonable and practical method of regulation”[746]; this was to be a test of general application, not only for government monopoly schemes which completely prohibited private interstate trade, but also for other legislative schemes which imposed lesser restrictions on interstate trade. Mason, Jacobs and Murphy JJ supported a slightly different and looser definition of ‘reasonable regulation’, arguing that legislative restrictions would be justified if it were “no greater than are reasonably necessary in all the circumstances”[747]. These two formulations seem very similar[748], but there is an important theoretical difference underlying them. The majority definition of “the only reasonable and practical method of regulation” is one which derives from a conception of justification whereby justified restrictions of interstate trade are those which accommodate one trader to another and thereby facilitate freedom of trade; justification does not derive from an individual’s interest in freedom of trade being counterbalanced by the community interest in pursuing some other public policy goal which involves the restriction of trade[749]. The minority

[746] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 287 (Barwick CJ), 301 (Gibbs and Wilson JJ) and 326 (Aickin J).

[747] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 306 (Stephen and Mason JJ).

[748] Aickin J acknowledges the similarity, but deliberately distinguishes the two tests: *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 327.

[749] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 282, 289 and 292 (Barwick CJ), and 324 (Aickin J). Note, however, that Gibbs and Wilson JJ do not subscribe to this particular component of the reasoning, arguing that the mutual accommodation of trader and trader is, in effect, an acknowledgment of a public interest which supports the restriction imposed by the legislation: of Barwick CJ’s citation of examples of such mutual accommodation of trader and trader, Their Honours say “in many cases, with all respect, these examples of proper legislative activity may be characterized [*sic*] as giving expression to the public character of s 92” (at 299).

definition of "no greater than [is] reasonably necessary in all the circumstances", on the other hand, explicitly acknowledges the existence of a community interest ("legislation should be no more restrictive than is reasonable in all the circumstances, due regard being had to the public interest"[750]) and conceives of justification as private interest being outweighed by community interest in respect of a particular piece of restrictive legislation.

Both definitions rest on the twin concepts of 'reasonable' and 'practical', a definition of which is offered by Stephen and Mason JJ. 'Reasonable' means that the adverse effect on traders is properly balanced by a public interest in the restriction which the legislation imposes, and that the is no "alternative means of regulation which, while directed to the same object, imposes less restraint upon the freedom of interstate trade"[751]; the judges in the majority seem to agree with this definition, save that in their view the balance in question would be that of individual traders within a market[752]. 'Practical' (or 'practicable') means capable of being put into practice, that is, "feasible from the point of view of those administering it"[753].

Both definitions are effectively 'minimum restriction' definitions, in that they would justify legislation which causes minimum restriction of interstate trade, but the majority definition is harder to satisfy as it pays less deference to the public interest and so would give less leeway to legislatures to decide what is reasonable and practical in pursuit of that interest[754]. Even

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[750] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 306 (Stephen and Mason JJ).

[751] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 306 (Stephen and Mason JJ).

[752] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 284 (Barwick CJ) and 324 (Aickin J). Contrast Gibbs and Wilson JJ at 299, discussed in footnote 749 above.

[753] *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 306 (Stephen and Mason JJ).

[754] Stephen and Mason JJ argue that "the only reasonable and practical method of regulation" is inappropriate because 'only' is too strict a criterion if 'reasonable' and 'practical' have already been satisfied – it would require

identifying a majority line of reasoning in this way, however, the end result of the case was that the NSW was *not* declared unconstitutional and inapplicable to Uebergang's interstate trade because Gibbs and Wilson JJ declined to rule on the question of the validity of the Act. Thus, by the time the Court delivered judgment in *Uebergang v Australian Wheat Board*, it appeared that justification by 'reasonable regulation' was to be achieved if the impugned legislation were "the only reasonable and practical method of regulation", but on two recent attempts, the Court had effectively preserved the validity of the compulsory single-desk marketing scheme for wheat, without a majority actually being convinced that it passed the test for 'reasonable regulation'.

With his typical lucidity, Prof Leslie Zines provides a neat summary of the specific matters which underlay the Court's inability to form a stable and decisive majority on the question of what constituted reasonable regulation: "It was clear that the concept of regulation was being applied by the several judges in radically different ways. While all seemed to agree that some notion of "balancing" was involved, the difference arose from: (a) the weight to be given to the freedom of trade; (b) whether that freedom is to be viewed primarily from an individual or public perspective: (c) the extent, if any, of the deference due to the legislatures in policy making; and (d) the relevance of the fact that a law did not discriminate against interstate trade"[755]. The connexion between the question of scope, as examined in Chapter I, and the question of justification is plain. Thus, by the 1980s, justification by reasonable regulation was a concept riven by fundamental philosophical disagreements as to what sort of free trade (what sort of internal market) was being created by s 92.

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that there be absolutely no other method which the legislature could have chosen: *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 305.

[755] James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 161-162.

Summary of Pre-*Cole v Whitfield* Justification:

In summary, it was clear that legislation which restricted interstate trade in the relevant way (depending on the prevailing definition of scope) was *prima facie* invalid, but was able to be justified if it satisfied a set of criteria. The first criterion was that the restrictive legislation must have a legitimate public purpose. Any purpose other than the mere restriction of interstate trade could qualify as such a purpose, and the Court would accept whatever purpose was advanced on the face of the law or in its preparatory documents without entering into any consideration of how 'important' a matter of public policy it was (that being a question rather for the legislature). This deference was not absolute, as the Court would not countenance a merely colourable purpose, but in practice the Court never actually declared that a restrictive law was unjustified on this basis. Such legitimate purposes ranged from public protection (consumer protection, protection of public health, prohibition of socially harmful activities) to practical matters (the regulation of transportation) to economic policy (stabilisation of an industry, promotion of competition within an industry), and the list of legitimate purposes was fundamentally an open and growing one.

The second criterion was that the restriction of interstate trade must fall into one of the two permissible categories which the case law had developed: indirect restriction or reasonable regulation. As for the former of these, a restrictive law could be justified if the restriction which it imposed on interstate trade were merely indirect, and the dividing line between direct and indirect restriction was that a direct restriction was one which was conditioned on the very act of interstate trade itself, that is, where the goods physically crossed the border, or on something essential to that interstate border crossing. This point was harder to define in respect of services, but 'directness' was still defined by restrictions on a fact, event or thing essential to interstate trade. Laws of general application which prescribed the terms on which goods or services were sold within a State were not direct restrictions of interstate trade, and so their restrictive effect on that trade would be justified as merely indirect or incidental. The relevant effect which was looked to was the specific legal effect of the law itself or its necessary implication, rather than its ultimate economic effect, and in this sense the jurisprudence connected with the sometime-dominant concept of the 'criterion of operation' of legislation, used for defining the scope of s 92, inasmuch as they both looked to how the impugned law touched upon trade as a matter of legal operation[756]. As such, it was not enough merely to show that the law would have the ultimate effect of causing a rise in the price of imported goods for consumers; it was also necessary to show that the law complained of had restricted interstate trade directly such as to cause this diminution of competitive position. Since the mid-1960s, however, when the Chief Justiceship passed from Dixon CJ to Barwick CJ, the exclusivity of focus on legal operation had been mollified somewhat and economic effect had been taken into account, although a legislative restriction would be still justified as being merely indirect if its effect on interstate trade (including its economic effect) were not conditioned on some act or thing essential to interstate trade.

Restrictive legislation would also be justified if it qualified as 'reasonable regulation'. It was clear that 'reasonable regulation' was a distinct enquiry from 'directness', and an independent head of justification, i.e. even legislation which directly restricted interstate trade was amenable to justification if it constituted 'reasonable regulation'[757]. In assessing the

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[756] James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 151.

[757] Prof Zines also notes the inutility of the 'criterion of operation' jurisprudence in connexion with 'reasonable regulation' as distinct from 'indirectness' discussed immediately above: James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 151.

reasonableness of the regulation, it was clear that some sort of balance was to be struck between the individual interstate trader's interest in being able to trade without restriction, but it was not clear what was weighed on the other side of this balance. For some judges (such as Barwick CJ), with a 'private interest' view of s 92, it was the interest of other traders which was the counterweight, and the reason why s 92 did not strike down 'reasonable regulation' was because such regulation preserved freedom of interstate trade by accommodating the various practitioners of that trade to one another. For other judges (such as Mason J), with a 'public interest' view of s 92, it was the interest of the public in achieving some policy outcome which was the counterweight, and this interest was to be found in the purpose of the legislation (provided that the purpose was a legitimate one). It seemed that the Court marginally favoured the first of these definitions. If the restriction caused by the legislation represented a proper balance between interstate traders' interests and it was the only way that this could be achieved in a manner that was feasible from an administrative point of view – that is, if the law caused minimum feasible restriction of interstate trade – then the law would be justified as 'reasonable regulation'. In order for this analysis to be made by the Court, the legislation could not be so vague as to render the reasonableness of the restriction effectively non-justiciable, and accordingly the more arbitrary a restriction the less likely that the Court would deem it reasonable and thereby justified as reasonable regulation.

Arguably, restrictive legislation might also be able to be justified if its effect on interstate trade fell beneath a *de minimis* threshold. This aspect of the jurisprudence was not well developed, and no cases were decided on this basis, but it was referred to on a number of occasions within the jurisprudence. What is clear at least is that the setting of the *de minimis* threshold was not a matter of the Court simply fixing on a certain numerical figure (e.g. the percentage of trade affected by the impugned legislation which was interstate trade) and then declaring the legislation justified if it were under this figure. In practice, the real way in which a *de minimis* exception implicitly operates in all litigation is that a plaintiff will not go to the difficulty and expense of bringing a case all the way to the highest court in the nation unless the impact of the law complained of is substantial (in the plaintiff's calculation, at least).

At this point, the s 92 jurisprudence had become deeply convoluted. Judicial differences of opinion about the kind of free trade which s 92 was meant to protect (trade free from governmental restriction in general, or just free from discriminatory laws) also manifested themselves in the question of justification once the question of scope appeared to be (temporarily) settled. The requirement that an impugned law be characterised in order to assess whether it was justified, and the looseness of some of the definitions in this process, meant that there was a persistent tendency in the Court for split decisions, and furthermore, for the delivery of multiple individual judgments even amongst those judges who did agree as to the result, which served to multiply the complexity of the jurisprudence of justification. As the Court was soon to declare – speaking for the first time in decades in a single, united judgment:

> The creation of a limitation [on the breadth of s 92's declaration that interstate trade, commerce and intercourse were to be "absolutely free"] where none was expressed and where no words of limitation were acceptable was a task which, having regard to the diverse and changing nature of inter-State trade, commerce and intercourse, was likely to produce a variety of propositions. And so it has. Sir Robert Garran contemplated that a student of the first fifty years of case law on s 92 might understandably "close[] his notebook, sell[] his law books, and resolve[] to take up some easy study, like nuclear physics or higher mathematics."[758] Some thirty years on, the student who is confronted with the heightened confusion arising from the additional case law…would be even more encouraged to despair of identifying the effect of the constitutional guarantee.[759]

[758] Robert Garran, *Prosper the Commonwealth* (Angus & Robertson 1958), 415; quoted in J A (John Andrew) LaNauze, 'A Little Bit of Lawyers' Language: The History of 'Absolutely Free' 1890-1900' in Allan Martin (ed) *Essays in Australian Federation* (Melbourne University Press 1969), 58.

[759] *Cole v Whitfield* (1988) 165 CLR 360, 392.

Fortunately for that exasperated student, that confused jurisprudence was soon to become much simpler. Just as it had for the question of the scope of s 92, the delivery of *Cole v Whitfield* in 1988 was to re-found the question of justification on a new jurisprudential basis. Proceeding from the unanimous decision in *Cole v Whitfield*, the subsequent cases following in its wake form a united body of jurisprudence on this question of justification, and while the 1988 decision did not quite inaugurate an era of uninterrupted *in banco* decisions, there has been a notable unanimity as to the result in all but one of the cases of this contemporary, post-*Cole v Whitfield* era. On the specific issue of justification, the Court has been remarkably unified. Accordingly, the contemporary jurisprudence of justification is herein presented as a cumulative whole.

The Contemporary Jurisprudence of Justification

Section 1 – Legitimate Purpose:

Even as the Court was establishing the modern, anti-protectionist interpretation of s 92 in *Cole v Whitfield*, it recognised the possibility that *prima facie* discriminatory burdens of a protectionist kind might be justified by reference to a non-protectionist purpose (in that very case, for instance, environmental protection)[760]. The major development in the concept of justification, however, came in *Castlemaine Tooheys Ltd v South Australia* (1990)[761]. That case

[760] *Cole v Whitfield* (1988) 165 CLR 360, 408-409.

[761] [1990] HCA 1, (1990) 169 CLR 436. In commentary following the decision, it was anticipated that the jurisprudence of justification expounded in *Castlemaine Tooheys Ltd v South Australia* would be the subject of much further litigation in future cases: see Gerard Carney, 'The Re-Interpretation of Section 92: The Decline of Free Enterprise and the Rise of Free Trade' 3 Bond Law Review 149, 163. As it turned out, the volume of litigation of s 92 was very small after the *Cole v Whitfield–Castlemaine Tooheys* period, and while justification was revisited in *Betfair Pty Ltd v Western Australia* in 2008, the rising issue became whether to re-define 'interstate trade' and how to identify 'protectionism' in the era of internet commerce.

concerned a South Australian law imposing a large mandatory deposit on single-use beverage bottles and a much smaller mandatory deposit on refillable bottles; in addition, the law made it mandatory for a retailer of beverages in single-use bottles to accept returns of such bottles (and to refund the deposit), regardless of whether the retailer had sold the particular bottles in question, whereas retailers had no such obligation in respect of refillable bottles (which people could just take to recycling depots in order to obtain their deposit refund). The interstate trade dimension to the South Australian law was that, in the beer market, single-use bottles were only used by interstate traders. On the basis of the case stated by the lower court, there was no doubt that the South Australian law created protectionism in favour of intrastate trade, so the only question was whether the law was justified.

On the subject of legitimate purposes which may be relied upon by way of justification, the majority decided that any purpose other than protection of intrastate trade against interstate trade will qualify as a legitimate purpose. This was a reiteration of the pre-*Cole v Whitfield* jurisprudence on this question. The reason for this broad definition of legitimate purposes was that the Court "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"[762], meaning that unless s 92 (or some other section of the Constitution) says otherwise, all purposes are legitimate for State legislatures to pursue.

This principle was qualified somewhat in *Betfair Pty Ltd v Western Australia* (2008)[763]. Firstly, and more straightforwardly, the Court made clear that the protection of State revenue was

[762] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 472.

[763] [2008] HCA 11, (2008) 234 CLR 418.

not itself a legitimate purpose, not only because this would contradict its earlier decision in *Bath v Alston Holdings Pty Ltd* (1988)[764] (discussed in Chapter II) but because it would undermine the whole purpose of s 92, "for such a justification, if allowable, would support the re-introduction of customs duties at State borders"[765]. Secondly, and potentially more significantly, while it was not questioned that States, as a matter of principle, have the power to legislate for the welfare of their people, considerable doubt was expressed about the utility of the concept of 'the people of a State' in the modern Australian context:

> ...references in *Castlemaine Tooheys* to 'the people of' the State and to 'its' well-being, rather than to those persons who from time to time are placed on the supply side or the demand side of commerce and who are present in a given State at any particular time, have their own difficulties. They appear to discount the significance of movement of persons across Australia, and of instantaneous commercial communication, and to look back to a time of physically distinct communities located within colonial borders and separated by the tyranny of distance.[766]

As a result of this diminished significance of the concept of 'the people of a State', the Court went on to advise that "the 'fundamental consideration' identified in *Castlemaine Tooheys Ltd v South Australia* of a condition of localised well-being will not encompass much modern State regulatory legislation in the 'new economy' [i.e. the internet economy]."[767] Given the likelihood of regulatory divergence between the several States[768], this is a strong indication that heavy

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[764] [1988] HCA 27, (1988) 165 CLR 411.

[765] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 479 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[766] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 453 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[767] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 474 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[768] For example, out of concern for the supposed danger to the racing industry posed by 'betting to lose', a taskforce established in 2003 by the Conference of Australian Racing Ministers had recommended that no State should license a betting exchange to operate, but it didn't take long for Tasmania to break ranks and license Betfair Pty Ltd in 2006. The fragility of interstate co-operation and its impact on legislation challenged under s 92 has not gone

regulation of a practice which is legal anywhere else in Australia – and particularly, as with betting exchanges, a practice legal *everywhere else* in Australia (although operating out of one particular State) – will be difficult to justify under s 92. This is also likely to have a particularly acute impact upon State legislative schemes that have set up a monopoly for the provision of certain goods or services (of which gambling services is a good example): even where the monopoly has been established after an open, competitive tender process amongst various bidders and is subject to periodic recontesting, the successful bidder will have factored in some sort of 'monopoly premium' in their winning bid. If a competitor were then to simply skirt around the monopoly by trading into that State from another State in reliance on s 92, the in-State monopoly holder would see the value of their exclusive licence significantly diminished[769]. The potential for this outcome could discourage providers from bidding for such a monopoly scheme in the first place, and thus discourage a State from attempting to establish or continue one.

In practice, however, for all the questioning of the concept of 'the people of a State' as part of justification of *prima facie* breaches of s 92, the Court in *Betfair Pty Ltd v Western Australia* acted in the same manner as it had in *Castlemaine Tooheys Ltd v South Australia*, accepting the legitimacy of the purposes advanced by way of justification essentially without question[770], but

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unnoticed in commentary, and its likely effect on the relevant industry is neatly described thus: "[T]he practicality of maintaining a uniform legislative regime seems unlikely. A scheme based on State cooperation seems highly volatile. All that might be necessary for the scheme to collapse would be the refusal by one State to adhere to what it perceived to be unduly harsh restrictions. E-commerce providers would then flock to base themselves within that State and subsequently challenge the validity of those other States' more oppressive regulatory regimes. As *Betfair* illustrates, the least restrictive form of regulation is most likely to survive." Eli Ball 'Section 92 and the Regulation of E-Commerce: A Casenote on Betfair Pty Ltd v Western Australia' (2008) 36 Federal Law Review 265, 277.

[769] See Bill Brown, 'Bet Fair and Bet Far: A New Frontier in Freedom of Interstate Trade and Commerce' (2008) 82(10) Law Institute Journal 34, 38.

[770] Except, perhaps, at 479 (and, *sub silentio*, at 476).

going on to find that the measures adopted by the State law were disproportionate to the achievement of these legitimate purposes and ruling that the impugned law was not justified[771].

A Mixture of Legitimate and Illegitimate Purposes:

Betfair Pty Ltd v Western Australia also established that if the legislation in question has a number of different purposes, *none* of these purposes can be protectionism, as to allow protectionism even to be one among many purposes for a law "would impermissibly weaken the force of the imperative demand of s 92...by allowing to stand legislation which imposes upon interstate trade a discriminatory burden of a protectionist kind, merely because of the presence of other objectives"[772]. This again echoes the pre-*Cole v Whitfield* jurisprudence, going back to the decision in *James v Cowan* (1930) that any legislative purpose would be legitimate provided that it was not simply the restriction of interstate trade and that such restriction of interstate trade could not even be one of the purposes of a law if the law was to be justified.

Identification of the Purposes of Legislation:

As to how the purposes of legislation may be discerned, in *Castlemaine Tooheys Ltd v South Australia* the Court relied on the agreed statement of facts and the submissions of counsel on this matter. In *Betfair Pty Ltd v Western Australia*, however, the Court engaged in a more active

[771] Commentators' reaction to *Betfair Pty Ltd v Western Australia* was somewhat muted. The Court's suggestion that it would be difficult for one State to successfully justify its prohibition of an economic activity which was not prohibited in another State was noted: Eli Ball 'Section 92 and the Regulation of E-Commerce: A Casenote on Betfair Pty Ltd v Western Australia' (2008) 36 Federal Law Review 265, 274. However, the overall reaction was that the case did not mark any particularly significant advance on what had been decided in *Cole v Whitfield* and *Castlemaine Tooheys Ltd v South Australia*: "The general response to the *Betfair* decision is perhaps best summed up as a combination of excitement that a s 92 decision was handed down, and some disappointment that the test of 'discriminatory protectionism' was not altered in any way." Naomi Oreb, 'Betting Across Borders – *Betfair Pty Ltd v Western Australia*' (2009) 31 Sydney Law Review 607, 618.

[772] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 464.

investigation of the purposes of legislation, drawing on sources such as official reports delivered to the relevant Minister before the introduction of the bill[773], the Second Reading Speech for the bill[774], the response of the relevant Minister to a question in Parliament during the passage of the bill[775], official Ministerial publications on the application of the law after its adoption[776], and a Ministerial letter connected to the application of the law to the party now before the Court[777].

Section 2 – Proportionality:

The concept of proportionality in relation to justification of relevant restrictions under s 92 is expressed using many different terms, including whether the law was necessary to achieve the legitimate purpose[778], whether it was appropriate and adapted to the legitimate purpose[779], and whether burdens on interstate trade were incidental and not disproportionate to the achievement of the legitimate purpose[780]. In the end, they are all closely related and there seems to be no real distinction between the meaning of these terms[781]. Nevertheless, it is conceptually useful to distinguish two elements of a proportionality test: suitability (whether the law is capable of

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[773] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 466-467.

[774] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 486.

[775] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 478.

[776] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 485.

[777] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 487.

[778] *Cole v Whitfield* (1988) 165 CLR 360, 409.

[779] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473.

[780] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473-474.

[781] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 479.

achieving the legitimate purpose) and necessity (whether the law is necessary to the achievement of the legitimate purpose, in the sense that no other measures less burdensome on interstate trade would have achieved the same purpose). It has also been suggested that the proportionality test should include a third element, namely, the requirement that there be a proper balance between the importance of the legitimate purpose and the gravity of the burden on interstate trade which is imposed by the law which is necessary to achieve that legitimate purpose[782]; the addition of this third element has been described as moving from the two-element 'abridged proportionality' to a three-element 'robust proportionality'[783].

Suitability:

As indicated above, in *Castlemaine Tooheys Ltd v South Australia* the South Australian law which imposed a differential mandatory deposit on single-use bottles and refillable bottles and created a more onerous system of bottle return for single-use bottles was found not to be justified because although the purposes claimed for it were legitimate, the measures which it adopted were disproportionate to those purposes. One of the purposes claimed for the South Australian law was the conservation of the State's energy resources, since there was a finite supply of natural gas and the production of single-use bottles drew upon this finite supply. The Court found that the South Australian law was not suitable for the conservation of the State's energy resources because its effect was to discourage the use of single-use bottles, the production of which occurred *outside* South Australia and *did not* draw on South Australia's gas supply, and

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[782] Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 Melbourne University Law Review 1, 8; Gonzalo Villalta Puig, 'A European Saving Test for Section 92 of the Australian Constitution' (2008) 13 Deakin Law Review 99, 107-110.

[783] Naomi Oreb, 'Betting Across Borders – *Betfair Pty Ltd v Western Australia*' (2009) 31 Sydney Law Review 607, 616-618.

encourage the use of refillable bottles, the production of many of which occurred *within* South Australia *did* draw on South Australia's gas supply; thus, the law was not only incapable of conserving the State's gas supply but it would actually achieve the very opposite of that purpose[784].

Necessity:

The measures adopted by a law must also be necessary for the achievement of the legitimate purpose, in the sense that no less burdensome alternative exists to achieve the same purpose[785]. In *Castlemaine Tooheys Ltd v South Australia*, in addition to the energy conservation purpose mentioned above, the other purpose claimed for the South Australian law was the prevention of littering. Despite misgivings about the propriety of judicial, rather than legislative,

[784] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 476-477. See also Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 Melbourne University Law Review 1, 14.

[785] There is an interesting question at this point as to how the jurisprudence of 'trade and commerce' under s 92 should relate to the jurisprudence of 'intercourse' under the same section. It was accepted in *Cole v Whitfield* that interstate trade and commerce might be subject to a wider range of legitimate restrictions than interstate intercourse (understood as the comings and goings of persons across State borders), meaning that the same jurisprudence on justification need not apply to both parts of s 92. In *Cunliffe v Commonwealth* [1994] HCA 44, (1994) 182 CLR 272, the majority declared that a *prima facie* restriction on interstate intercourse would be valid if it were reasonably necessary to preserve an orderly society (Mason CJ at 308, Deane J at 346, McHugh J at 396, Gaudron J at 392), whereas Dawson J (at 336) thought that such a restriction would be valid if it were reasonably necessary to achieve the legitimate legislative purpose of the Act in question. On the face of it, the position of the majority on this point harkens back to the 'mere regulation' jurisprudence which operated under the individual right (trade restriction) analysis earlier in the 20th Century. The position of Dawson J, on the other hand, is more consistent with the interstate trade and commerce jurisprudence prevailing after *Cole v Whitfield*, which, as has been seen, identifies the legitimate purpose of the Act and then asks whether the restriction can be justified as reasonably necessary to achieve that legislative purpose. In subsequent case law, it is this latter view which has been adopted: *AMS v AIF* [1999] HCA 26, (1999) 199 CLR 160, 179 (Gleeson CJ, McHugh and Gummow JJ; Hayne J concurring); and *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44, (2005) 224 CLR 322, 353 (Gleeson CJ and Heydon J), 393-394 (Gummow J) and 461 (Hayne J). Even with the Court now accepting that justification for restriction of interstate intercourse relates to the specific purpose of the Act rather than a broader concept of social order, Zines argues that intercourse is by its nature and by precedent freer than trade and commerce from legislative restriction, and thus "it clearly cannot be left to the legislature to impede that freedom by pursuing any policy it wishes (short of discrimination against interstate intercourse). It would necessary for the Court to examine the nature of the countervailing social interest and, in effect, balance it against the individual right": James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 194. Such a balancing of interests by the Court, subsequent to a determination of suitability and necessity, will be seen later in this Chapter to be a controversial suggestion in relation to interstate trade and commerce.

determination of the question of necessity[786], the Court found that the measures adopted were not in fact necessary to achieve litter prevention because the difference in the mandatory deposit on single-use and refillable bottles was far in excess of what South Australia had admitted was necessary[787] and because if the collection depot system worked well enough for refillable bottles it should work well enough for single-use bottles too[788].

Betfair Pty Ltd v Western Australia, on the other hand, is very clear that it *is* proper for the Court to consider the necessity of impugned legislation, stating that necessity is not a political question best left to the legislature because "[i]f a criterion of validity of legislation is possession of a particular attribute, then Ch III of the Constitution [the Chapter which vests the judicial power of the Commonwealth in the High Court] commits to the federal judicial power the determination of that issue"[789]. However, it is not *absolute* necessity which the Court is looking for, but 'reasonable necessity'[790], which presumably gives some scope to State legislatures to determine what measures are reasonable from an administrative point of view. In this sense, the Court was echoing the pre-*Cole v Whitfield* jurisprudence whereunder 'reasonable regulation' was that which was reasonable *and practical* (in the sense of capable of being put into practice administratively), acknowledging that the legislature had some latitude to select, from amongst alternative forms of legislation, that which was most readily administered.

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786 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473. See also Gerard Carney, 'The Re-Interpretation of Section 92: The Decline of Free Enterprise and the Rise of Free Trade' 3 Bond Law Review 149, 161.

787 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 475.

788 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 476.

789 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 476.

790 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 477.

Having established that the measures adopted by the State law must be reasonably necessary for the achievement of the legitimate purpose, the Court in *Betfair Pty Ltd v Western Australia* proceeded to apply this principle to the facts of the case, and this application was relevant for present purposes in that it touched on the issue of the degree to which one State may restrict or prohibit an economic activity which is permitted in another State. (Although it happened to concern impediments to the provision of *services*, the same principles are applicable to non-fiscal impediments to the free movement of *goods* as well.) The State law challenged in *Betfair Pty Ltd v Western Australia*, it will be recalled, was a Western Australian law prohibiting the use of betting exchanges in Western Australia and the publication of Western Australian race fields (lists of greyhounds or horses in a race in Western Australia) without Ministerial permission. In Western Australia, betting was traditionally conducted through the use of licensed bookmakers and licensed operators of totalisators, both of which betting methods only allow a gambler to bet on a competitor *to win*. A betting exchange, on the other hand, is a service whereby an individual gambler can offer (at odds chosen by himself or herself) a bet to win *or a bet to lose* and this bet will be matched, through the use of the betting exchange, with another individual gambler who wishes to accept that bet. Betfair Pty Ltd had been licensed to operate a betting exchange in Tasmania and other States but had to cease operations in Western Australia when the new law came into effect. It will also be recalled that it was made clear that Betfair Pty Ltd would not be granted permission to publish a Western Australian race field precisely because it operated a betting exchange. Given that the Western Australian law forbad the use of betting exchanges and the publication of race fields by betting exchanges, and that betting exchanges only operated from other States, and that such services were in competition with the types of betting offered in intrastate trade (bookmakers and operators of totalisators), the law was, in practice, discriminatory against interstate trade and gave a competitive advantage to intrastate trade. Western Australia offered two legitimate purposes by which the law was argued to be justified: the need to ensure that gambling operators made a financial contribution to the racing industry in Western Australia and the desire to protect the integrity of that racing industry[791].

As to the first purpose, it was argued by Western Australia that it was legitimate to require gambling operators to contribute to the racing industry from which they profited. Since bookmakers and operators of totalisators already did so in Western Australia but operators of betting exchanges (such as Betfair Pty Ltd) did not do so, a prohibition on betting exchanges and on the publication of race fields by those operating betting exchanges was, the State contended, necessary to satisfy this legitimate purpose. The Court rejected this argument on the grounds that the measures adopted in the Western Australian law were not necessary to ensure that the gaming industry made a financial contribution to the racing industry as there were less burdensome ways to achieve the same outcome. For example, in Tasmania, Betfair Pty Ltd had been licensed to conduct a betting exchange after it agreed to underwrite the funding of the Tasmanian racing industry and make further financial contributions to it[792], and in Victoria, in which Betfair Pty Ltd was also permitted to operate, an agreement had been reached whereby Betfair Pty Ltd agreed to return a percentage of money taken in respect of races in Victoria to the Victorian racing industry[793]. In light of this, contributions from the gaming industry to the Western Australian racing industry could have been ensured with much less burden being placed on interstate trade by adopting one of these methods (requiring that Betfair Pty Ltd underwrite

[791] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 478.

[792] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 469.

[793] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 479.

contributions, contribute a particular sum or contribute a percentage of their turnover in that State), all of which were administratively feasible as they were already operating in other States (and no argument was put as to why the situation should be any different in Western Australia). Thus, the prohibition on the use of betting exchanges in Western Australia and the prohibition on the publication of race fields by betting exchanges was not necessary to achieve that legitimate purpose[794].

As to the second purpose, it was argued by Western Australia that the integrity of the racing industry needed to be protected from those who would seek to interfere with competitors in races or use inside information about competitors in races to profit illegally. Since it was easier to illegally interfere with a horse to make it *lose* than to make it *win*, and only betting exchanges offered the option of 'betting to lose', Western Australia argued that the prohibition of betting exchanges (and of the publication of race fields by betting exchanges) was necessary for the achievement of this purpose. The Court rejected this argument on the grounds that there was a less burdensome way of protecting the integrity of racing, namely allowing betting exchanges to operate only if licensed and making grant of such a licence conditional upon satisfying a probity test[795], as was the case in Tasmania where Betfair Pty Ltd had been licensed in the first place[796]. Indeed, Betfair Pty Ltd had been complying with the probity requirements imposed on it in Tasmania and there was no evidence of increased illegal activity in relation to gambling either in

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[794] Heydon J also considered the administrative policy that operators of gaming services would only be permitted to publish race fields if they entered into a commercial arrangement with the State-run gambling service Racing and Wagering Western Australia, and decided that this was really a means of lessening interstate competition by forcing such traders to do a deal with their intrastate competitors, and thus it was covert protectionism: *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 488.

[795] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 479-480.

[796] For the Tasmanian probity test, see *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 468-469.

Tasmania or in the other States in which it operated[797]. Heydon J, who delivered a sole judgment in broad agreement with the joint judgment of the rest of the Court, viewed the prohibition on betting exchanges and their publication of race fields as unnecessary because that prohibition was too broad in scope: while the purpose was to prevent those who were able, and wished, to interfere with horses or profit from insider information, the ban on betting exchanges actually extended to *all* gamblers, not just those of nefarious capacity and intent. Also, while the purpose was to preserve the integrity of the Western Australian racing industry, the prohibition was too broad for that purpose because it extended to preventing Western Australians themselves from using betting exchanges in respect of races and sporting matches *outside* Western Australia[798]. Thus, although the Court did not doubt that both purposes advanced by the State of Western Australia (requiring that betting exchanges contribute to the maintenance of the racing industry in Western Australia, and protecting the legal integrity of the racing industry in Western Australia) were legitimate purposes, their judgment was clear that less burdensome means existed to achieve both of these legitimate purposes. Accordingly, it was decided that no justification was available for the Western Australian law and it was declared invalid under s 92.

At this point, it is apposite to mention how the contemporary jurisprudence of justification subtlely echoes the pre-*Cole v Whitfield* concept of justification of legislation as ‘mere regulation’ or ‘reasonable regulation’ of interstate trade. Considerations of legitimate purpose, suitability and necessity in the contemporary jurisprudence recall the earlier ‘reasonable regulation’ jurisprudence inasmuch as they seek to identify a purpose which the restrictive

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[797] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 480.

[798] He also added that the prohibition on the publication of race fields by betting exchanges was too narrow, because it did not cover the many other people of nefarious intent who might seek to use race fields to further a criminal enterprise without any reliance on a betting exchange to do so; in this sense the law was *unsuitable* to the legitimate purpose: *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 488.

legislation is pursuing and then decide whether that pursuit is moderate enough to countervail the restriction of interstate trade. At a conceptual level, both the historical jurisprudence of ‘reasonable regulation’ and the contemporary jurisprudence acknowledge that local needs may justify some restraint of interstate trade, but the contemporary jurisprudence is much more clearly structured than its historical forebear, as well as being squarely on the side of justification enjoying a ‘public’ purpose – that is, for the benefit of the State community as a whole, rather than just the ‘private’ purpose of protecting one interstate trader from another)[799].

A Third Element – Balancing?:

It has been argued that there should also be a third element to the proportionality test, namely the requirement of a proper balance between the importance of the legitimate purpose and the gravity of the burden imposed on interstate trade by the law necessary to achieve that legitimate purpose. Indeed, a string of recent decisions in the High Court[800] have recognised the existence of this third, ‘balancing’ element in respect of the implied constitutional protection of freedom of political communication. Although the Court has yet to explicitly apply this balancing element in a decision on s 92, it has referenced the s 92 jurisprudence while discussing

[799] On the potential for the historical jurisprudence to still provide some guidance for the development of the contemporary law of justification, see James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 169: "…[T]he earlier concept of "regulation" may still be relevant to a free trade interpretation of s 92. It seems that although a law may affect interstate and intrastate trade differently and give some degree of protection from competition to the latter that will not conclusively lead to a finding of invalidity. As in the case of the earlier concept of regulation, it may be necessary to weigh and balance an important local issue against the protectionist effect of the law…The big difference between the earlier doctrine and that operating at present is that the issue does not arise until it is found that there is some degree of discrimination and protection in fact". In light of the discussion of the newly-acknowledged third ‘balancing’ element of contemporary justification (namely, the absence of such an element), Zines's suggestion as to this ‘weighing and balancing’, should be seen in light of what now appears to be a structure of legitimate purpose–suitability–necessity–balancing analysis.

[800] *McCloy v New South Wales* [2015] HCA 34, (2015) 257 CLR 178; *Brown v Tasmania* [2017] HCA 43, (2017) 261 CLR 328; *Unions NSW v New South Wales* [2019] HCA 1.

the balancing element in other constitutional contexts[801], and it is likely that the balancing element will eventually find its way into a decision on s 92. Nevertheless, the recognition and proper functioning of this balancing element is the subject of considerable judicial disagreement: it was only recognised by a bare 4-3 majority in *McCloy v New South Wales* (2015)[802], and since then there have been attempts to confine its operation to being 'a tool but not a test' for justification[803] or a test which would only ever be failed by legislation 'grossly disproportionate' to its legitimate purpose[804]. Crucially, even in respect of freedom of political communication where the balancing element has been recognised, no case has been decided on the basis that a burdensome law which was otherwise justified fell at the last hurdle due to failing to strike a proper balance between restriction and legitimate purpose. Given the uncertainty of the place of any such balancing element within the jurisprudence of justification under s 92, it is appropriate to canvas some of the arguments in principle for and against its operation.

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801 *Unions NSW v New South Wales* [2013] HCA 58, (2013) 252 CLR 530, 556-557; *Unions NSW v New South Wales* [2019] HCA 1 [42]-[43] and [97].

802 Over the strong dissent (on this point) of Gaegler J. See also the criticism levelled by Prof Anne Twomey: "If the Parliament decides that the importance of the legitimate end far outstrips the significance of the burden on the implied freedom [of political communication], and the High Court then decides the opposite, surely it is substituting its own assessment for that of the Parliament in striking down the law?" Anne Twomey, 'Proportionality and the Constitution' (ALRC Freedoms Symposium, Sydney, 08 October 2015) <www.alrc.gov.au/proportionality-constitution-anne-twomey> accessed 22 April 2019.

803 "*McCloy* does not elevate three-staged proportionality testing to the level of constitutional principle; and *McCloy* does not endow it with precedential status. The point is one of emphasising that the tool is, at best, a tool. For my own part, I have never considered it to be a particularly useful tool." *Brown v Tasmania* (2017) 261 CLR 328, 376 (Gaegler J).

804 "More precisely, and more consistently with the approach that has been taken to the application of express constitutional guarantees, such as s 92 of the Constitution, an impugned law that otherwise presents as suitable and necessary for the achievement of a legitimate purpose compatible with the constitutionally prescribed system of government should not be regarded as inadequate in its balance unless it so burdens the implied freedom of political communication as to present as "grossly disproportionate" [reference omitted] to, or as otherwise going "far beyond"[reference omitted], what can reasonably be conceived of as justified in the pursuit of the legitimate purpose." *Brown v Tasmania* (2017) 261 CLR 328, 422-423 (Nettle J).

In this concept of striking a proper balance between the legitimate purpose pursued and the gravity of the burden on interstate trade, one can see echoes of the pre-*Cole v Whitfield* definition of what constituted 'reasonable regulation', inasmuch as those judges who had a 'public' view of the meaning of s 92 would have defined 'reasonable' as meaning that there was a proper balance between the private restriction on interstate traders' freedom of trade and the public importance of the policy which the legislation was pursuing.

The chief argument in favour of the adoption of the balancing element is that, unlike suitability and necessity which concentrate only on the *purpose* of impugned State law, balancing concentrates on the *effect* of the State law and so it is more apt to prevent protectionism (which is itself identified by its effect)[805]. Furthermore, it has been argued that since the concept of necessity involves the Court making a judgment as to what level of administrative or public inconvenience can be tolerated in a hypothetical alternative (less restrictive) form of legislation which achieves the same legitimate purpose as the impugned actual (more restrictive) legislation, the Court will perforce be involved in some degree of balancing of competing public interests:

> Issues of degree arise, therefore, in relation to the extent of the effect on interstate trade and the extent to which alternative means could be used to ensure the achievement of the non-protectionist purpose. As these issue are not purely quantitative, values will often intrude. It is suggested that this will inevitably result in consideration of the importance of the particular local object.[806]

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[805] Gonzalo Villalta Puig, 'A European Saving Test for Section 92 of the Australian Constitution' (2008) 13 Deakin Law Review 99, 118.

[806] James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 198.

The majority in *McCloy v New South Wales* recognised this, acknowledging that the balancing of competing interests necessarily involves consideration of values, although was keen to reconcile this with the limitations of the judicial power:

> The balance struck between the importance of the purpose and the extent of the restriction on the freedom necessarily involves a value judgment. The fact that a value judgment is involved does not entitle the courts to substitute their own assessment for that of the legislative decision-maker [references omitted]. This accords with the view, so often expressed by this Court, as to the role of Chapter III courts under the separation of powers effected by the Constitution.[807]

However, by placing effect at the end of the justification enquiry (that is, after the purpose has been found to be legitimate and the means adopted by the law to achieve that purpose found to be both suitable and necessary), this seems to misunderstand the concept of protectionism. Although it is true that protectionism may be *prima facie* identified by its effect, effect alone is not sufficient to constitute protectionism in the sense that the term is used in connexion with s 92, because the very possibility of a law being justified by reference to a non-protectionist purpose shows that relevant protectionism for s 92 must have both a protectionist effect and a protectionist *purpose*[808]. Furthermore, the recent adoption of the balancing element potentially poses a serious problem for the Court in requiring it to assess the importance of a legitimate State legislative purpose. If the High Court were to invalidate a State law on the basis that its

[807] *McCloy v New South Wales* (2015) 257 CLR 178, 219 (French CJ, Kiefel, Bell and Keane JJ). Commentators have not been so universally approbative of the Court making such value judgments: Proportionality including a balancing element is "a rather cumbersome edifice which at the end of the day, at the last step, delivers nothing more than a value judgment" Anthony Mason, 'The use of proportionality in Australian constitutional law' (2016) 27 Public Law Review 109, 121.

[808] Although the mechanism by which justification is carried out examines whether the law is suitable and necessary for a *non-protectionist purpose*, in effect, if the law fails these tests, its purpose is deemed to have been (in part) protectionist, since the law's effects must always have some purpose, and those effects which are excessive to the effects which would have been suitable and necessary for the achievement of a *non-protectionist* purpose must then have had a *protectionist* purpose.

legitimate purpose were deemed too unimportant by comparison with the burden on interstate trade, the Court would be effectively substituting its own assessment of the importance of that legitimate purpose for that of the elected State legislators[809]. This is, of course, not a clear-cut issue because adjudication of the constitutional validity of State (and Commonwealth) legislation is one of the High Court's explicit duties[810], and in exercising that jurisdiction it must, like any court, impose its own judgment on the laws in question. Nevertheless, the Court's position may become acutely difficult if a case arose in which the constitutional validity of certain legislation, having passed all other tests of justification, ultimately turned on the Court's decision as to this balancing element, because the Court would then be required to engage in just the sort of legislative quantification and balancing of various different political interests which it was so hesitant to do in *Castlemaine Tooheys Ltd v South Australia* in respect of 'necessity' (or at least, absolute necessity). Also, just as for the Court of Justice of the European Union, such encroachment on the legislative sphere has the potential to bring the High Court into disrepute, as has happened at other times when it has made decisions which sectors of the public (and the government) have seen as being within the legislative, not the judicial, purview[811]. It is the function of legislators and members of the executive government to strike such fine balances

[809] See the comments of Prof Twomey cited at footnote 802 above.

[810] Constitution ss 71 and 76(i), and *Judiciary Act* 1903 (Cth) s 30 (a).

[811] Without casting any negative judgment on the content of such decisions, the reader may recall the strong negative reaction from some quarters of the public to *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 187 CLR 1; starker examples can be seen in the United States, in which the decisions of *Roe v Wade* 410 US 113 (1973) and, more recently, *Citizens United v Federal Election Commission* 558 US 310 (2010). In each of these cases, in Australia and the United States, the judicial decision in question provoked strong criticism of the court amongst sizeable sectors of the public for supposedly departing from the strict judicial function and entering the province of the legislature. While Australia has been fortunate not to witness such sustained hostility to apex court decisions as in the United States, the High Court would surely be very unwilling to open up an avenue of jurisprudence on s 92 that might give rise to such an American-style situation, in which political candidates openly and frequently run for high office on a platform of overturning major court judgments.

between different political considerations, and to be subject to media scrutiny during their term in office and periodic elections to determine whether they retain the confidence of the public in making such decisions. Judges, who are not subject to the same level of media scrutiny and, in Australia, are not subject to public input in their appointment nor, under legal principles of security of tenure, to public confidence-testing once appointed, should not generally perform this function. This is to say nothing of the negative practical ramifications which may ensue if the Court takes on a muscular view of this 'balancing' function, with counsel being put to the task of making arguments on complex social and economic matters, increasing the cost to litigants of already expensive litigation[812].

In addition to the problem of the Courts having to quantify the importance of legitimate State legislative purposes, the adoption of the balancing element has the potential to undermine the federal principles on which the Constitution stands. In arguing that the virtue of the balancing test is its focus on the effect rather than merely the purpose of State laws, Prof Gonzalo Villalta Puig contends that, as it is conceivable that a State law could create a significant protectionist effect without having protectionism as its purpose, only the balancing element could remedy this situation[813]. This is predicated on the assumption that unintentional protectionism is incompatible with the Constitution and that "[a] saving test [such as the two-element test] that validates laws or measures that do not have protectionist purpose but that, nonetheless, have a protectionist effect is nothing but absurd". However, this assumption does not take into account the effect which the balancing element may have in the wider scheme of

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[812] See Naomi Oreb, 'Betting Across Borders – *Betfair Pty Ltd v Western Australia*' (2009) 31 Sydney Law Review 607, 618.

[813] Gonzalo Villalta Puig, 'A European Saving Test for Section 92 of the Australian Constitution' (2008) 13 Deakin Law Review 99, 118-119.

the Constitution: provided that the State law is otherwise justified because its purpose is not protectionist and it is suitable and necessary to achieve that purpose, if the Court were then to declare the law invalid on the basis of its own assessment of the *importance* of that purpose, a State's capacity to determine what purposes are important enough to warrant legislation and to legislate accordingly would be significantly curtailed, and this would severely diminish the capacity of States to function as legislative polities, undermining the federal structure of the Constitution.

In order to prove that the balancing element is not only difficult to apply in practice but contrary to the federal principles on which the Constitution is based, let us engage in a thought experiment. Let it be assumed, for the sake of example, that the people of Queensland decided that the use of the female contraceptive pill was contrary to Queensland morality, and in pursuance of that decision their representatives in the Queensland Parliament passed a law by which the manufacture, sale, possession and use of the contraceptive pill in Queensland were made unlawful. Let it be assumed that contraceptive pills had never been produced in Queensland, but were produced in other States of Australia and, up until the entry into force of the new Queensland legislation, had been imported into Queensland for sale and use there. Furthermore, let it be assumed that Queensland had at all material times an active industry producing forms of contraception other than the contraceptive pill (condoms, intra-uterine devices, etc). In such a case, the Queensland law banning manufacture, sale, possession and use does not distinguish between interstate and intrastate trade, as the prohibition seems to apply equally to all. In practice, however, the prohibition on sales (at least) falls more heavily on interstate trade because all supplies for sales of contraceptive pills would be sourced from interstate trade and none from intrastate trade. What is more, the decrease in competition from contraceptive pills would presumably give a competitive or market advantage to the forms of contraception which were manufactured in Queensland as there would be some elasticity of demand between contraceptive pills and these other forms of contraception. Such a law, then, would impose a *prima facie* discriminatory burden of a protectionist kind (i.e. a relevant restriction for s 92), and the validity of that law would depend on whether it was reasonably necessary for the achievement of a non-protectionist purpose. Let us apply for the time being the two-stage proportionality test comprising a suitability and a necessity element. The non-protectionist purpose which would be advanced for the law would be the protection of the moral integrity of the Queensland people, who had decided that the use of the contraceptive pill in particular threatened that moral integrity, and the law would clearly be *suitable* to the achievement of that purpose inasmuch as it was capable of eliminating the manufacture, sale, possession and use of the contraceptive pill in Queensland. It also seems likely that the law would satisfy the *necessity* element, as there is no less burdensome way of achieving a total ban on the use of a product than to totally ban the use of the product (and the manufacture, sale and possession of it, which are incidental to its use). On the two-element proportionality test which prevailed until the decision in *McCloy v New South Wales*, this hypothetical Queensland law would not contravene s 92 of the Constitution. On the other hand, applying the post-*McCloy v New South Wales* three-element proportionality test, the balancing element would be both difficult to apply and destructive of the States' ability to regulate their own affairs in accordance with their position in the federal Constitution. Firstly, it would be difficult to apply because even though the losses suffered by interstate traders who could no longer sell contraceptive pills into Queensland could fairly easily be quantified (namely, their former revenues from these sales which are now prohibited), the importance of the protection of Queensland morality, which is a legitimate purpose for Queensland law and in respect of which this law is necessary, cannot be so easily quantified[814]. Since no number can be given to Queensland morality, how can it be meaningfully compared to the burden on interstate trade? Even if the Court were to seek to determine the importance of banning the use of the contraceptive pill to Queensland public morality by analysing the strength of Queensland opposition to the contraceptive pill, looking perhaps at the legislative history of the State, relevant provisions of its State Constitution or even demographic evidence from opinion polls and social studies, any attempt to 'balance' the importance of banning the contraceptive pill (expressed in moral or philosophical terms) against the importance of interstate trade (expressed in hard economic figures) would be logically impossible and would devolve into mere judicial value-judgments. While it cannot be denied that judges will, in certain circumstances, have to make difficult decisions informed by their own values, great caution must be shown in expanding the circumstances in which this must occur, and particularly in the application of the balancing element of the proportionality test if and when it eventually finds its way into the jurisprudence of s 92. Furthermore, even if the Court did somehow manage to make a meaningful comparison between two unlike things and decided that the Queensland law should be declared invalid on account of the great burden (indeed a prohibition) which it imposed on interstate trade, this would undermine the continued existence and functioning of Queensland as a State in the federal structure of Australia because, on this subject matter and potentially on any other subject matter as well, Queensland would not be capable of legislating for the welfare of its own people, even where it does so in accordance with

[814] This is the reason for the choice of subject matter for this thought experiment as a matter relating to 'morality': had the hypothetical law related to something like the banning of fruit imports so as to keep fruit-fly out of Queensland, it would have been easy to quantify the State interest in economic terms, and the real problem of dealing with *unquantifiable* State interests could not have been addressed.

the will of its people and in pursuit of a legitimate non-protectionist purpose to which the law is both suitable and necessary.

More broadly, Prof Amelia Simpson has convincingly argued that since s 92 is an important structural element in the Constitution and the federal system which it creates, the effect of that provision must be fixed and certain, and cannot be subject to a case-by-case balancing operation undermining the certainty of that federal system[815]. Thus, the problem with the balancing element is not merely the fact that it is difficult for the Court to apply and that a negative decision on the validity of a State law will tend to erode the ability of that State to function in a federal structure, but also the fact that the uncertainty which its very existence creates (quite apart from the actual result of the balancing operation in a particular case) tends to put the federal structure of the Constitution on unsteady ground.

It remains to be seen just what the practical impact of the Court's decision in *McCloy v New South Wales* will be: if the balancing element does indeed make its way across to s 92 jurisprudence, it may remain (as it has, so far, in respect of the implied freedom of political communication) a debated matter of theory and not a basis on which legislation is actually to be stuck down in practice. However, even without being used to strike down State legislation, its chilling effect on State legislative autonomy and its erosive effect on the federal structure of the Constitution is not to be dismissed lightly.

[815] Amelia Simpson, 'Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone' (2005) 33 Federal Law Review 445, 473-476.

Executive Discretion:

It was seen above that the pre-*Cole v Whitfield* jurisprudence had grappled with the question of on what terms an administrative discretion may be justified under s 92, and after *Hughes & Vale Pty Ltd v New South Wales (No 2)* and *Buck v Bavone*, the Court had come to the position that the validity of such discretion depended on its justiciability: a discretion grounded in the existence of *objective facts* could be justified, whereas one grounded in the *subjective opinion* of the decision maker could not. Given the ongoing significance of administrative discretion, it is worth revisiting this question in light of the post-*Cole v Whitfield* jurisprudence.

In the background of the judicial development of the law on executive discretion, a significant legislative development occurred in Australian law with the passage of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 5 of which , as the name implies, subjected administrative decisions to judicial review (in addition to the system of administrative review within the executive branch of government), and as an incident of such judicial review required, in s 13, that executive decision makers furnish reasons for their decisions, including findings of fact and the evidence used to make such findings. This alleviated the problem which had vexed the historical jurisprudence, whereby even the judicial requirement that valid executive decisions be made on the basis of objective facts rather than subjective opinions was of limited practical effect if decision makers were not as a rule required to disclose their decision-making process. The significance of this legislative development was noted in *Miller v TCN Channel Nine* (1986)[816], a case which concerned the establishment and operation of a wireless

[816] [1986] HCA 60, (1986) 161 CLR 556, 570 (per Mason J). See also Prof Zines's comments at James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 163.

telegraph station which was used for interstate television broadcasts; the station did not have the requisite licence under Commonwealth law, and Channel Nine objected that the licence requirement was invalid under s 92. In the event, the licence requirement was held to be invalid because it was subject to too wide a Ministerial discretion to grant or refuse. Although decided a couple of years before *Cole v Whitfield* in 1988 the case nevertheless represents a useful examination of executive discretion and s 92 (and on this point it is not contradicted by the later *Cole v Whitfield* decision); the judgment of Brennan J in particular is worth considering for how it sets out a test for discriminatory protectionism and executive discretion under s 92, although His Honour came to a different conclusion from the majority of the Court on the facts. Brennan J asks two questions in determining the validity of such a discretion[817]: 1) does the Act actually empower the decision maker to decide against the applicant on grounds that he or she is engaging in interstate trade, and 2) assuming that it does not, is there sufficient judicial review to ensure that the Court can ascertain that the discretion is not being exercised in such a manner as to engender such discrimination in practice? The first arm of this test must surely be uncontroversial: since the days of *Hughes & Vale Pty Ltd v New South Wales (No 2)* it had been clear that a discretion authorising discrimination against interstate trade cannot be consistent with s 92. Likewise the second arm is merely a logical extension of the non-discrimination principle into the new legal landscape of judicial review and mandatory furnishing of reasons for administrative decisions. Prof Leslie Zines[818] supports the application of Brennan J's test to the post-*Cole v Whitfield* landscape, although notes that, even despite the mandatory furnishing of reasons for administrative decisions under the *Administrative Decisions (Judicial Review) Act*,

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[817] *Miller v TCN Channel Nine* (1986) 161 CLR 556, 611-612.

[818] James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 350.

nonetheless there is no general requirement *at common law* to provide such reasons, nor is there a legislative requirement *at State level in all States of Australia* so as to bind State government decision makers to provide reasons.

An application of the contemporary law of justification to the matter of executive discretion can be seen in *Betfair Pty Ltd v Western Australia*, wherein the State law in question did not explicitly forbid the operation of betting exchanges, but merely required Ministerial permission to operate one in Western Australia (and to use a Western Australian 'race field' of information about horses racing in the State). However, Ministerial statements had made it clear that no such permissions would be granted to betting exchanges, and so Betfair Pty Ltd's ability to apply for them was a merely illusory possibility[819]. Thus, the Ministerial discretion at issue in the case was incompatible with s 92. It is evident, then, that in assessing the validity of an executive discretion which could work a discrimination against interstate trade, the Court will not only look for explicit discrimination against interstate trade in the terms of the discretion, but even where the discretion is non-discriminatory on its face, will look at how it works in practice, including any evidence that there is an executive policy in respect of the exercise of such discretions which would effect the forbidden discrimination. *Betfair Pty Ltd v Western Australia* was a particularly clear case because the responsible Minister had gone on record with her opposition to betting exchanges, but surely the Court would also hear evidence on discriminatory executive policies which may not have been loudly trumpeted in a Ministerial press release.

[819] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 481.

Conclusion:

Since the inception of the Australian Constitution in 1901, the focus of s 92 jurisprudence has primarily been on the definition of the proper scope of that section, but connected to that has been the secondary, yet equally important, question of what laws initially within that scope may nonetheless be justified and be preserved as valid. The connexion between the primary question of scope and the secondary question of justification is evident in the growth of the Australian jurisprudence of justification, as the ideological struggles between the ‘individual rights’ and ‘free trade’ views on scope found their echoes in narrower or broader definitions of justification, particularly whether such justification was merely about protecting one interstate trader from being overridden by another or whether it encompassed a broader character of protecting the ‘public interest’.

The initial evolution of the jurisprudence of justification was, to say the least, somewhat confused. A clear distinction was not always made between scope and justification, and the Court was not always clear that it was engaging in a two-stage process of assessment. Indeed, many judgments do not even parse the issue into two stages, but in a retrospective analysis such two-stage parsing reduces some of the confusion of these early decisions wherein judges’ reasonings often ‘talked past each other’. In the historical jurisprudence, the first major attempt to create a unified concept of justification was that of the ‘real object’ of the legislation, a concept developed in *James v South Australia* and *Peanut Board v Rockhampton Harbour Board* to encompass questions of directness of restriction of interstate trade and merely incidental effect on interstate trade. As the Court’s jurisprudence matured and the trade restriction analysis came to dominate the question of scope, from the time of *Samuels v The Readers’ Digest Association*

Pty Ltd justification coalesced around the two distinct grounds, each conceptually distinct: indirect restriction and 'reasonable regulation'.

However, the delivery of the seminal case of *Cole v Whitfield* marked the inauguration of a new era not only for the scope of s 92, which was firmly established by reference to discrimination of a protectionist kind, but consequently for justification too, as the subsequent cases from *Castlemaine Tooheys Ltd v South Australia* onwards show. The contemporary jurisprudence shows an admirable clarity – and unity – of judicial thinking, especially by comparison to the confused and contested jurisprudence which prevailed for most of the 20th Century.

In the contemporary, post-1988 jurisprudence of justification, a law which is *prima facie* discriminatory against interstate trade will be justified if: the defendant State (or, less commonly, Commonwealth) can show that it pursues a legitimate public purpose, that it is suitable to the achievement of that purpose, that it is necessary to the achievement of that purpose, and – most likely – that there is a proper balance between the importance of the legitimate purpose and the gravity of the burden on interstate trade. The suitability, necessity and balancing components are together referred to as the 'proportionality test' of justification.

The list of legitimate purposes is essentially open-ended, provided that economic protectionism itself (including protection of State revenue) cannot so qualify, nor can it even be one among many purposes. While *Betfair Pty Ltd v Western Australia* does question the ongoing theoretical validity of the concept of 'the people of a State' whose welfare these legitimate purposes protect, nevertheless the case does not in practice overrule the use of the concept. Importantly, as compared to the historical jurisprudence, in the contemporary jurisprudence legitimate purpose clearly has a 'public' character. 'Suitability' requires that the impugned law does actually serve to achieve the legitimate purpose advanced, and the Court has not been shy of using this to dismiss a line of potential justification, as in *Castlemaine Tooheys Ltd v South Australia* in which the State law was judged to not actually be suitable to conserve State gas supplies. ‘Necessity’ requires that the impugned law be the manner of achieving the legitimate purpose which is least restrictive of interstate trade. The newly-adopted balancing element appears – although it has not yet been properly tested – to require that Court to be satisfied that there is a proper balance between the legitimate purpose (to which the impugned law is suitable and necessary) and the weight of the burden imposed on interstate trade. As has been adverted to earlier, the Court will need to proceed with caution in the application of this balancing element so as to avoid making excessive inroads into the legislative power, an area in which the Court lacks forensic competence and democratic legitimacy.

The Court has also been careful to apply a close analysis to executive discretion and the circumstances in which it can be justified. Already by the time of *Hughes & Vale Pty Ltd v New South Wales (No 2)* the Court was insisting on objective criteria rather than subjective opinion, and the passage of legislation in 1977 requiring the disclosure of reasons by administrative decision makers has significantly advanced this area of the Court’s jurisprudence, as *Miller v TCN Channel Nine* and *Betfair Pty Ltd v Western Australia* demonstrate.

Many of these ideological and jurisprudential concepts explored above, and most especially the structure of the contemporary test for justification, shall be seen in Chapters VII and VIII to have close echoes in European Union law, indicating the powerful currents that flow deep within the jurisprudence of internal market law, whatever the differences that appear on the surface as storms and surges particular to one system or another pass by.

PART 2: JUSTIFICATION

SUBPART 2: EUROPEAN UNION

CHAPTER VII: JUSTIFICATION OF LEGISLATION COMING WITHIN THE SCOPE OF FREE MOVEMENT OF GOODS AND SERVICES IN THE EU

Subchapter 1: Justification and Free Movement of Goods

Treaty on the Functioning of the European Union (English language edition):

Article 36: The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Introduction:

According to the Treaty on the Functioning of the European Union, measures which contravene art 34 TFEU or art 35 TFEU, whether because they are quantitative restrictions of imports or exports or because they are 'measures having equivalent effect' to quantitative restrictions of imports or exports, may be justified on the conditions provided in art 36 TFEU.

Additionally, measures offending against art 34 TFEU or 35 TFEU may be justified because they protect fundamental rights and freedoms set out in the Convention for the Protection of Fundamental Rights and Freedoms 1950 (the European Convention on Human Rights or 'ECHR') which have, over time, been absorbed into the EU legal order as general principles. This latter route of justification has existed since at least the late 1980s, but since the inculcation of these rights in the Charter of Fundamental Rights in 2009, it is to the Charter that the Court first looks.

Furthermore, as was seen in Chapter III, *Cassis de Dijon* created the concept of 'measures necessary to satisfy mandatory requirements' which were said not to come within 'measures having equivalent effect' under art 34 TFEU, and this has since been recognised as applying to art 35 TFEU as well[820]; where it is applicable, this concept effectively functions as another means of justification[821]. Since proportionality is a common requirement to all avenues of justification and applies in the same fashion to all of them, it will be dealt with in its own right.

<u>Section 1 – Article 36 TFEU</u>

The list of grounds of potential justification in art 36 TFEU is exclusive, and the Court has refused to read in new grounds (including grounds which are legitimate under 'mandatory

[820] Case C-205/07 *Criminal Proceedings against Lodewijk Gysbrechts and Santurel Inter BVBA* [2008] ECR I-9947, para 45.

[821] Technically, a national law which qualifies as a 'measure necessary to satisfy mandatory requirements' does not offend against art 34 TFEU or art 35 TFEU in the first place, and so does not require 'justification' in the same sense as the word is used in art 36 TFEU. Nonetheless, the Court uses the term 'justification' in the context of 'mandatory requirements', and there is a functional equivalence between 'mandatory requirements' and 'justification' in the strict sense under art 36 TFEU.

requirements')[822]. Importantly, the economic interest of the Member State is not a basis for justification under art 36 TFEU[823]. In order for a national law offending art 34 TFEU or art 35 TFEU to be justified under art 36 TFEU, the purpose of the law must come within one of the stated grounds in that article. Once European Union-level law effectively achieves an objective in respect of certain goods, the pursuit of that objective will *no longer be capable* of justifying national laws which breach art 34 TFEU or art 35 TFEU[824].

Grounds of Justification:

It is not necessary to undertake a minute examination of each basis for justification under art 36 TFEU, but some information on the more important bases will be useful in explaining the content of art 36 TFEU.

1 – Public Morality:

In general, it is for Member States to establish their own standards of public morality according to their own national values[825]. Where a national law prohibits the importation of certain goods on the basis of public morality, however, it must also prohibit the manufacture and marketing of those goods within the domestic sphere[826]. This basis of justification has been little

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[822] Case C-113/80 *Commission v Ireland ('Souvenir Jewellery Hallmarking')* [1981] ECR 1625, paras 7-8.

[823] Case C-95/81 *Commission v Italy ('Advance Payments for Imports')* [1982] ECR 2187, para 27.

[824] Case C-22/83 *Campus Oil Ltd and others v Minister for Industry and Energy and others* [1984] ECR 2727, para 27.

[825] Case C-24/79 *R v Maurice Donald Henn and John Frederick Ernest Darby* [1979] ECR 3795, para 15.

[826] Case 121/85 *Conegate Ltd v HM Customs & Excise* [1986] ECR 1007, paras 15-16. This may be seen as matter going to the first element of the proportionality test, i.e. whether the law prohibiting importation is suitable to the task of protecting public morality, because banning imports but not domestic production cannot preserve national moral standards. Alternatively, it could be seen as a matter going to whether it is a disguised restriction on interstate trade.

relied on, the only prominent cases involving a British customs law which prohibited the importation of 'indecent or obscene articles' (which in one case were Danish pornographic films and magazines, in the other case German inflatable erotic dolls), but even in today's modern, liberal, cosmopolitan European Union there remains sufficient difference in national moral standards for public morality to be a live basis for justification of restrictions on importation of goods from other Member States.

2 – Public Policy:

In the context of public policy as a justification for derogation from the free movement of capital, the Court has said that public policy (and public security) may only be invoked as justification when there is a "genuine and sufficiently serious threat to a fundamental interest of society"[827], and this definition should in principle apply to derogations from free movement of goods as well[828]. Like any derogation from a TFEU free movement provision, the notion of 'public policy' must be interpreted strictly[829] and it will not encompass consumer protection[830] or the fairness of commercial transactions[831] (or, presumably, the other legitimate bases of justification under the mandatory requirements doctrine which are not mentioned in art 36 TFEU).

[827] Case C-54/99 *Association Église de Scientologie de Paris v The Prime Minister* [2000] ECR I-1335, para 17.

[828] As it applied to freedom to provide services in Case C-36/02 *Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para 30.

[829] Case C-36/02 *Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para 30.

[830] Case C-177/83 *Th. Kohl KG v Ringelhan & Rennet SA and Ringelhan Einrichttungs GmbH* [1984] ECR 3651, para 19.

[831] Case C-113/80 *Commission v Ireland ('Souvenir Jewellery Hallmarking')* [1981] ECR 1625, para 5.

3 – Public Security:

As for any derogation under art 36 TFEU, the public security basis cannot be used to protect the mere economic interests of a Member State. However, it will be available when the objective which the national measure seeks to achieve is one so intimately connected with the welfare of the country that if it is not achieved the entirety of the economy, the national institutions and the existence of the country may be threatened. Such a public security justification was allowed in the case of an Irish law which burdened interstate trade by requiring that petroleum importers purchase a quantity of their total petroleum sales from an Irish refinery, so as to maintain the Irish oil refining industry and mitigate the possibility of fuel shortages in Ireland:

> It should be stated in this connection that petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that [art 36 TFEU] allows States to protect.[832]

On this basis, it is only in the case of objectives having 'exceptional importance' to the preservation of a Member State that public security will be an available basis of justification under art 36 TFEU[833].

[832] Case C-22/83 *Campus Oil Ltd and others v Minister for Industry and Energy and others* [1984] ECR 2727, para 34.

[833] See also Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099, Opinion of AG Jacobs, para 209.

4 – Health and Life of Humans, Animals and Plants:

Whilst a Member State can generally set its own standards of health protection[834], it must be able to prove, on the basis of scientific evidence and not nebulous conjecture, that the subject of the national regulation poses a risk to public health[835]; as with other bases for justification under art 36 TFEU, health protection must be interpreted strictly as it is a derogation from the general principal of non-discrimination[836]. Where there exists uncertainty within the scientific community as to the threat posed by the subject of the national regulation, or there is uncertainty as to the amount of exposure to a potentially harmful product which a person is likely to have in the course of his or her life, the Member State will be capable of deciding what scientific evidence to favour and will be able to justify national measures on this basis[837]. It is for the legislating Member State to decide on the appropriate level of protection in response to such risks[838], "without having to wait until the reality and seriousness of those risks become fully apparent"[839]. Thus, the Court applies the so-called 'precautionary principle'[840], and this

[834] Case C-366/04 *Georg Schwarz v Bürgermeister der Landeshaupstadt Salzburg* [2005] ECR I-10139, para 32.

[835] Case C-17/93 *Criminal Proceedings against J.J.J. Van der Veldt* [1994] ECR I-3537 at paras 16-18; Case C-270/02 *Commission v Italy ('Imported Sports Food')* [2004] ECR I-1559, para 24.

[836] Case C-148/15 *Deutsche Parkinson Vereinigung eV v Zentrale sur Bekämpfung unlauteren Wettbewerbs eV* ECLI:EU:C:2016:776, para 29.

[837] Case 174/82 *Criminal Proceedings against Sandoz BV* [1983] ECR 2445, paras 16-17; Case C-192/01 *Commission v Denmark ('Vitamin Enriched Food Labelling')* [2003] ECR I-9693, paras 43-44.

[838] Case 174/82 *Criminal Proceedings against Sandoz BV* [1983] ECR 2445, para 16.

[839] Case C-157/96 *Ex parte National Farmers' Union* [1998] ECR I-2211, para 63. The Court was here speaking in the context of *EU-level* legislation in response to an evolving risk (bovine spongiform encephalopathy in the UK in the 1990s), but as an explanation of the precautionary principle it is equally applicable to Member States' reliance on that principle.

[840] Alan Dashwood and others, *Wyatt & Dashwood's European Union Law* (6th edn, Hart Publishing 2011) 436. Indeed, the precautionary principle has become so broadly established in EU law that, according to the General Court (formerly known as the 'Court of First Instance'), it has the status of an autonomous principle in EU law in respect of EU legislation. "…[A]lthough the precautionary principle is mentioned in the Treaty only in connection [*sic*] with environmental policy, it is broader in scope. It is intended to be applied in order to ensure a high level of

effectively allows the Member State to adopt measures treating the regulated good in the strictest manner reconcilable with the range of scientific opinions: "…account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the Treaty and that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary form one Member State to another, Member States must be allowed discretion"[841].

The Precautionary Principle:

When relying on the precautionary principle, a Member State must rest its choice of restrictive legislation on "the result of international scientific research" and the "latest scientific data available at the date of the adoption of the national decision"[842], which may include the use of expert studies[843] and statistics as to market share of various products which are the subject of the impugned legislation[844]. The risk itself must be "real, specific and serious"[845] and the risk assessment "cannot be based on purely hypothetical considerations"[846] but rather must be "an

protection of health, consumer safety and the environment, in all the Community's spheres of activity…It follows that the precautionary principle can be defined as a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment by giving precedence to the requirements related to the protection of those interests over economic interests": Joined Cases T-74/00, T-76/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others v Commission* [2002] ECR II-4945, paras 183/184.

[841] Joined Cases C-171 and 172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, para 19.

[842] Case C-95/01 *Criminal Proceedings against Greenham and Abel* [2004] ECR I-1333, paras 40 and 42.

[843] Case C-463/01 *Commission v Germany ('Bottle Deposit')* [2004] ECR I-11705, para 60.

[844] Case 90/86 *Criminal Proceedings against Zoni* [1988] ECR 4285, para 27.

[845] Case C-423/98 *Albore* [2000] ECR I-5965, para 22.

[846] Case C-95/01 *Criminal Proceedings against Greenham and Abel* [2004] ECR I-1333, para 43.

objective, detailed analysis supported by figures, [and] must be capable of demonstrating, with solid and consistent data, that there are genuine risks”[847].

Member States’ choice of what legislation to adopt in response to scientific uncertainty is subject of course to the overriding requirement, applicable to all justification under art 36 TFEU, that the law comply with the principle of proportionality (in particular, the necessity element of that test)[848]. Necessity, in the sense that there was ‘no less restrictive means of achieving the same goal’, does not require that Member States produce scientific studies to show unsuitability of other (less restrictive) legislative options: “It cannot, however, be inferred [from previous case law] that a Member State is deprived of the possibility of establishing that an internal restrictive measure satisfies those requirements, solely on the ground that the Member State is not able to produce studies serving as the basis for its adoption”[849].

Section 2 – Mandatory Requirements:

Availability:

Justification under the ‘mandatory requirements’ doctrine is not available where the law is a quantitative restriction on imports *per se*, nor where the law is a ‘measure having equivalent

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[847] Case C-73/08 *Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française* [2010] ECR I-2735, para 71.

[848] Case C-192/01 *Commission v Denmark (‘Vitamin Enriched Food Labelling’)* [2003] ECR I-9693, para 45.

[849] Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and 410/07 *Stoß and Others* [2010] ECR I-8069, para 72.

effect' because it is discriminatory on its face[850] or in its necessary legal operation[851]; the same is presumably true in respect of exports, although the case law does not specifically address this issue[852]. 'Mandatory requirements' may only be invoked in the case of a law which applies to all goods within its jurisdiction but, in practice, creates a heavier burden on imported goods (indirect discrimination). It has been argued that the reason for 'mandatory requirements' being available in some cases and not others is that *indirect discrimination* is inherently capable of justification and does not require the grounds for justification to be exclusively listed as in art 36 TFEU for *direct discrimination*[853], but equally it has been claimed that the same grounds of justification should be available to all types of national measures, with direct discrimination simply requiring a stronger evidential basis for relying on the justificatory grounds[854]. In respect of environmental protection in particular (which is a head of legitimacy under 'mandatory requirements' but not

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[850] Case C-113/80 *Commission v Ireland ('Souvenir Jewellery Hallmarking')* [1981] ECR 1625, para 11; Joined Cases C-321/94 to C-324/94 *Criminal Proceedings against Jacques Pistre, Michèle Barthes, Yves Milhau and Didier Oberti* [1997] ECR I-2343, para 52.

[851] Case C-207/83 *Commission v United Kingdom ('Country of Origin Labelling')* [1985] ECR 1201, paras 19-20 in which the Court rejects justification under mandatory requirements on the grounds that even thought the law requiring goods be labelled with their national origin applied to all goods, it was intended to allow consumer prejudice to discriminate against goods imported from particular Member States. Taking consumer biases as given, the necessary effect of the law was to allow those biases to act against certain imported goods.

[852] Case C-205/07 *Criminal Proceedings against Lodewijk Gysbrechts and Santurel Inter BVBA* [2008] ECR I-9947 merely affirms (at paras 45 and following) the availability of mandatory requirements and observes no distinction in their application to art 34 TFEU or art 35 TFEU.

[853] Nicholas Bernard, 'Discrimination and Free Movement in EC Law' (1996) 45 International & Comparative Law Quarterly 82, 93.

[854] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2015) 705. See also Peter Oliver and others, *Oliver on Free Movement of Goods in the European Union* (5th edn, OUP 2010) 220, which argues for explicit recognition of what certain cases seem to have tacitly acknowledged, that mandatory requirements apply even in cases of discrimination.

under art 36 TFEU), Advocates-General Jacobs[855] and Bot[856] have argued that the addition of environmental protection to the principles on which the European Union operates and the fact that environmental protection is likely to require differential burdens on goods depending on their origin both indicate that it should in all cases be an available basis for justification. Nevertheless, on the present state of the law[857], 'mandatory requirements' are only available to justify indirect discrimination.

The Identity of the Mandatory Requirements:

While *Cassis de Dijon* mentions fiscal supervision, public health, fairness of commercial transactions and consumer protection in particular, this is not an exhaustive list of mandatory requirements. Other objectives which can qualify as mandatory requirements in the general

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[855] Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099, Opinion of AG Jacobs, paras 230-233. The Court's response was to observe (at para 75) that the law in question was also designed to protect 'the health and life of humans, animals and plants' (which *was* available under art 36 TFEU) and to note the inclusion of environmental protection in the principles of the European Union (at para 76); the issue of justification did not turn out to be relevant however, as the law was found not to contravene art 34 TFEU in the first place. In relation to justification under art 36 TFEU, however, the Court's comments may be taken as an indication that 'health and life of humans, animals and plants' may be read to include environmental protection in a broader sense.

[856] Joined Cases C-204/12 to C-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits en Gasmarkt*, Opinion of AG Bot ECLI:EU:C:2013:294, paras 92-97. The Court's response was to ignore the issue and simply find the 'green electricity' scheme at hand non-discriminatory in the first place. In later stages of the litigation, Advocate-General Bot seems to have acknowledged that his earlier arguments had not commanded the assent of the Court in its earlier decisions, and states crisply "I shall not mount a rearguard action, although I do not find the Court's reasoning in those judgments to be persuasive": see Case C-492/14 *Essent Belgium NV v Vlaams Gewest and Others*, Opinion of AG Bot ECLI:EU:C:2016:257, para 4; see also para 83.

[857] For recent reaffirmation that mandatory requirements are not available in cases of discrimination, see footnote 951 below (the Court is addressing services in these cases, but the point is equally applicable to goods, given the identical jurisprudence on this point).

interest are environmental protection[858], the encouragement of the film-making industry[859] and the regulation of working hours[860] and shop opening hours[861]. The kinds of objectives which may be pursued as mandatory requirements might best be summed up as "legitimate elements of [national] economic and social policy, consistent with the objectives of public interest pursued by the [TFEU]"[862]. It seems, then, that unlike the grounds of justification under art 36 TFEU, mandatory requirements will allow considerations of national economic policy short of the high threshold of 'public security', provided that they do not contradict principles of the TFEU[863]. Prof Möstl argues that the open-endedness of the list of mandatory requirements is part of the ECJ striking the balance between central, EU-level authority and Member State authority, recognising the basic necessity for Member States to be able to pursue public policy on a variety of different topics: "The very fact that in its jurisdiction on "mandatory" or "overriding requirements" as developed since *Cassis de Dijon*, the ECJ has been ready to accept unwritten

[858] Case C-240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usages (ADBHU)* [1985] ECR 531, para 13. Paralleling the growing acceptance of environmental protection as a 'mandatory requirement' which could be pled in justification of Member State laws restricting free movement, in the field of EU-level legislation, environmental protection was originally just incidental to the development of the common market, in the sense that some Member States had more stringent environmental laws than others and the free flow of goods, services, capital and labour would be distorted if there were not appropriate EU-level environmental legislation imposing common minimum standards of protection: Michael Longo, 'Co-Operative Federalism in Australia and the European Union: Cross-Pollinating the Green Ideal' (1997) 25 Federal Law Review 127, 132.

[859] Joined Cases 60/84 and 61/84 *Cinéthèque SA v Fédération Nationale des Cinémas Français* [1985] ECR 2605, paras 20-23.

[860] Case C-312/89 *Union Départementale des Syndicats CGT de l'Aisne v SIDEF Conforama, Société Arts et Meubles and Société Jima* [1991] ECR I-997, para 11; Case C-332/89 *Criminal Proceedings against André Marchandise, Jean-Marie Chapuis and SA Trafitex* [1991] ECR I-1027, para 12.

[861] Case 145/88 *Torfaen Borough Council v B & Q Plc* [1989] ECR 3851, para 14.

[862] Case C-155/80 *Summary Proceedings against Sergius Oebel* [1981] ECR 1993, para 12. In that case, the sole purpose of the restriction on imports was to ensure compliance with restrictions on overnight working hours for bakers (at para 18), which formed "a legitimate element of economic and social policy" (at para 12).

[863] This is not the same as the third element of the proportionality test, as it is merely a question of whether the national interest advanced is *per se* consistent with the principles of the TFEU, rather than balancing the measures necessary to achieve this national interest against the diminution of free movement of goods.

reasons of justification for interferences with fundamental freedoms beyond what is laid down explicitly in the treaties, can only be interpreted as an expression of deep respect for exactly that original responsibility of the Member States [to protection the public interest within their territory]"[864].

Owing to the fact that the list of objectives which may be pursued under 'mandatory requirements in the general interest' is not closed, the limit on the applicability of the doctrine is more likely to be found in the proportionality element of the test for justification (see below).

Section 3 – Fundamental Rights and Freedoms:

The Court has long insisted that, when legislating in a manner which affects the free movement of goods, Member States must respect fundamental rights and freedoms recognised and protected by EU law; most conspicuously, this jurisprudence has focused on rights and freedoms established in the ECHR, inasmuch as such rights and freedoms also form part of EU law[865]. The protection of such a fundamental right may thus constitute justification for a breach of art 34 TFEU or art 35 TFEU[866]. Of late, the matter has come to be examined primarily in the light of the Charter of Fundamental Rights of the European Union, which has enjoyed binding legal force since 2009.

[864] Markus Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405, 411.

[865] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE v Dimotiki Etairia Pliroforissis* [1991] ECR I-2925, paras 44-45; Case C-299/95 *Friedrich Kremzow v Austria* [1997] ECR I-2629, para 14; Case C-368/95 *Vereinigte Familiapress Zeitunsverlags und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689, paras 18 and 24-26. The inclusion, within the general principles of EU law, of fundamental rights deriving from the ECHR and from constitutional traditions common to the Member States is now made explicit in art 6(3) of the Treaty on European Union.

[866] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659, para 74.

Charter of Fundamental Rights of the European Union:

In the context of justification of Member State laws which are *prima facie* inapplicable due to incompatibility with EU law, it is necessary to consider the role of the Charter of Fundamental Rights of the European Union (the CFREU, or simply 'the Charter'). The Charter was proclaimed in 2000 by the EU Parliament, Commission and Council of Ministers, but its legal effect was uncertain (and probably non-existent[867]) until it was formally incorporated in the Treaty of Lisbon, which itself came into force in 2009. Largely based on rights already enshrined in the European Convention on Human Rights, to which EU candidate states are required to have acceded before they accede to the EU itself, the Charter binds EU institutions and the Member States through its invocation in art 6 TEU: "The Union recognises the rights, freedoms and principles set out in the Charter…which shall have the same value as the Treaties". Most relevantly for present purposes, the Charter thus binds the ECJ and national courts in the application of EU law.

Inasmuch as it touches on free movement law, the Charter is largely consistent with ECJ precedent. Indeed, the Court has affirmed that there is no need for a separate analysis of Charter-based claims for justification, as the Charter jurisprudence merely runs parallel with the pre-existing jurisprudence before the Charter came into effect[868]. As a constitutional document which officers of the European Commission swear to uphold[869], the Charter has an important

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[867] Although note that the Court of Justice was already referring to it before its formal empowerment: Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] I-505, para 41.

[868] Case C-390/12 *Robert Pfleger* ECLI:EU:C:2014:281, paras 35-36; Case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft v Hungary* ECLI:EU:C:2015:386, para 74.

[869] As of 2010, new EU Commissioners "solemnly undertake to respect the Treaties and the Charter of Fundamental Rights of the European Union in the fulfilment of all [their] duties".

symbolic function, being held in the same esteem as the Treaties themselves. Together with the Treaties, it is thus rendered akin to the foundational constitutional documents which presidents and prime ministers across the liberal democratic world promise to uphold when they enter upon their office[870]. As an additional source of free movement law, however, the Charter is moot. The contrast between the presentational and substantive roles of the Charter is well enunciated by Prof Stephen Weatherill:

> …the Charter is *presentationally* innovative in free movement law. The Court has taken to treating challenged national measures as restrictive not only from the point of view of free movement law but also limitations from the perspective of Articles 15-17 of the Charter dealing with the freedom to choose an occupation, the freedom to conduct a business and the right to property. But it has then typically declared that no need arises for separate examination of the Charter-based claims, for analysis runs in perfect alignment with the Court's pre-Charter practice: the Charter is not *substantively* transformative. Precisely the same pattern applies to justification: the Court's citation of the Charter as a source of values that might serve an interest of higher significance than trade integration should not be taken to represent any change of *substance*.[871] (emphasis in original)

Thus, the Charter marks an important step in the constitutionalisation and political development of the European Union, but does not mark a substantive development in the EU's free movement case law, nor the economic integration which is the purpose of that case law. Nevertheless, given its presentational role, arguments relating to justification on the grounds of fundamental

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[870] The President of India promises to "preserve, protect and defend the Constitution and the laws" ("संविधान और विधि का परिरक्षण, संरक्षण और प्रतिरक्षण करूँगा"; *Constitution of India* Article 60) and the Prime Minister to "bear true faith and allegiance to the Constitution of India as by law established" ("विधि द्वारा स्थापित भारत के संविधान के प्रति सच्ची श्रद्धा और निष्ठा रखूँगा"; *Constitution of India* Schedule III). The President of the United States promises to "preserve, protect and defend the Constitution" (*Constitution of the United States* Article II Section 1). The President and Chancellor of Germany promise to "uphold and defend the Basic Law and the laws of the Federation" ("das Grundgesetz und die Gesetze des Bundes wahren und verteidigen"; *Basic Law of the Federal Republic of Germany* Article 56). The President and Prime Minister of Italy promise to "observe loyally the Constitution" ("osservar[e] lealmente la Costituzione"; *Constitution of the Italian Republic* Article 91 (President) and *Law Number 400/88* Article 1(3) (Prime Minister)). By contrast, there is no oath of office at all for the President of France.

[871] Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 106.

rights will now commence from the Charter[872], in particular where they relate to grounds of justification specifically mentioned in the Charter, such as the right of workers to take collective action (art 28 CFREU), and the obligation to ensure a high level of protection of human health (art 35 CFREU), the environment (art 37 CFREU) and consumers (art 38 CFREU).

The existence of Charter rights, however, does not detract from the wider grounds of justification under 'fundamental rights and freedoms within EU law', which predate the existence of the Charter and continue to exist alongside it. Indeed, the Charter is explicitly clear to this effect:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, *including the European Convention for the Protection of Human Rights and Fundamental Freedoms*, and by the Member States' constitutions.[873] (emphasis added)

As such, the jurisprudence of justification by protection of fundamental rights endures.

Fundamental Rights and Art 36 TFEU and Mandatory Requirements:

Turning to rights deriving from the ECHR, *absolute* rights and freedoms in the ECHR, such as the right to life or the freedom from torture, appear to be capable of unrestricted exercise, meaning that national measures necessary for the protection of such an absolute right would *always* be justified in respect of potential breaches of art 34 TFEU or art 35 TFEU[874]. In respect of ECHR rights which are *not absolute*, however, such as freedom of expression or freedom of

[872] For an early example, see Case C-28/09 *Commission v Austria ('Heavy Lorry Restrictions')* [2011] ECR I-13525, para 121.

[873] Art 53 CFREU.

[874] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659, para 80.

association and assembly, the Court has recognised that they must be applied in a social and political context in which rights and freedoms in the ECHR and in the TFEU may conflict with one another[875], and that ECHR rights may not be exercised in a manner disproportionate to TFEU rights[876], nor *vice versa*[877].

The relationship between justification on the basis of protection of ECHR rights and freedoms and justification on the basis of public policy in art 36 TFEU is somewhat unclear. It might be thought that cases on ECHR rights, and indeed cases on EU rights in general are a subset of public policy for art 36 TFEU and will automatically qualify as legitimate interests for 'public policy' justification because the policy of the EU is taken to be the policy of the Member States. While there is little if any practical difference between treating EU rights cases as a separate category from public policy, there does seem to be a sound argument in theory for distinguishing between public policy on the one hand, which will vary between Member States, and EU policy (ECHR and other EU rights) on the other hand, which will be the same across the European Union. In such a conception, 'public policy' under art 36 TFEU would require proof that it is indeed the policy at that time of the Member State in question, and may be more difficult to justify because, being unique to one Member State, it is more likely to restrict free movement of goods than EU policy (such as the protection of EU rights) which should apply across the entire European Union anyway. Alternatively, fundamental rights and freedoms under

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[875] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659, para 80.

[876] Case C-200/96 *Metronome Musik GmbH v Music Point Hokampt GmbH* [1998] ECR I-1953, para 21. See also Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Svenska Byggnadsarbetareförbundets avd. 1, Byggettan and Svenska Elektrikerföbundet* [2007] ECR I-11767, paras 91 and 93-95 in which the Court held that the ECHR freedoms "must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality" (in that case, the ECHR's freedom of expression and freedom of association and assembly and the TFEU's freedom to provide services).

[877] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE v Dimotiki Etairia Pliroforissis* [1991] ECR I-2925, para 44.

EU law might be thought to be subsumed within mandatory requirements, but fundamental rights can even justify measures discriminatory on their face, which mandatory requirements cannot.

Section 4 – Proportionality:

A national law seeking justification under either art 36 TFEU, 'mandatory requirements' or 'fundamental rights and freedoms' must pass a proportionality test. The precise elements of this proportionality test are disputed: it usually appears to have two elements (suitability and necessity) but is sometimes argued to have three elements (suitability, necessity and balancing)[878]. The distinction between the different elements of the proportionality test is that the *suitability element* assesses whether the national law in question is actually capable of achieving the desired legitimate purpose, the *necessity element* assesses whether the law is necessary to achieve that purpose in the sense that there is no other means less burdensome on free movement of goods by which the same purpose could be achieved, and the *balancing element* (if it exists) assesses whether the necessary means of achieving a legitimate purpose are nevertheless disproportionate to the burden on free movement of goods[879]. On fulsome consideration, it appears that the proportionality test probably does include all three elements since proportionality is a general principle of EU law and at this general level it has been stated

[878] The three-element proportionality test probably derives from German administrative law: Nicholas Green, 'Proportionality and the Supremacy of Parliament in the UK' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999) making reference to Jürgen Schwarze, *European Administrative Law* (1st edn, Sweet & Maxwell 1992) 689 (Prof Schwarze's work has subsequently been updated to a 3rd edn in 2006, although without altering the relevant point).

[879] See Takis Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999) 68; Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, OUP, Oxford, 2016) 179-180.

that the proportionality test includes the three elements of suitability, necessity and balancing[880]. The three-element proportionality test has also been found to be specifically applicable to the free movement of goods[881] and received the support of Advocate-General Slynn in his Opinion in *Commission v Denmark ('Bottle Deposit')* (1988) [882], Advocate-General van Gerven in his Opinion in *Criminal Proceedings against Gourmetterie Van den Burg* (1990)[883] and Advocate-General Jacobs in *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* (2003)[884]. However, many cases do not make reference to this third element and, perhaps most significantly, no case has been decided specifically on the basis of this third element.

1 – Suitability:

At first blush, this is a relatively straightforward element, requiring that the measures adopted be capable of achieving the legitimate purpose. The Court will not merely accept the Member State's word for it that the impugned legislation is actually suitable for achieving the legitimate purpose advanced by way of justification, but will consider whether the legislation *actually* achieves that purpose: for example, in *Deutsche Parkinson Vereinigung eV v Zentrale sur Bekämpfung unlauteren Wettbewerbs eV* (2016))[885], after it was found that price-fixing

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[880] Case 331/88 *The Queen v Minister for Agriculture, Fisheries and Food and Secretary of State for Health; Ex parte Fedesa* [1990] ECR I-4023, para 13.

[881] Case C-22/82 *Commission v France ('Protests Against Italian Wine')* [1983] ECR 1013, para 54; Case C-22/83 *Campus Oil Ltd and others v Minister for Industry and Energy and others* [1984] ECR 2727, at para 37.

[882] Case 302/86 [1988] ECR 4607, Opinion of AG Slynn, 4626. See also Damien Geradin and Raoul Stewardson, 'Trade and Environment: Some Lessons from *Castlemaine Tooheys* (Australia) and *Danish Bottles* (European Community)' (1995) 44 International & Comparative Law Quarterly 41, 59-61.

[883] Case C-169/89 [1990] ECR I-2143, Opinion of AG van Gerven, paras 8-10.

[884] Case C-112/00 [2003] ECR I-5659, Opinion of AG Jacobs, paras 104-112.

[885] Case C-148/15 ECLI:EU:C:2016:776.

legislation for pharmacy-only drugs created a discriminatory burden against interstate traders, the German authorities pleaded by way of justification that such regulation was necessary to protect human health, specifically by ensuring uniform supply of such drugs across the country, the supply of such drugs to emergency services, the continued existence of pharmacies in rural areas and the protection of medical doctors from being unduly pressured by patients into prescribing unnecessary drugs. The Court went through each of these supposed justifications and found that there was not only no evidence to support that the price-fixing legislation was suitable to achieve them[886], but that if anything it might actually have the opposite effect by removing the possibility that prescription drugs could be provided at higher or lower prices to suit the market demands of different areas within the country[887]. (The central role of evidence – or the lack of it – in the Court's deliberations, which has been discussed above, is also notable here)

Suitability is much less likely to be a matter of dispute than the necessity element of the proportionality test. That said, where there is dispute as to the suitability of a national measure to achieve a legitimate purpose, it is often framed around whether the measure pursues its supposed purpose "in a consistent and systematic manner"[888]. In a detailed article on this question[889], Gjermund Mathisen examines the role of consistency ("an absence of

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[886] Case C-148/15 *Deutsche Parkinson Vereinigung eV v Zentrale sur Bekämpfung unlauteren Wettbewerbs eV* ECLI:EU:C:2016:776, paras 37 (uniform supply), 39 (emergency services) and 41 (patients pressuring doctors).

[887] Case C-148/15 *Deutsche Parkinson Vereinigung eV v Zentrale sur Bekämpfung unlauteren Wettbewerbs eV* ECLI:EU:C:2016:776, para 38 (continued existence of rural pharmacies).

[888] Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, para 53; Joined Cases C-171 and 172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, para 42; Case C-169/07 *Hartlauer* [2010] ECR I-1721, para 55; Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, para 94.

[889] Gjermund Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 Common Market Law Review 1021.

contradictions"[890] with other laws of the Member State) and coherence (the measure "makes sense, fits, is intelligible"[891] for the achievement of its supposed purpose and pursues it in a systemic manner) in the justification of *prima facie* incompatible measures. On close analysis, consistency and coherence turn out to be not independent and additional requirements of the test for justification, but rather factors in the assessment of suitability – their absence is strongly indicative of *unsuitability*, but their presence is not strictly necessary for suitability. Thus, the case law discloses numerous examples of Member State laws failing the justification test because they pursued their legitimate purpose *inconsistently* and were thereby *unsuitable* to that purpose[892]. Member State laws on product requirements which purported to protect the health of consumers have been vitiated by inconsistency, such as *Commission v Germany ('Beer Purity Law')* (1987)[893], in which a German law forbade the use of additives in beer, despite the fact that they were not similarly forbidden in other widely consumed beverages, and *Debus* (1992)[894], in which an Italian law limited sulphur dioxide levels in beer to 20mg/L while imposing no such limitation on wine, which was much more widely consumed in the Italian market. In these cases, the fact that the impugned law imposed a restriction on the free movement of one particular good without applying to other goods whose restriction would also be necessary to achieve the

[890] Gjermund Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 Common Market Law Review 1021, 1023.

[891] Gjermund Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 Common Market Law Review 1021, 1024.

[892] See also, generally, Niamh Nic Shuibne and Marsela Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2013) 50 Common Market Law Review 965, discussed further below in the context of the necessity element.

[893] Case 178/84 [1987] ECR 1227.

[894] Joined Cases C-13/91 and C-113/91 [1992] ECR I-3617.

justificatory purpose rendered it unsuitable to the achievement of that purpose and thus prevented justification of the restriction.

In the recent case of *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland* (2015)[895], the Court confirmed the significance of consistency in the assessment of the suitability element of justification: "a restrictive measure can be considered an appropriate [i.e. suitable] means of securing the achievement of the objective pursued only if it genuinely reflects a concern to secure the attainment of that objective in a consistent and systemic manner"[896]. The legal provisions at issue in that case, which created a minimum pricing scheme for alcohol, were judged to be suitable to the achievement of the objective of protecting public health (specifically, reducing alcohol consumption by excessive drinkers and alcohol consumption by the population at large) because they formed part of a larger scheme of Scottish Government legislation and policy aimed at achieving these specific goals – they were part of a consistent and systemic suite of policy measures[897].

Nevertheless, it is necessary to bear in mind that consistency and coherence are not to be applied as strictly as if there were specific requirements for justification in and of themselves, lest an impractical barrier be set up to any new and reforming legislation on the part of Member States: "States may often tend to address problems with new and specific measures, be it in replacement of or in addition to any existing measures, rather than with comprehensive reform of all existing relevant measures. The latter approach is simply not practicable in all circumstances.

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[895] Case C-333/14 ECLI:EU:C:2015:845.

[896] Case C-333/14 *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland* ECLI:EU:C:2015:845, para 37.

[897] Case C-333/14 *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland* ECLI:EU:C:2015:845, para 38.

As a result, inconsistencies might often be found if the search for them is comprehensive enough"[898].

Likewise, a Member State law which does not pursue its purported purpose in a systemic manner (i.e. is *incoherent*) is *unsuitable* to the achievement of that purpose. For example, in respect of a free movement of goods, in *Commission v United Kingdom ('Diseased Turkeys')* (1982)[899], a British law on dealing with the infectious poultry virus which caused Newcastle disease[900] abruptly changed in 1981 from a preventative policy of vaccination of birds to a curative policy which forbade vaccination and prescribed compulsory slaughter of all birds in a flock which had been exposed to the disease, and prohibited all poultry meat and egg imports from countries which did not apply the same policy; the purported purpose of this policy change was the protection of the human and animal health, but it lacked rigorous scientific backing, in sharp contrast to the strong scientific backing that underlay the previous adoption of the preventative vaccination policy in 1964. As a result, the Court was of the opinion that the British law did not pursue its stated purpose in a systemic way, and was thus unsuitable to it and unjustified[901]. Laws on selling arrangements whose purpose was the protection of consumers

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[898] Gjermund Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 Common Market Law Review 1021, 1046.

[899] Case C-20/82 [1982] ECR 2793.

[900] The Newcastle disease virus is a type of avian paramyxovirus 1, an RNA virus within the *Avulavirus* genus which infects both birds and humans; in birds, it causes respiratory difficulties, nervous tremors, swelling of tissue and eventual death, although in humans it causes no harm beyond mild conjunctivitis and influenza-like symptoms.

[901] "It should be noted, in this context, that when the United Kingdom abandoned, in 1964, the policy of non-vaccination and compulsory slaughter conducted till then in Great Britain, in order to adopt a policy of control of Newcastle disease by vaccination, this change of policy was thoroughly prepared by an elaborate report of a committee of experts, by various studies and by prolonged discussions among veterinary experts. The evidence available in the present case does not suggest that any comparable effort was made before the Government decided, in 1981, to reintroduce the policy which it had applied before 1964. *The deduction must be made that the 1981 measures did not form part of a seriously considered health policy*." Case C-20/82 *Commission v United Kingdom ('Diseased Turkeys')* [1982] ECR 2793, para 38 (emphasis added).

have been vitiated by incoherence, such as *GB-INNO-BM v Confédération du commerce luxembourgeois* (1990)[902], in which a Luxembourg law prohibited advertising which mentioned how long a special discounted price lasted or what the previous (undiscounted) price of the product had been, while evincing no evidence as to how keeping this information from consumers actually helped them in any meaningful way, and similarly *Schutzverband gegen Unwesen in der Wirtschaft eV v Yves Rocher GmbH* (1993)[903], in which a German law prohibited the use of 'eye-catching' or 'conspicuous' price comparisons in product advertising, without showing how the prevention of accurate (as distinct from false or misleading) price comparisons actually protected the consumer from harm. As these examples show, coherence is potentially a more controversial criterion of assessment than consistency: while consistency involves a relatively straightforward comparison between activities which are and aren't restricted by a law to show an objective inconsistency in the pursuit of the stated purpose, coherency involves an assessment that a given restriction isn't logically connected to the achievement of the stated purpose, isn't extensive enough or doesn't have sufficient evidential backing – thereby relying on a more subjective and contestable reasoning process.

What is common to both consistency and coherence, however, is that they are not additional requirements in the test for justification, but methodological tools for examining the element of suitability. In Mathisen's expression, "thinking and reasoning in terms of consistency may help pinpoint legal or factual circumstances which do undermine the suitability of the legislation at issue"[904], or to put it more forcefully, as Prof Gert Straetmans says, they can function as a

[902] Case C-362/88 [1990] ECR I-667.

[903] Case C-126/91 [1993] ECR I-2361.

[904] Gjermund Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 Common Market Law Review 1021, 1042.

'hypocrisy test'[905], as they are used by the Court to go behind the mere assertion by a Member State that a measure pursues a certain legitimate objective, so as to determine whether it actually does pursue this objective (whether it is actually 'suitable' to it) or this is just a colourable purpose[906]. On the other hand, looking at the issue from the opposite perspective, consistency and coherence make a more extensive limitation more likely to be justified: "Even a measure as restrictive as a public monopoly, if only it forms part of a consistent policy, may be easier to justify than a far less restrictive licensing requirement disrupted by inconsistencies. In that sense, consistency makes restrictions on free movement more acceptable"[907]. This demonstrates the complex role played by questions of consistency and coherence within the assessment of the suitability of a restrictive measure, and its ultimate justification.

2 – Necessity:

Since justification is a derogation from the TFEU's fundamental principle of free movement of goods[908], it must be interpreted narrowly to mean that the national measures are *necessary* to

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[905] Gert Straetmans, 'Case C-6/01, *Anomar* v. *Estado português*; Case C-243/01, *Piergiorgio Gambelli* e.a.; and C-42/02, *Diana Elisabeth Lindman*' (2004) 41 Common Market Law Review 1409, 1424 (note 59).

[906] See also Gjermund Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 Common Market Law Review 1021, 1034.

[907] Gjermund Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 Common Market Law Review 1021, 1047.

[908] Prof Markus Möstl would qualify the primacy of free movement of goods as *the* fundamental principle of the EU. In the context of mutual recognition and secondary law, although equally applicable to primary EU law such as the Treaties in the context of his larger argument, he observes that "The ECJ, at times, has the tendency to suppose that mutual recognition facilitating free movement is the main aim of European legislation so that all exceptions from it (even if they are permitted in the interest of safety or other legitimate policy goals) must be given a narrow meaning. This approach seems one-sided. A well-balanced interpretation of secondary law must seek to give *effet utile* to both its aims, the internal market one and the substantive policy one": Markus Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405, 417.

achieve the legitimate object[909], that is, that there must be no other means less burdensome on interstate trade by which this object may be achieved[910]. As the recent case of *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland* shows, the Court will engage in quite a close analysis of necessity, and will not let Member State legislation pass the necessity stage of the proportionality test if there is a less restrictive alternative to achieve the same end. The Court was strongly of the opinion that the minimum pricing scheme for alcohol at issue in the case was not *necessary* to achieve a reduction in excessive alcohol consumption (and alcohol consumption in general) if an excise scheme could achieve the same end. The reason for this was that an increase in the alcohol excise would affect all alcohol, both domestic and imported, equally, whereas a minimum pricing scheme could fall more heavily on imported alcohol given that lower retail price was one of the chief means by which relatively unknown foreign alcohol could compete against well-known local Scottish alternatives which had higher cost of production[911]. (On this point, see the discussion in Chapter III regarding whether such restrictions disadvantage interstate traders as such or rather new market entrants whether domestic or interstate.) For an EU court to review Member State legislation of such obvious sensitivity as that relating to alcohol policy, and then to effectively propose that the Member State abandon its chosen policy response in favour of a significant change to its taxation system, is a major decision with important implications for the EU-Member State political balance – all the more so when the legislation in question had been enacted in an attempt to ameliorate a

[909] Case C-25/76 *Simmenthal SpA v Ministero delle Finanze Italiano* [1976] ECR 1871, para 10; Case C-153/78 *Commission v Germany ('Meat Import Restrictions')* [1979] 2555, para 5.

[910] Case C-104/75 *Adriaan de Peijper, Managing Director of Centrafarm BV* [1976] ECR 613, para 17; Case C-22/83 *Campus Oil Ltd and others v Minister for Industry and Energy and others* [1984] ECR 2727, para 44.

[911] Case C-333/14 *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland* ECLI:EU:C:2015:845, paras 42-48.

longstanding bane of Scottish public health, surely the central ground of justification under art 36 TFEU. For all its tough treatment of the necessity or otherwise of the Scottish minimum pricing legislation, the Court did, however, pass the actual decision of fact back the referring court in Scotland to determine[912], and, as was mentioned in Chapter III, the UK court system has approved of the necessity of the minimum pricing scheme, which has recently come into effect[913]. This is, then, a good example of how the Court of Justice attempts to balance the strictness of EU law (here, in the justification of restrictions of interstate trade which are *prima facie* incompatible with the Treaty) with the need to give deference to local experience 'on the ground', which a Court sitting at the remove of Luxembourg cannot have. It is instructive to contrast this with the Court's treatment of the necessity element of justification a couple of years earlier in the cases of *Laval* (2007)[914] (and *Viking Line* (2007)[915]), discussed below.

The mere fact that it is more administratively convenient to use certain measures will not satisfy this necessity test where there exists an alternative less burdensome to interstate trade which would not "clearly...exceed the limits of what can reasonably be required"[916] of national administration. That said, as has been seen in the context of Australian law, there seems to be an interplay between the breadth of the definition of scope and the breadth of the definition of valid justifications, as the expanded definition of scope employed in *Commission v Italy ('Motorcycle*

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[912] Case C-333/14 *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland* ECLI:EU:C:2015:845, para 49.

[913] On 01 May 2018; see footnote 373 above.

[914] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] I-11767.

[915] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] I-10779.

[916] Case C-104/75 *Adriaan de Peijper, Managing Director of Centrafarm BV* [1976] ECR 613, para 18.

Trailers') (2009)[917] also saw the Court give Italy a fairly wide "margin of appreciation"[918] within which to determine both the level at which at which to set their desired road safety and the means which were to be used to achieve that level of road safety. Crucially, justification for the impugned measure, which had been judged to come within the scope of the provisions on free movement of goods, was not precluded merely because there were, hypothetically, other, less restrictive measures to ensure road safety (as Advocates-General Léger[919] and Bot[920] had both argued in the case), as Italy was entitled to pursue measures which had the advantage of generality, simplicity of comprehension and easy of enforcement: "the fact remains that Member States cannot be denied the possibility of attaining an objective such as road safety by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities"[921]. Quite how this allowance for a margin of appreciation including 'ease of understanding and enforcement of rules' squares with the Court's declaration some decades earlier that 'mere administrative convenience' would not satisfy the necessity element of justification, is an open question. Beyond the mere drift of judicial opinion over 30 years, the best answer is that which has been seen to operate across time in both the EU and Australian jurisprudence: changes in the definition of scope tend to effect changes in the definition of justification, with the Court attempting to balance a wider definition

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[917] Case C-110/05 [2009] ECR I-519.

[918] Case C-110/05 *Commission v Italy ('Motorcycle Trailers')* [2009] ECR I-519, para 65.

[919] Case C-110/05 *Commission v Italy ('Motorcycle Trailers')* [2009] ECR I-519, Opinion of AG Léger, paras 52-61.

[920] Case C-110/05 *Commission v Italy ('Motorcycle Trailers')* [2009] ECR I-519, Opinion of AG Bot, paras 170-171.

[921] Case C-110/05 *Commission v Italy ('Motorcycle Trailers')* [2009] ECR I-519, para 67.

of the former with a wider definition of the latter and thereby preserve Member State legislative autonomy. As Prof Niamh Nic Shuibhne and Dr Marsela Maci put it in respect of this very case, "Introducing the bigger picture angle, it is…difficult to avoid concluding that the usual standard of proof was side-lined for more instrumental than evidentiary reasons here, given that the judgment effected a significant stretching of *restrictions* of Article 34 TFEU"[922] (emphasis in original). In sum, the Court's position at present appears to be that the measures adopted must be the least burdensome means of achieving the desired legislative purpose, but in discounting other possible means, a Member State is entitled to include some considerations of practicality of adherence to, and enforcement of, the law without failing the necessity element of the justification test.

3 – Balancing:

As stated above, the balancing element of the proportionality test has not actually been used by the Court as a basis on which to find national legislation incompatible with EU law, despite the encouragement of several Advocates-General. Indeed, the very inclusion of a balancing element in the EU law proportionality test has been the subject of some criticism, there being two significant problems with it: difficulty in quantifying local values and the politicisation of the Court. Firstly, it will be difficult for the Court of Justice, sitting in its grey judicial palace on a plateau above Luxembourg City, to properly quantify local Member State values (especially of a non-economic nature) as against the clearer economic values of free movement of goods[923]; in

[922] Niamh Nic Shuibne and Marsela Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2013) 50 Common Market Law Review 965, 996.

[923] See Damien Geradin and Raoul Stewardson, 'Trade and Environment: Some Lessons from *Castlemaine Tooheys* (Australia) and *Danish Bottles* (European Community)' (1995) 44 International & Comparative Law Quarterly 41, 68-69. Prof Barnard makes the interesting observation that there is a disparity between the conclusion which the Court of Justice tends to reach and which the Member State court tends to reach when adjudging the question of proportionality for purposes of justification of restrictive measures: "There is some evidence that if the

the case of the CJEU this will be particularly acute where the case is a direct proceeding, but even if the case is a preliminary reference from a national court and the CJEU returns the issue of the balancing element to the national court to decide, the national court will still have trouble quantifying such nebulous concepts as social and cultural values in order to be able to properly weigh them against the economic value of free movement of goods and read which way the balance inclines. Ultimately, this is because, whether it is the EU court or a national court which is called upon to make this assessment, they are both still judicial organs not as suited to the quantification and weighing up of competing interests as members of the legislature or executive. Obviously, judges have some familiarity with quantifying things which are difficult to quantify and working out a suitable system by which apples may be weighed against oranges – such difficult decisions are, after all, part of any court case in which important legal principles are under consideration. Nevertheless, for all the experience that EU and national court judges have in dealing with complex legal principles, the fact of the matter is that they have less experience dealing with competing social or political values, and that, unless they have been elected to judicial office (which the judges of the CJEU certainly have not), they lack direct democratic authority to decide on issues so significant for national life. Furthermore, the application of the balancing element involves the substitution of their own judgment for that of elected legislators and second-guessing those democratic representatives.

The second problem is that requiring judges to undertake this sort of quantification of the importance of local values and then to balance them against other, EU-wide interests, tends to

proportionality review is performed by the Court of Justice, it tends to find the national measure disproportionate. By contrast, if the review is conducted by the national court it tends to uphold the validity of the measure" (Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, OUP 2016), 180).

bring the Court into controversy and disrepute[924], because it is seen as encroaching too far on legislative power, and indeed on national sovereignty. Such were the accusations against the Court during the period of the Sunday Trading Cases, when the public came to see the CJEU as over-reaching its judicial role and invading national sovereignty[925]. Given the particular sensitivity to issues of national sovereignty at this turning point in the EU's history – when one of its largest Member States has voted to remove itself from the Union in an attempt to 'take back control' of its own national law-making power, and across the Union the holding of further such 'exit' referenda are becoming significant policy points in national elections – if the Court were to actively rely on the balancing element to find Member States' laws incompatible with EU law, rather than tending to rely on the necessity element as it presently does, it could invite further accusations of judicial over-reaching and contribute to the growing mood of Euroscepticism across the continent.[926]

What, then, should be the role of this balancing element? Is it even part of the current case law? In the recent case of *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland*[927], Advocate-General Bot's Opinion explicitly supported the existence of

[924] See Damien Geradin and Raoul Stewardson, 'Trade and Environment: Some Lessons from *Castlemaine Tooheys* (Australia) and *Danish Bottles* (European Community)' (1995) 44 International & Comparative Law Quarterly 41, 68.

[925] See Stephen Weatherill, 'After *Keck*: Some Thoughts on How to Clarify the Clarification' (1996) 33 Common Market Law Review 885, 904.

[926] This would be less pronounced if the Court remitted the actual decision on the balancing element to the national court, but nevertheless it would still represent EU law causing the disapplication of national laws and the diminution of national sovereignty. One can imagine that the politico-legal effect of such a situation may not be fully blunted by the national court being the finder of fact on this point. That said, it is apposite here to reiterate the point made above by Prof Catherine Barnard (see footnote 924 above) that when deciding the proportionality question, the Court of Justice is more likely to find against the Member State law and the national court is more likely to find in favour of the Member State law.

[927] Case C-333/14 ECLI:EU:C:2015:845.

this balancing element[928], but the Court itself pointedly declined to mention it, although it may have obliquely included the concept within the latitude given to Member States to determine the level of protection of legitimate interests, particularly human health. (That is, the relatively broad discretion enjoyed by Member State legislatures in the protection of human health recognised the significant weight given to that justificatory purpose, and so implicitly weighted the balance strongly in favour of justifying the Member State law.) Even so, the balancing element has not been explicitly disclaimed by the Court of Justice, and so remains – at least formally – a part of the proportionality test for determining whether a restriction on the free movement of goods is justified.

There is a rich vein of doubt as to whether it actually exists *in practice*, however, and the seams of this vein of doubt extend even into the highest levels of Member State judiciary. In recent cases, the Supreme Court of the United Kingdom has had cause to comment on this very issue. In *R (Lumsdon) v Legal Services Board* (2015)[929], Lord Reed and Lord Toulson argued that:

> There is some debate as to whether there is a third question, sometimes referred to as proportionality *stricto sensu*: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately, as in Case 331/88 *The Queen v Minister for Agriculture, Fisheries and Food and Secretary of State for Health; Ex parte Fedesa and others* [reference omitted]".[930]

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[928] Case C-333/14 *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland* ECLI:EU:C:2015:845, Opinion of AG Bot, paras 73-76.

[929] [2015] UKSC 41; [2016] AC 697.

[930] *R (Lumsdon) v Legal Services Board* [2015] UKSC 41; [2016] AC 697, para 33.

More recently, in *Scotch Whisky Association and others v The Lord Advocate and another* (UKSC) (2017)[931], the latest (and perhaps last) of the series of cases at Scottish, UK and EU level concerning the legality of the Scottish Government's minimum alcohol pricing legislation (discussed in Chapter III and earlier in the present Chapter), the Supreme Court has refined its views so as to question whether the balancing element really does have an existence independent of the undoubted elements of proportionality, namely suitability and necessity. Lord Mance (writing for the Supreme Court) questions the real content of the third, balancing, element:

> The difficulty [the Court of Justice's silence on the balancing element in *Scotch Whisky*] raises is to know what, if any, scope there is for a more general third stage proportionality question, of the nature described by Advocate-General Bot [reference to the AG's Opinion omitted]). The Court's guidance in this respect is oblique…No doubt deliberately, the Court there suggests that the third stage, rather than involving any independent balancing of interests, can be subsumed within the second stage, that is consideration of what is necessary to achieve the desired protection of human life and health.
>
> …
>
> By suppressing Advocate-General Bot's third stage, one may surmise that the Court of Justice intended at the very least to signal the appropriateness of an even greater level of restraint and respect for national authorities' choice of measures to protect health than that which Advocate-General Bot himself recognised under the third stage test which he identified.[932]

If it is accepted that this third, balancing, element has a formal but not a practical existence, does its existence actually matter? In the contention of the author of this thesis, even the balancing element's mere existence on the books of EU law must tend to have a chilling effect on national legislatures considering the passage of legislation, in the manner discussed in Chapter VI. However much national courts and other learnèd commentators may doubt it has any real

[931] [2017] UKSC 76.

[932] *Scotch Whisky Association and others v The Lord Advocate and another* [2017] UKSC 76, paras 9 and 15.

practical content, there is clearly uncertainty around its proper role, and even such uncertainty alone has a tendency to dissuade Member States from risking the enactment of legislation which may, at the cost of considerable financial outlay and no little public embarrassment and loss of political capital, ultimately be judged to be unjustified under EU law. Furthermore, the fact of Advocates-General still actively arguing for the inclusion of the balancing element – if not perhaps urging the *decision of the case* on that basis – shows that it is far from a dead letter, giving all the more power to its chilling effect on national legislatures.

Burden and Standard of Proof:

It is for the Member State seeking to justify a *prima facie* infringement of art 34 TFEU or art 35 TFEU to provide evidence to satisfy the above elements of art 36 TFEU, and thus it is the Member State which bears the burden of proof under the latter article[933]. As with many a provision of law which concerns an infringement and the possibility of justification thereof, in respect of free movement of goods, the burden of proof thus shifts from the interstate trader who must prove the *prima facie* infringement of art 34 or 35 TFEU to the Member State who must prove justification under art 36 TFEU.

The standard of proof for justification under art 36 TFEU is satisfied when "it may reasonably be concluded from the evidence submitted"[934] that the requisite element of justification under examination (suitability, necessity, or the final balancing element) is made out. As such, it is not required that this conclusion be the *only* reasonable conclusion, merely

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[933] Case C-148/15 *Deutsche Parkinson Vereinigung eV v Zentrale sur Bekämpfung unlauteren Wettbewerbs eV* ECLI:EU:C:2016:776, para 35.

[934] Case C-333/14 *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland* ECLI:EU:C:2015:845, para 56; Case C-148/15 *Deutsche Parkinson Vereinigung eV v Zentrale sur Bekämpfung unlauteren Wettbewerbs eV* ECLI:EU:C:2016:776, para 36.

that it be *a* conclusion reasonably achieved from the evidence; this strikes a balance between, on the one hand, the need for the Court to enforce the terms of the Treaty in judicial proceedings according to accountable forensic standards (reasonableness and evidence) and, on the other hand, the acknowledgment that legislation is a complex matter involving the weighing up of multiple factors, many beyond the Court's power of review, and ultimately rests on some exercise of discretion on the part of the legislator. Just as there is some margin of discretion exercised by the legislating Member State as to how to pursue legitimate objectives, provided that the justification is *a* (although not necessarily *the only*) reasonable conclusion from the evidence, reasonable minds may differ on the issue without the Court thereby rejecting justification.

(In the familiar forensic terms of common law, 'reasonable conclusion from the evidence' is more akin to the civil standard of proof 'on the balance of probabilities' than the criminal standard of proof 'beyond reasonable doubt': a lower standard, easier to satisfy, and one which is premised on the idea of competing, though all potentially reasonable, conclusions.)

An interesting point raised in *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland* was the question of whether the Court, in assessing whether restrictive legislation was justified, could take into account evidence which was duly presented to the Court but did not yet exist at the time when the Member State legislature enacted the measure in question. That is, was the date at which the legislation was passed the deadline for relevant evidence, or was the deadline the (perhaps much later) date of the hearing before the Court? This is particularly relevant in the case of scientific studies on the effectiveness of various elements of public policy, since it is in the nature of such studies that they are regularly and continually being published, and it can very well be the case that a study may be prompted by the passage of legislation, rather than preceding it and being available to legislative decision makers in the first place. The answer of the Court was clear. Given that "the requirements of EU law must be complied with at all relevant times"[935], it necessarily followed that:

> …the referring court must take into consideration any relevant information, evidence or other material of which it has knowledge under the conditions laid down by its national law. Such an assessment is all the more necessary in a situation such as that of the main proceedings, where there appears to be scientific uncertainty as to the actual effects of the measures provided for by the national legislation the legality of which is to be reviewed by the referring court.
>
> Consequently…Article 36 TFEU must be interpreted as meaning that the review of proportionality of a national measure, such as that at issue in the main proceedings, is not to be confined to examining only information, evidence or other material available to the national legislature when it adopted that measure.[936]

The reasoning behind this is sound: the proportionality assessment, in both its suitability and necessity components (and the disputed balancing element, for that matter) is not an assessment of the 'reasonableness' or 'good faith' of the national legislature in passing the restrictive legislation. It is an objective assessment of whether that legislation meets the requirements of proportionality under EU law, and thus the most up-to-date relevant evidence must be used in that assessment, regardless of whether that information was available to the Member State legislature at the time of legislation. A negative assessment of proportionality is not, after all, intended to be a slight against the honesty of the Member State legislature – it does not relate to the *honesty* or *good faith* of the legislature in passing the law on the basis of the information that was before it at the time. The Court was also correct, it is argued, to advert to the particular importance of up-to-date evidence when adjudging delicate issues relating to scientific uncertainty, as it could hardly have suggested that legislation seeking to act in a field of some

[935] Case C-333/14 *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland* ECLI:EU:C:2015:845, para 63.

[936] Case C-333/14 *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland* ECLI:EU:C:2015:845, paras 64-65.

scientific uncertainty should be preserved in aspic within the limited, and perhaps subsequently superseded, information that existed at the time of legislative passage.

A Sliding Scale of Proportionality Review?

Linked to the element of balancing is the question of whether there is a sliding scale of proportionality review, such that the more sensitive the interest which the Member State is attempting to protect with the impugned legislation, the more loosely the proportionality test is applied. This sliding scale could potentially make itself felt in all three elements of the proportionality review – suitability, necessity and overall balance – but it would most obviously apply to the element of necessity, where the analysis of less restrictive alternatives might be more forgiving where a Member State is regulating on a subject of great national sensitivity. While some commentators have canvassed the existence of such a sliding scale of proportionality review[937], the Court itself has issued no such judgment, and given the difficulties in defining what national interests qualify as 'more sensitive' than others, and whether there would be a universal standard for this across the disparate national polities that comprise the EU, it is unlikely that the Court will do so. Furthermore, Prof Nic Shuibne and Dr Maci give short shrift to the idea that any such sliding scale should operate *sub silentio*: "If the Court does conceive of a sliding scale of justification grounds, mapped onto a similarly gradated proportionality scale – if some public interests are more important than others in other words – it

[937] Stefaan Van den Bogaert and Armin Cuyvers, 'Money for Nothing: The Case Law of the EU Court of Justice on the Regulation of Gambling' (2011) 48 Common Market Law Review 1175, 1206-1210.

needs to say so and to articulate the correspondingly variegated adjudicative framework more explicitly."[938]

[938] Niamh Nic Shuibne and Marsela Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2013) 50 Common Market Law Review 965, 988-989.

Subchapter 2:
Justification and Free Movement of Services

Treaty on the Functioning of the European Union (English language edition):

Article 52 (1): The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.[939]

Introduction:

Once a national measure has been found to come within the scope of art 56 TFEU (whatever analysis may be used to define that scope), it is *prima facie* incompatible with the Treaty and can only be saved if the litigant arguing in favour of its compatibility (commonly, the Member State itself) can prove that it is justified by reference to some *legitimate purpose*, that it is *suitable* to achieve that purpose, that it is *necessary* to achieve that purpose, and that the burden on the interstate trade in services *does not outweigh* the importance of the Member State's achieving the legitimate purpose in question (the balancing element). The similarity between justification of restrictions on the free movement of goods and restrictions on the freedom to provide services is readily apparent. The issue of justification for restrictions on the freedom to provide services, then, is largely dealt with in the same way as justification for restrictions on the free movement of goods discussed earlier in this Chapter, and accordingly it will be examined along the same lines, looking at 1) what constitutes a legitimate purpose under art 52(1); 2) what constitutes a legitimate purpose in a wider sense (imperative requirements in the public interest); 3) the place

[939] The 'Chapter' referred to in art 52 TFEU is actually Chapter 2 (Right of Establishment) of Title IV of the TFEU, but art 62 TFEU (in Chapter 3 on Services) makes art 52 applicable to the provision of services too.

of Fundamental Rights and Freedoms as justificatory purposes; and 4) how proportionality between the legitimate purpose and the Member State law in question is assessed.

Section 1: Legitimate Purposes under art 52(1) TFEU:

Art 52(1) TFEU prescribes three explicit grounds for restricting the freedom to provide services, namely public policy, public security and public health. As will be seen in Section 2 below, these legitimate purposes specified in the Treaty are the only grounds on which a national law *discriminatory* against interstate service provision can be justified – that is, they are derogations from the general principle of non-discrimination contained in art 18 TFEU – and so they must be interpreted strictly. In that vein, as for free movement of goods, 'public policy' in particular cannot be given an expansive meaning such as would embrace a Member State's general economic aims[940] but may only be relied upon where there is a "genuine and sufficiently serious threat to the fundamental interests of society"[941]. As such, 'public policy', 'public security' and 'public health' have much the same meaning as they do under art 36 TFEU discussed earlier in Subchapter 1[942], and the Court will not let Member States unilaterally define

[940] Case C-252/85 *Bond van Adverteerders v Netherlands* [1988] ECR 2085, para 34; Case C-17/92 *Federación de Distribuidores Cinematográficos v Spain* [1993] ECR I-2239, para 16.

[941] Case C-36/02 *Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para 30. Since the Court cites its earlier judgment in Case C-54/99 *Association Église de Scientologie de Paris v The Prime Minister* [2000] ECR I-1335, para 17 for this proposition, it is likely that the same requirement of a genuine and sufficiently serious threat to the fundamental interests of society applies to 'public security' too, as it did in that case.

[942] 'Public health' under art 52(1) TFEU is probably coterminous with 'health and life of humans, animals and plants' under art 36 TFEU: even though the legitimate purposes specified in the Treaty are to be construed narrowly and art 52(1) TFEU does not explicitly refer to the non-human aspects of the natural environment by which public health may be affected, the Court seems to accept that a national law may be justified under 'public health' where the regulated activity has indirect consequences for human society, e.g. gambling addiction leading to loss of money to support families, divorce and suicide in Case C-42/02 *Lindman v Skatterättelsenämnde* [2003] ECR I-3519, para 24.

their content without oversight by the Court itself[943]. It is important to note, however, that the list of legitimate purposes under art 52(1) is much shorter than that provided in art 36 TFEU in respect of justifications for restrictions on the free movement of goods, with the result that national measures discriminatory on their face (which are only justifiable by reference to the legitimate purposes enunciated in the Treaty itself and rights and freedoms laid down in the Charter of Fundamental Rights and Freedoms) will be more difficult to justify when they affect the freedom to provide services than when they affect the free movement of goods. This will be particularly important where, as in *Omega Spielhallen*, the measures in question restrict both free movement of goods *and* freedom to provide services and it is necessary for the Court to decide whether to examine compatibility with the Treaty by reference to the provisions on goods or the provisions on services.

Section 2: Imperative Reasons Relating to the Public Interest:

Availability:

As for free movement of goods, national laws which are discriminatory on their face (a.k.a. 'directly discriminatory' or 'distinctly applicable' laws) may only be justified by reference to the legitimate purposes specified in the Treaty[944], so any wider public interest justification is not available for such laws. Just as when the concept of discrimination is used in relation to the definition of the scope, when used in relation to justification, 'discrimination on the face of the law' can be evidenced by the law's making reference to the nationality of the services provider

[943] Case C-36/02 *Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para 30.

[944] Case C-252/85 *Bond van Adverteerders v Netherlands* [1988] ECR 2085, para 32; Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007, para 11; Case C-17/92 *Federación de Distribuidores Cinematográficos v Spain* [1993] ECR I-2239, para 16.

or making reference to the fact that the service provider or recipient is established or resident in another Member State[945]. Advocate-General Jacobs has argued that the wider legitimate purpose of 'public interest' should apply even to laws which are discriminatory on their face[946], and this argument has often been advanced by Member States seeking to justify of their discriminatory laws[947]. The potential incongruity of looking for discrimination in the field of justification where scope may have moved beyond discrimination analysis to trade restriction analysis (in which discrimination may not even be considered), has also been noted[948].

The Court came closest to giving credence to the argument for allowing public interest justification even for directly discriminatory laws in *Lindman v Skatterättelsenämnde* (2003)[949], where, in reference to a Finnish law exempting winnings from lotteries conducted in Finland from income tax (but not winnings from lotteries conducted outside Finland), the Court seemingly considered the possibility that such a law, evidently discriminatory on its face, could be justified by reference to "overriding reasons in the public interest such as the prevention of

[945] Case C-17/92 *Federación de Distribuidores Cinematográficos v Spain* [1993] ECR I-2239, para 13. There is some confusion over whether a national law making distinctions on the basis of residence constitutes direct discrimination or not: in Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007, paras 10-11 the Court stated that a law making a distinction on the basis of location of establishment was directly discriminatory and only capable of justification by reference to the purposes laid out in the Treaty, whereas in Case C-388/01 *Commission v Italy ('Preferential Museum Admission')* [2003] ECR I-721, para 21 a law allowing free museum admission only for those resident in Italy was considered capable of broader public interest justification. In her Opinion in Case C-42/02 *Lindman v Skatterättelsenämnde* [2003] ECR I-3519, AG Stix-Hackl argues for an expansive definition of direct discrimination where the national law pertains to the service rather than the *service provider* as such, which would include nationality and location of residence/establishment but would also include services otherwise 'foreign': "it seems appropriate to identify discriminatory rules in the field of services on the basis of the origin of the service and not on the basis of the location of the registered office or nationality of the service-provider" (Opinion, para 76).

[946] Case C-136/00 *Danner* [2002] ECR I-8147, Opinion of AG Jacobs, para 40.

[947] See Case C-118/96 *Safir v Skattemyndigheten i Dalarnas Län* [1998] ECR I-1897, Opinion of AG Tesauro, para 27 and Case C-42/02 *Lindman v Skatterättelsenämnde* [2003] ECR I-3519, Opinion of AG Stix-Hackl, paras 99-101.

[948] Lorna Woods and others, *Steiner & Woods's EU Law* (13th edn, OUP 2017) 552.

[949] Case C-42/02 *Lindman v Skatterättelsenämnde* [2003] ECR I-3519.

wrongdoing and fraud, the reduction of social damage caused by gaming, the financing of activities in the public interest and ensuring legal certainty"[950] (although, in the event, justification could not be made out due to lack of evidence on the issue of proportionality). Nevertheless, despite the slight excursus in *Lindman v Skatterättelsenämnde*, the Court has not explicitly disturbed its settled position that laws discriminatory on their face may only be justified by reference to the legitimate purposes listed in art 52(1), and as such, public interest justification is only available to laws not directly discriminatory[951].

The Nature of the Public Interest:

Laws which are not directly discriminatory, may be justified by reference to a legitimate purpose of "imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established"[952]. This formulation of 'imperative reasons in the public interest' in *Säger v Dennemeyer* is indistinguishable from *Cassis de Dijon*'s 'mandatory requirements in the general interest' discussed in earlier in Subchapter 1, and like the *Cassis de Dijon* concept, is open-ended, not limited to a closed set of allowable purposes. It can include, for example,

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[950] Case C-42/02 *Lindman v Skatterättelsenämnde* [2003] ECR I-3519, para 23. This application of public interest justification to discriminatory laws was explicitly rejected by AG Stix-Hackl in the same case (Opinion, paras 67-73).

[951] See Joined Cases C-344/13 and C-367/13 *Cristiano Blanco and Pier Paolo Fabretti v Agenzia delle Entrate – Direzione Provinciale I di Roma – Ufficio Controlli* ECLI:EU:C:2014:2311, paras 38-39, and Case C-375/14 *Criminal Proceedings against Roanna Laezza* ECLI:EU:C:2016:60, paras 25-26.

[952] Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221, para 15. It is argued by AG Tesauro that the formulation of public interest justification given in *Säger v Dennemeyer* is designed to bring it in line with formulation of public interest justification in *Cassis de Dijon* for free movement of goods, but that in fact such public interest justification dates back to the early case law on freedom to provide services (such as Case C-23/74 *van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, para 12): Case C-118/96 *Safir v Skattemyndigheten i Dalarnas Län* [1998] ECR I-1897, Opinion of AG Tesauro, footnote 33.

consumer protection[953], heritage protection[954], protection of intellectual property[955], protection of workers and minimisation of industrial disputes[956], public appreciation of cultural heritage[957], the maintenance of quality radio and television programming[958], and freedom of expression and the maintenance of a plurality of views in broadcast media[959]. The public interest cannot comprise, however, "aims of a purely economic nature"[960] unless they relate to "the risk of seriously undermining the financial balance of the social security system"[961], nor can it comprise "the financing of benevolent or public interest activities such as social works, charitable works, sport or culture"[962] as a purpose in and of itself. (The financing of such social goods may bolster *other* legitimate purposes which come within the concept of 'public interest' in their own right, but it must be only an accessory advantageous consequence, not the real purpose behind the law[963].)

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[953] Case C-220/83 *Commission v France ('Insurance Services')* [1986] ECR 3663, para 20; Case C-205/84 *Commission v Germany ('Insurance Services')* [1986] ECR 3755, paras 30-33.

[954] Case C-180/89 *Commission v Italy ('Tourist Guides')* [1991] ECR I-709, para 20.

[955] Case C-62/79 *SA Compagnie générale pour la diffusion de la télévision, Coditel v Ciné Vog Films* [1980] ECR 881, para 15.

[956] Case C-279/80 *Criminal proceedings against Alfred John Webb* [1981] ECR 3305, para 19.

[957] Case C-198/89 *Commission v Greece ('Tourist Guides')* [1991] ECR I-727, para 21.

[958] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007, para 27.

[959] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007, paras 22-23.

[960] Case C-120/95 *Decker v Caisse de maladie des employés privés* [1998] ECR I-1831, para 39; Case C-158/96 *Kohll v Union des caisses de maladie* [1998] ECR I-1931, para 41; Case C-35/98 *Staatssecretaris van Financiën v Verkooijen* [2000] ECR I-4071, para 48; Case C-388/01 *Commission v Italy ('Preferential Museum Admission')* [2003] ECR I-721, para 22.

[961] C-120/95 *Decker v Caisse de maladie des employés privés* [1998] ECR I-1831, para 39; Case C-158/96 *Kohll v Union des caisses de maladie* [1998] ECR I-1931, para 41.

[962] Case C-275/92 *HM Customs and Excise v Schindler* [1994] ECR I-1039, para 60.

[963] Case C-67/98 [1999] *Questore di Verona v Zenatti* ECR I-7289, para 36.

Even with this exclusion of purely economic aims, though, the expansive definition of 'public interest' means that the practical limitation on the doctrine is found in the proportionality test applied after a national law has been judged to pursue an imperative requirement in the public interest.

Section 3: Fundamental Rights and Freedoms:

As was seen to be the case in respect of free movement of goods in Subchapter 1, *prima facie* restrictions on the freedom to provide services may likewise be justified on the basis of principles included in the Charter of Fundamental Rights of the European Union, as well as on the basis of other fundamental rights and freedoms which form part of the general principles of EU law because they derive from international agreements which all the Member States have signed (particularly the ECHR) or from the constitutional traditions common to all the Member States[964]. As to this latter category, it is not necessary that the fundamental right relied on be formally enshrined in the national constitution as a substantive right[965].

While the existence of the Charter rights is relatively straightforward, it is not precisely clear whether the other (non-Charter) 'fundamental rights and freedoms deriving from general principles of EU law' form part of the 'public policy' grounds of justification in art 52(1) TFEU or they are an independent head of justification, as the case law speaks of both in very close proximity:

> Since both the Community [i.e. Union] and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in

[964] Case C-36/02 *Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, paras 33.

[965] Case C-36/02 *Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, paras 34.

> principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services [reference omitted].
>
> However, measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures [reference omitted].[966]

Nevertheless, for the reasons enunciated in Subchapter 1, a fundamental right is a legitimate justificatory purpose whether or not it is regarded as forming part of the concept of 'public policy' or indeed the broader 'public interest', but it is probably better regarded as being a legitimate purpose in its own right, separate from public policy on the one hand since it is a right common across the whole EU (not just particular to one Member State as may be the case for public policy) and separate from public interest on the other hand since it is available even where the law in question is directly discriminatory.

Section 4: Proportionality:

Once a restrictive national law has been found to come within the scope of the freedom to provide services, and a legitimate justificatory purpose has been identified, it will only be successfully justified by reference to that purpose if it can pass the proportionality test. As was seen for the proportionality test in free movement of goods, in order to pass the proportionality test the national law 1) must be suitable for achieving the legitimate purpose, 2) must be necessary for achieving the legitimate purpose, and 3) must not place a burden on interstate trade which outbalances the importance of achieving the legitimate purpose. The existence of the

[966] Case C-36/02 *Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, paras 35-36.

suitability and necessity elements is not in doubt[967], and although the balancing element is often left out of the Court's explanation of proportionality, it has been clearly stated that proportionality is a general principle of EU law and that it includes this balancing element[968] and has been specifically mentioned as final element of justification for restrictions on freedom to provide services[969] – although, as was mentioned in respect of free movement of goods in Subchapter I, it has never yet been the basis for a negative decision by the Court.

1 – Suitability:

A Member State law must be suitable to achieve the legitimate purpose in the sense that it actually does serve to bring about the desired end. As was the case for free movement of goods, suitability is not typically the decisive element of proportionality, and attempts at justification are much more likely to fail on the necessity element. That being said, the considerations discussed above with respect to consistency and coherence also apply to the suitability element of justification of restrictions on the freedom to provide services. For example, in respect of freedom to provide services, in *Commission v Spain ('Taxation of Lottery Winnings')* (2009)[970], a Spanish law selectively exempted from taxation the winnings from lotteries which were conducted within Spain by certain official Spanish governmental or charitable organisations, while maintaining the normal level of taxation on winnings from lotteries conducted elsewhere, purportedly in order to protect consumers by discouraging the squandering of money on games of chance and by directing demand for gambling services into less addictive forms. The Court

[967] Joined Cases C-369/96 and C-376/96 *Criminal Proceedings against Jean-Claude Arblade and Bernard Leloup* [1999] ECR I-8453, para 35.

[968] Case 331/88 *The Queen v Minister for Agriculture, Fisheries and Food and Secretary of State for Health; Ex parte Fedesa* [1990] ECR I-4023, para 13.

[969] Case C-124/97 *Läärä v Finland* [1999] ECR I-6067, para 39.

[970] Case C-153/08 [2009] ECR I-9735.

did not accept that the law was justified on these grounds as "the exemption of winnings is likely to encourage consumers to participate in the lotteries, games of chance and betting able to benefit from such exemption and is therefore not a suitable and coherent means of ensuring the attainment of the objective supposedly pursued"[971] and "to the extent that the exemption at issue does not differentiate between the various types of games of chance, the Kingdom of Spain cannot justifiably contend that the exemption aims to channel people's desire to gamble towards certain games which are likely to be less addictive"[972]. As was seen above in respect of free movement of goods, the lack of consistency and/or coherence in an impugned Member State law tends to diminish its suitability, and thus its amenability to justification.

2 – Necessity:

A Member State law must be necessary to achieve the legitimate purpose in the sense that there is no other way in which the same purpose could be achieved which would be less burdensome to the freedom to provide services. Mere administrative convenience for the government in imposing certain restrictions on service provision does not prove that such restrictions are necessary[973]. Showing the Court's preference for light regulation of the market and minimal interference with freedom to provide services, a Member State law will not be necessary if the same result could have been achieved by competitive forces in the market itself without government interference[974]. On the other hand, the fact that one Member State's law is

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[971] Case C-153/08 *Commission v Spain ('Taxation of Lottery Winnings')* [2009] ECR I-9735, para 40.

[972] Case C-153/08 *Commission v Spain ('Taxation of Lottery Winnings')* [2009] ECR I-9735, para 41.

[973] Case C-205/84 *Commission v Germany ('Insurance Services')* [1986] ECR 3755, para 54.

[974] Case C-180/89 *Commission v Italy ('Tourist Guides')* [1991] ECR I-709, paras 23-24; Case C-154/89 *Commission v France ('Tourist Guides')* [1991] ECR I-659, paras 20-21.

different from another Member State's law on the same subject matter does not itself prove that the first Member State's law is unnecessary:

> ...the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide[975].

The strength of this language suggests that the fact that another Member State regulates the same activity less restrictively is *totally* irrelevant to the assessment of necessity. However, a close analysis opens the possibility that another Member State's less restrictive law might be relevant to the assessment of necessity if it could be shown that both Member States were attempting to achieve the same purpose and one had simply chosen a more burdensome way of doing it than the other. The Court has recognised something very similar to this in explicitly stating that a Member State's law will fail the necessity test if the law of the service provider's home State achieves the same or essentially the same purpose already[976], but in the strict sense this relates to *double regulation* (where both Member States follow the same purpose and regulate in

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[975] Case C-124/97 *Läärä v Finland* [1999] ECR I-6067, para 36; Case C-42/07 *Liga Portuguesa de Futebol Profissional v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-7633, para 58; Joined Cases C-447/08 and C-448/08 *Criminal Proceedings against Otto Sjöberg and Anders Gerdin* [2010] ECR I-6921, para 38.

[976] Joined Cases C-110/78 and C-111/78 *Ministère public and Chambre syndicale des agents artistiques et impresarii de Belgique ASBL v van Wesemael* [1979] ECR 35, para 39; Case C-279/80 *Criminal proceedings against Alfred John Webb* [1981] ECR 3305, paras 19-20; Case C-272/94 *Criminal Proceedings against Michel Guiot and Climatec SA* [1996] ECR I-1905, paras 11 and 13. See also Case C-43/93 *Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803 in which a French law requiring that non-EU nationals have French work permits was judged unnecessary where such a non-EU national already had a work permit from another EU country from which he was providing services. The principle of home State regulation (where the regulation is essentially identical) applies in the case of free movement of goods, where, for example, phytosanitary tests passed in the home State must be 'credited' towards meeting host State standards: Case C-272/80 *Criminal proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV* [1981] ECR 3277, paras 14 and 16. (Double regulation may, however, be proven necessary where the host State regulation achieves something that the home State regulation does not, such as the protection of insurance policy holders from the risk of non-payment by poorly funded insurance companies: Case C-205/84 *Commission v Germany ('Insurance Services')* [1986] ECR 3755.)

essentially the same way, requiring the trader to ensure compliance with both regimes) rather than two Member States' *different regulatory regimes* (where both Member States regulate in different ways, either following the same or closely similar purposes). It remains an open question whether it is likely in practice that two Member States will be judged to be pursuing the very same legitimate purpose such that the more burdensome law could be judged unnecessary on this basis.

Inasmuch as the Court is displaying its unwillingness to compare two different real world regulatory regimes, its jurisprudence here seems to be somewhat illogical: following the Court's reasoning, the question of whether a Member State has chosen the least burdensome method of regulation is not to be analysed by comparison with real practical examples of other Member States' laws which achieve the same purpose, but instead it is to be determined in a largely hypothetically exercise by reference to an imaginary law which the Court has posited within the Member State in question to achieve the same purpose in a less burdensome way. Surely if the Court is willing to do the latter, it should *a fortiori* be willing to compare real-world examples of laws actually in existence, this being more straightforwardly consistent with the proper judicial function. Nonetheless, however illogical this may be as a method of legal reasoning, the Court has likely adopted this position for 'politico-constitutional' reasons, to assuage concerns about a race to the bottom between Member States in which the cultural distinctiveness of each one is scraped away as its laws are disallowed on the basis of this necessity criterion, because somewhere else in the EU some country has a less burdensome law on the same subject matter. This concern for Member State regulatory autonomy can be seen in the receptiveness of the Court to Member States' arguments about the margin of discretion which they should enjoy in pursuing their legislative objectives[977]. It is worth noting here that it is the *European* Court which established the jurisprudence of justification (as indeed other elements of free movement), although European law recognises that *Member State* law largely defines the content of justification: "the test of justification is a European one; it is European law (and not the Member State) which decides the amount of autonomy that is left. In particular the Member State may only invoke those grounds of justification that are recognised as being legitimate in European law…[but] the appropriate level of protection within their territory must, in principle, remain with the Member States"[978]. Prof Catherine Barnard argues[979] that the margin of discretion increases as the socio-cultural sensitivity of the regulated activity increases, especially where it is an activity which is prohibited in some Member States. A good example of this is gambling, which is regulated in many different ways in different Member States: in *Läärä v Finland* (1999), for example, the Court decided that it was within the Member States' discretion to choose whether to completely prohibit or just restrict the use of slot machines in pursuit of the purpose of reducing gambling and crime[980]; in *Liga Portuguesa de Futebol Profissional* (2009) the Court referred to the "significant moral, religious and cultural differences between the Member States"[981] in leaving Member States a wide discretion as to how to regulate gambling; and in *Gambelli* (2003) the Court made a clear link between the sensitivity of the subject matter,

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[977] Case C-6/01 *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) v Portugal* [2003] ECR I-8621, paras 76-81.

[978] Markus Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 405, 411.

[979] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, OUP 2016) 309-311.

[980] Case C-124/97 *Läärä v Finland* [1999] ECR I-6067, para 35.

[981] Case C-42/07 *Liga Portuguesa de Futebol Profissional v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-7633, para 57.

the societal differences between the Member States and the breadth of Member States' legislative discretion:

> ...moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.[982]

Evidently, the Court is willing to acknowledge that Member States enjoy a margin of discretion in deciding what is necessary to achieve the legitimate purpose in question, and the margin becomes wider as the socio-cultural sensitivity of the subject matter increases.

One prominent case in which the margin of appreciation given to national legislation was notably *narrow*, however, was the infamous case of *Laval* (2007)[983]. Laval un Partneri Ltd was a construction company incorporated in Latvia which sent its employees, whose employment contracts had been concluded under Latvian law, across to Sweden to build a school on a construction site operated by Laval un Partneri Ltd's Swedish-incorporated subsidiary company. Laval un Partneri Ltd intended to keep these workers on their Latvian employment contracts with pay and conditions meeting the relevant collective agreement in Latvia, rather than the higher standards of the host country, Sweden. The Swedish builders' union objected to this, instituting a blockade of the construction site in question and convincing the Swedish electricians' union to engage in a sympathy boycott of Laval un Partneri Ltd's operations in Sweden; being unable to access the site, the Latvian workers went home for Christmas, never to return. Other unions soon joined the sympathy boycott, with the effect that the Swedish-owned subsidiary went

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[982] Case C-243/01 *Gambelli* [2003] ECR I-13031, para 63.

[983] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] I-11767.

bankrupt and Laval un Partneri Ltd found itself unable to do business in Sweden at all. The primary blockade by the Swedish builders' union and the sympathy boycotts were lawful under Swedish law, but Laval un Partneri Ltd brought suit against the unions for infringing the freedom to provide services under what is now art 56 TFEU, and the case was duly referred to the ECJ. It was readily accepted by the Court that the boycott constituted a restriction of freedom to provide services[984], and that the protection of workers' rights was a fundamental right in EU law[985], and thus the question became whether the boycott action was justified. The Court did not doubt that the boycott was *suitable* to the achievement of the legitimate objective of protecting workers' rights[986], so the question then became whether it was *necessary* for the protection of such workers' rights. In a decision arousing great public controversy and academic commentary, the Court found against the justification of the boycotts on the grounds that they were not necessary to ensure the protection of workers' rights, and thus decided that there had indeed been an impermissible infringement of Laval un Partneri Ltd's freedom to provide services under art 56 TFEU. The reasoning offered for this decision is thin: the boycott was judged to be unnecessary because workers' rights were already sufficiently protected by EU law[987], and the unions'

[984] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] I-11767, paras 99-100.

[985] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] I-11767, paras 90-93. In addition to citing various instruments and decisions which confirm the right to take collective action as a fundamental right in EU law, the Court notes that the right is enshrined in the Charter of Fundamental Rights in art 28, which was not technically binding until 2009.

[986] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] I-11767, para 107.

[987] Specifically, by art 3 of Directive 96/71/EC of the European Parliament and Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, which ensured that, while working in Sweden, the Latvian workers would enjoy Swedish employment conditions (unless their original Latvian conditions happened to be better) in the following fields: maximum working hours and minimum rest periods; minimum annual holidays; minimum pay and overtime rates; conditions of hiring-out, health, safety and hygiene; protective measures for pregnant workers, new mothers, children and young people; equality of treatment on grounds of sex and freedom from other discrimination. See Case C-341/05 *Laval un Partneri Ltd v*

attempt to force Laval un Partneri Ltd into pay negotiations were not necessary because the Swedish legislation on minimum pay was so unclear as to make it impossible or excessively difficult to comply with and exercise free movement rights at all[988]. The Court is hereby making significant inroads into Member State legislative autonomy, judging what level of protection of the right of collective action is necessary in the Swedish context, and that Swedish labour relations legislation is itself so unclear that it cannot be reconciled with the meaningful exercise of free movement. Although any EU-level decision requiring the disapplication of a national law for incompatibility with the Treaty will perforce involve an exercise of EU authority which contracts Member State autonomy to some degree, the fact that the ECJ did not even return the question to the referring court in Sweden for decision on the facts but simply entered judgement against justification further emphasises the degree to which the Court contracted Member State legislative autonomy in this case.

Similar concerns apply to the Court's judgment in *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* (2007)[989], wherein the Court was confronted with a similar legal question, although in this case relating to the freedom of establishment under what is now art 49 TFEU: the Finnish-incorporated company Viking Line ABP ran a ferry service between Finland and Estonia using a Finnish-flagged vessel, but sought to reduce costs by re-flagging the vessel in Estonia and continuing to run the same ferry line while complying with the lower pay standards of Estonian law; the Finnish

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Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet [2007] I-11767, para 108.

[988] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] I-11767, para 110.

[989] Case C-438/05 [2007] I-10779.

Seamen's Union objected, planning a strike of its workers on the vessel and requesting that other unions refuse to deal with Viking Line ABP (or its Estonian subsidiary). As in *Laval*, the Court in *Viking Line* saw the planned industrial action as a *prima facie* breach of free movement provisions (there, art 49 TFEU on establishment)[990], but accepted that workers' rights were a legitimate interest capable of justifying such a restriction[991], and that industrial action was in principle suitable to the protection of workers' rights[992]. However, it declared that the Finnish Seamen's Union's actions would not be necessary for the protection of workers' rights if "the jobs or conditions of employment at issue were not jeopardised or under serious threat"[993], a factual determination which they returned to the referring court in Sweden for decision[994]. The ECJ did direct the national court that the union's collective action would not be necessary unless it had exhausted all other, less restrictive, means to induce Viking Line ABP to halt its re-flagging plan[995]. Although the Court in *Viking Line* did refer the matter back to the Member State court for determination, unlike in *Laval* in which the Court made the determination itself, there is nevertheless a significant inroad made against Member State autonomy by establishing the standard that the legitimate interest of protecting workers' rights could only function to

[990] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] I-10779, paras 72-74.

[991] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] I-10779, paras 43-45.

[992] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] I-10779, para 77.

[993] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] I-10779, para 81.

[994] In particular, it was for the national court to assess whether an undertaking given by Viking Line ABP in relation to maintaining the existing working conditions of employees would be sufficient to ensure that the jobs and conditions were not jeopardised or under serious threat: Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] I-10779, paras 82-84.

[995] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] I-10779, para 87.

justify restrictions on free movement if the high threshold of jobs or conditions being ‘jeopardised or under serious threat’ were cleared.

In furtherance of these politico-constitutional concerns, a strong doctrinal criticism levelled against the judgment is that it fails to afford a sufficient ‘margin of discretion’ to Swedish law, given the sensitivity of industrial relations and the significance of the right of collective action under EU law. Prof Stephen Weatherill, for instance, describes the decision as “abominable”[996] as “the Court did not follow the model regularly preferred in the case law…it leaves wholly out of account any margin of appreciation apt to permit recognition of local circumstances”[997]; in particular, the Court’s decision to establish a certain basic standard of labour rights beyond protection of which collective action would not be justified, “shows scant regard for the exercise of established routes to achieve social protection built up over time at national level and often only after struggle and sacrifice by marginalized [*sic*] groups in society. Social constitutional law clashes with economic considerations and emerges bloodied, as locally determined political choices are undermined”[998]. A partial amelioration of the *Laval* and *Viking Line* judgments was effected by subsequent EU legislation[999], but more substantial legislative action at the EU level appears unlikely[1000].

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[996] Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 125.

[997] Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 126.

[998] Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 126-127.

[999] Recital 35 of the Rome I Regulation, which pertains to conflict of laws in respect of contractual obligations in civil and commercial matters, prescribes that “Employees should not be deprived of the protections afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit”: Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

[1000] See Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) 127.

On the same topic of the content of the right to collective action, there is a notable contrast between the case law of the ECJ and the European Court of Human Rights (ECtHR): art 11 of the ECHR enshrines the right to collective action (as an incident of freedom of association)[1001], and the ECtHR has interpreted this in a manner that does not require the high standard of jobs being 'jeopardised or under serious threat' before collective action can be protected[1002].

In light of the *Laval* and *Viking Line* decisions, then, it can be seen that while the margin of appreciation granted to national laws generally increases with the sensitivity of the subject

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[1001] Art 11 – Freedom of Assembly and Association

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

[1002] See, in particular, the ECtHR decision in *Demir and Baykara v Turkey* ECHR 2008 1345, delivered a few months after the ECJ's decisions in *Laval* and *Viking Line*. In *Demir and Baykara*, the Grand Chamber of the ECtHR decided that the applicants, two Turkish public servants, had the right to join a union and that the union had the power to engage in collective bargaining on their behalf. By contrast with EU law, art 11 ECHR does not allow the right to collective bargaining to be balanced against economic interests such as freedom to provide services; there is no requirement that the workers' jobs be 'jeopardised or under serious threat'. Ewing and Hendy describe the fundamental 'conflict of laws' between European Human Rights law and European Union law on this point:

> Although *realpolitik* suggests that both the ECtHR and the ECJ would attempt to avoid any expression of conflicting views, nevertheless if the ECtHR were to conclude that the consequences of *Viking* and/or *Laval* were such as to give rise to a breach of Article 11, the ECJ would then have a problem, as would its political masters, for it would make explicit what is now implicit, namely, that there is a conflict between the two courts at the apex of the European political systems. If the ECJ insisted on holding the line on *Viking* and *Laval*, it would be open to a trade union on the receiving end of any decision in domestic law arising as a result to make a complaint to the Strasbourg court to recover damages for losses suffered (as in *Demir and Baykara*, and subsequent cases). It is difficult then to see how the ECtHR could avoid upholding Article 11 and the right to collective bargaining and to strike over the business freedoms contained in what are now Articles 49 and 56 of the TFEU. And so issues would bat to and fro between the two courts in a titanic battle of the juristocrats, each vying for supremacy in the European legal order, one determined to impale trade union rights on the long lance of economic freedom and the other subordinating economic freedom to the modest demands of human rights and constitutionalism.

See Keith D Ewing and John Hendy QC, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 Industrial Law Journal 2, 41-42. Predicting a likely solution to this conflict, Prof Ewing and Mr Hendy regard a political solution by way of EU-level legislation as unlikely, and suggest instead that the ECJ adapt its jurisprudence to take account of developments in European Human Rights law, as part of the totality of circumstances which are considered in the question of justification (at 42-43). So far, the ECJ has not been given an opportunity to address this issue.

matter, there has been a notable, much criticised – and probably not to be repeated – constriction of this in the specific field of collective action and workers' rights.

3 – Balancing:

As for the free movement of goods, the balancing element of the proportionality test is often left out of the Court's description of that test, but has been confirmed as a general feature of proportionality under EU law and a specific feature of freedom to provide services. In practice, no case has been decided on the basis of the balancing element, but so long as it remains a part of the proportionality test it has the potential to be used to require the disapplication of a Member State law which has already been judged to pursue a legitimate purpose, to be suitable for achieving that purpose and to be necessary for achieving that purpose because there is no other less burdensome way (determined within a margin of Member State discretion) of doing so. As was argued in respect of justification under free movement of goods in Subchapter 1, the possibility that a Member State law could be declared incompatible with the Treaty on the basis of this balancing element has significant negative constitutional ramifications, because it would represent judges substituting their assessment of the relative importance of a particular legitimate purpose on the one hand and the freedom to provide services across national borders on the other hand, an exercise more political than legal, for which the judges of the Court are not trained, for which they do not have a direct democratic mandate and for which all the relevant facts will not be at their disposal. Furthermore, to the extent that the matter were decided by the Court of Justice rather than simply being sent back to the national court for determination, it would represent EU-level judges trying to comprehend the true local importance of the achievement of the legitimate purpose in issue, a difficult exercise for judges who are, by virtue of the composition of the Court of Justice, almost all foreign to the Member State in question. For these reasons, the existence of the balancing element in the proportionality test, even without its actually being used to declare Member State laws incompatible with the Treaty, marks a deep incursion on Member State legislative autonomy which ultimately subjects much of a Member State's law making power to the oversight and disallowance of the Court of Justice – but such is the state of the law.

Conclusion: Justification for Free Movement of Goods and Services

Once a Member State law has been found to come within the scope of artt 34, 35 or 56 TFEU, justification of such a *prima facie* breach of the free movement of goods or services is subject to a very similar jurisprudential process. It first must be examined whether there exists a legitimate purpose which may be argued in justification of the law, such purpose being one of the legitimate purposes explicitly listed in art 36 TFEU or art 52(1) TFEU, or one of the rights explicitly listed in the Charter of Fundamental Rights of the European Union, or (more broadly) a legitimate purpose derived from the Fundamental Rights and Freedoms enshrined the ECHR and other relevant international agreements, or, *in the case of laws which are not directly discriminatory*, a legitimate purpose within the more general concept of the public interest of the Member State in question ('measures necessary to satisfy mandatory requirements', which are effectively synonymous with 'imperative reasons relating to the public interest').

It is true that, as regards the list of explicit purposes in artt 36 and 52(1) TFEU which may be pleaded in justification of direct discrimination, the list for restrictions on the free movement of goods (public morality, public policy, public security, the protection of health and life of humans, animals or plants, the protection of national treasures, and the protection of industrial and commercial property) is longer than that for the freedom to provide services (public policy, public security and public health). For such a discrepancy between these two fundamental freedoms, a ready explanation may be found in the relative impersonality of goods, which may pass through many hands in the distribution chain from the producer to the consumer, as compared to services, which must be provided directly from the service provider to the service consumer; given the greater ‘personality’ of services, it is necessary to more strictly limit the grounds of justification for *direct discrimination* against the providers of those services, lest such discrimination undermine the operation of the internal market. Nevertheless, in practice, such direct discrimination in respect of either goods or services tends to be rare in the modern era – an indication of the successful integration of the anti-discrimination norm into national legislative culture – meaning that impugned legislation tends to be merely indirectly discriminatory, and thus, for both goods and services, amenable to justification by the whole suite of reasons encompassed within the broad ‘public interest’ justification of mandatory requirements/imperative reasons.

Once a legitimate purpose has been identified, for both free movement of goods and services the law must pass a three stage proportionality test of being suitable to achieve the legitimate purpose, being necessary to achieve that purpose (because there is no less burdensome way to achieve it) and the burden on interstate trade not outweighing the importance of achieving that purpose. The suitability element is significant for the requirement, emerging as the case law has developed, for the national law to be part of a consistent and coherent policy response. The necessity element is where national legislation will most often be ‘rejected’ by the ECJ, and while there is a wider margin of appreciation for more sensitive national issues, the cases of *Scotch Whisky Association*, *Laval* and *Viking Line* show that the Court will not allow this margin of appreciation to nullify the stricture of this necessity requirement that there be ‘no less restrictive means available’. The last element of the proportionality test, balancing, makes a significant inroad into Member State legislative capacity and even though it has not yet actually been relied on to require the disapplication of Member State legislation for incompatibility with EU law, it must nevertheless tend to have a dissuasive influence on Member State legislatures (or, more particularly, on their legal advisors), discouraging them from exercising their legislative capacity for fear that their law may end up being struck down in Luxembourg.

PART 2: JUSTIFICATION

SUBPART 3: AUSTRALIA & THE EUROPEAN UNION COMPARED

CHAPTER VIII: BREADTH OF JUSTIFICATION UNDER AUSTRALIAN AND EU JURISPRUDENCE

In Chapter V, the scope of the provisions guaranteeing free movement of goods and services in Australia (s 92 of the Constitution) and in the European Union (artt 34, 35 and 56 TFEU) were compared. That is, of course, only half the analysis, as it has been seen in this thesis so far that the question of scope is inextricably linked to the question of justification, with an expansion of the former often correlating with an expansion of the latter. Moreover, it is the total effect of scope and justification together which determines the ultimate significance of each jurisdiction's free movement provisions. Accordingly, this Chapter will analyse the second element, the question of justification, and will compare how the jurisprudence of valid justifications for such restrictions operates in Australia and the European Union. This comparison can conveniently be divided into two separate sections, the first dealing with the grounds of justification available in each jurisdiction, the second dealing with the issue of proportionality. In both jurisdictions it is necessary that the purpose of the impugned law come within one of the grounds for justification and then, once that is established, the law must also be proportionate (in the relevant sense) to the achievement of that purpose.

Section 1: Grounds for Justification:

The issue of grounds for justification in Australian law is relatively straightforward. *Castlemaine Tooheys Ltd v South Australia* (1990) established that it was within the legitimate power of a State to enact laws for the welfare of the people of that State, and so, provided that the law's purpose was not to contravene the Constitution by establishing the very protectionism which s 92 intends to prohibit, that purpose will constitute legitimate grounds for justification[1003]. In practice, this means that where the State claims a certain purpose for the law (other than protection of State industry), the Court will accept that purpose as legitimate for the sake of justification without further inquiry, as occurred in *Castlemaine Tooheys Ltd v South Australia* in respect of litter prevention and the conservation of energy resources. Even in *Betfair Pty Ltd v Western Australia* (2008), in which the Court cast doubt on the meaningfulness of the concept of 'the people of a State', subject to what is said immediately below, they did not engage in any significant questioning of the legitimacy of the purposes advanced for the law in question. It is possible, on the basis of the formulation in *Castlemaine Tooheys Ltd v South Australia*, that the Court could question the legitimacy of a claimed purpose if it thought that the law did not relate "to the protection of the community from a *real* danger or threat to its welfare or to the enhancement of its welfare" (emphasis added), and indeed the use of various different governmental sources in *Betfair Pty Ltd v Western Australia* to identify the purpose of the law,

[1003] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 472.

rather than simply relying on the arguments of counsel, would aid the Court in identifying what constitutes a *real* danger or threat to the welfare of the State. In the context of *Castlemaine Tooheys Ltd v South Australia* at least, this seems unlikely, as that case notably expressed great deference to the State legislature on the determination of political questions[1004], but a passing reference to the possible *unreality* of the threat to community welfare may be discerned in *Betfair Pty Ltd v Western Australia* when the joint judgment suggests that the apprehended threat to the racing industry from betting exchanges is "an attempt at an evidentiary level to measure something of an imponderable"[1005]. One thing which is certain in *Betfair Pty Ltd v Western Australia* is that protectionism cannot even be one among many purposes of an impugned law, that is, if protectionism played *any part at all* in the motivation of the law, justification will be *completely precluded* and no other purpose behind the law will be capable of saving it from invalidity under s 92[1006]. As such, under Australian law, State legislation will have grounds for justification as long as it was *not at all* motivated by protectionism, and subject to this any pursuit of the welfare of the people of the State will be grounds for justification.

In EU law, on the other hand, there are three avenues of justification: the closed list of grounds in artt 36 and 52(1) TFEU, the open list of mandatory requirements, and fundamental

[1004] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 473 (speaking about necessity, but applicable to legitimate grounds as well). The court also comments that the legitimacy of the State legislature's apprehension about threats to the welfare of the State must be accepted.

[1005] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 479.

[1006] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 464. Note the distinction between *justification*, wherein a subjective intent on the part of the legislator to engender protectionism will preclude such justification, and *scope*, wherein a subjective intention on the part of the legislator to engender protectionism is not what matters, only the objective fact of whether protectionism was actually created or not. To follow the issue as the Court would analyse it, if the law does convey an objective protectionist benefit on home State industry it comes within the scope of s 92 and the Court considers whether that protectionism is justified; it cannot be justified if that protectionism was the subjectively intended purpose (or one of the purposes). If the law does not convey an objective protectionist benefit on home State industry, then it does not matter whether the legislator subjectively intended to convey such a benefit (and failed, from an objective point of view), the law is not within the scope of s 92 and the Court does not then have to consider the question of justification.

rights and freedoms. As was indicated in Chapter VII, the grounds enumerated in artt 36 and 52(1) TFEU are given a strict reading and so even grounds which on first thought might seem quite broad (e.g. public policy) are limited to the *fundamental* interests of society, not just the government's latest policy initiatives. Thus, in respect of artt 36 and 52(1) TFEU, the grounds of justification are significantly more limited than those which are available under Australian law, as Australian law would clearly allow all the grounds listed in artt 36 and 52(1) TFEU and plenty more besides. Mandatory requirements in the general interest, on the other hand, seem to be a very close match to Australian law, since they cover all the public interest requirements which the Australian concept of the welfare of the people of a State would cover[1007]. The difference, of course, is that mandatory requirements are only available as an avenue of justification when the Member State law in question is not discriminatory on its face, whereas the Australian 'welfare of the people of a State' grounds are available to any kind of law imposing a relevant restriction, whether the law does so on its face or merely in its practical effect. It is less likely that direct discrimination against interstate trade could be justified, of course, but in Australian law the possibility at least remains open. Fundamental rights and freedoms are in a similar position to grounds listed in artt 36 and 52(1) TFEU in respect of their comparison to Australian law, as anything covered by fundamental rights and freedoms would also be covered by the welfare of the people of a State, and the Australian test is a good deal broader beyond that. Thus, any grounds of justification entertained by EU law will also be entertained by Australian law, but Australian law applies the same expansive definition of legitimate grounds to *all* kinds of

[1007] See Christopher Staker, 'Section 92 of the Constitution and the European Court of Justice' (1990) 19 Federal Law Review 322, 338.

impugned laws, and therefore makes it considerably easier for a State to prove this first element of justification, particularly in relation to legislation which is discriminatory on its face.

It bears noting at this point that one specific ground which neither Australian nor EU law will entertain by way of justification is the mere protection of State revenue. The Australian concept of 'the welfare of the people of a State' does not extend to cover the amassing and conserving of the people's money in State coffers[1008], and the 'public policy' ground in artt 36 and 52(1) TFEU likewise is interpreted to exclude the defence of State finances or the national currency[1009], as is the broader grounds of 'mandatory requirements in the public interest'.

<u>Section 2: Proportionality:</u>

Once a law identified as a relevant restriction has been shown to come within one of the grounds of justification, it will be necessary, both under Australian and EU law, for the means adopted by that law to be proportionate to the legitimate purpose. In Australia the various formulations of 'appropriate and adapted', 'proportionate' and 'necessary' are all used more or less interchangeably, but if, as is likely, the s 92 jurisprudence on justification enunciated in *Betfair v Western Australia* is now to be subject to the principles espoused by the majority in *McCloy v New South Wales* (2015) as well, the proportionality test now has three elements: suitability, necessity and balancing. The position in EU law is more straightforward, as three-stage proportionality has a longer history in EU jurisprudence: it appears that proportionality in respect of non-fiscal impediments to the free movement of goods and services applies in the

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[1008] *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411, 426-427; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 479.

[1009] Case C-25/81 *Commission v Italy ('Advance Payments for Imports')* [1982] ECR 2187, paras 26-27.

same way as proportionality applies in other areas of EU law, and that this proportionality test has three elements: suitability, necessity and the balancing of legitimate purpose and burden on interstate trade.

Suitability and Necessity:

The first two elements of the Australian and EU tests are markedly similar. As to the former, in each jurisdiction, the Court often skips over the suitability element because it can easily be rolled into other elements of the test, but this does not mean that a State can casually omit to plead its case on this point: in both Australia[1010] and the EU[1011], mere generalisation and assertion are not enough to prove the suitability element of the justification test.

That said, one reason why the Court in each jurisdiction often glides over the issue of suitability is because it is unlikely that a State would be so brazen as to attempt to justify an impugned law on the basis of a legitimate purpose which the law is simply not capable of achieving. As indicated in Chapter VI, however, South Australia is an example of such a brazen State, inasmuch as it attempted to pass off its differential bottle deposits for refillable and single-use bottles in *Castlemaine Tooheys Ltd v South Australia* by reference to the legitimate purpose of protecting State energy reserves; the Court dismissed this argument on the grounds that the law was not only incapable of achieving that outcome, but it would actually have the opposite

[1010] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 dismisses Western Australia's unevidenced assertion that prohibiting betting exchanges helped to combat criminal race-fixing: "The mismatch between the technique employed in s 27D and the end supposedly achieved is so great as to prevent that end being treated as its purpose" (at 488).

[1011] Case C-333/08 *Commission v France ('Food Production Processing Aids')* [2010] ECR I-757, para 97; Case C-543/08 *Commission v Portugal ('Golden Shares'*) [2010] ECR I-11241, para 87; Case C-165/08 *Commission v Poland ('Genetically Modified Organisms')* [2009] ECR I-6843, paras 54 and 59.

effect[1012], thus rejecting the possibility of justification on account of failure to satisfy the suitability element. Likewise, the Court of Justice will not passively accept a law as suitable to a legitimate purpose which it does not actually serve to achieve. Within the element of suitability, then, consistency and coherence (explored in Chapter VII), can be understood to play a similar role in Australian and EU law. In the above-cited example from *Castlemaine Tooheys Ltd v South Australia*, the Court effectively decided that the law was not, to use the terminology of EU law, 'coherent' to the legitimate purpose proffered by South Australia because it did not actually serve to achieve that purpose. In a similar vein, the case advanced by Betfair Pty Ltd in *Betfair Pty Ltd v Racing New South Wales* (2012) was that the flat 1.5% fee for the use of a race form was in practice 'inconsistent' (to use the EU terminology) because it fell more heavily on some forms of gambling than on others; although the Court in that case did not agree that the claimant had successfully proven this argument, it was accepted that the argument of inconsistency of application was, in principle, a legitimate one to advance. The reasoning in these cases can be compared to the reasoning of the Court of Justice in cases such as *Placanica* (2007)[1013] and *Commission v Spain ('Taxation of Lottery Winnings')* (2009)[1014] on coherence and *Commission v Germany ('Beer Purity Law')* (1987)[1015] and *Debus* (1992)[1016] on consistency. It can be seen that the High Court considers questions of consistency and coherence in a similar fashion to the

[1012] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 476-477.

[1013] Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891.

[1014] Case C-153/08 *Commission v Spain ('Taxation of Lottery Winnings')* [2009] ECR I-9735.

[1015] Case 178/84 *Commission v Germany ('Beer Purity Law')* [1987] ECR 1227.

[1016] Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617.

Court of Justice, folding them into the question of an impugned law's suitability to the purpose pled in justification.

The necessity element of justification, however, is usually far more significant, and in both Australia and the EU it has been held to require that the least burdensome means be chosen to achieve the desired legitimate purpose. For example, it was seen in Chapter VI that the High Court ruled against the South Australian bottle deposit scheme in *Castlemaine Tooheys Ltd v South Australia* in part because it the amount of the deposit (and the margin of difference between the deposit for single-use and refillable bottles) was greater than was necessary to achieve the legitimate purpose of environmental protection and conservation of energy resources. Likewise, when confronted with similar factual circumstances, the ECJ similarly ruled against the necessity of a Danish bottle deposit scheme in *Commission v Denmark ('Bottle Deposit')* (1988)[1017]: although Denmark's imposition of a mandatory deposit scheme for single-use bottles was justified, the limitation on the total quantity of liquids that could be sold in single-use bottles in the Danish market each year was more than what was necessary to achieve the desired purpose, and so was not the least burdensome means of achieving that outcome[1018].

[1017] Case C-302/86 *Commission v Denmark ('Bottle Deposit')* [1988] ECR 4607.

[1018] See discussion in Michael Longo, 'Co-Operative Federalism in Australia and the European Union: Cross-Pollinating the Green Ideal' (1997) 25 Federal Law Review 127, 135-138. At 137, Longo makes the interesting suggestion, not often explicitly discussed in EU jurisprudence, that the Court was in part motivated by political considerations in coming to its decision, inasmuch as it sought to "placate[e] the Euro-sceptical, enviro-enthusiast Danes" ruling that the environmental protection aim and the deposit scheme were valid in principle, even if the specific legislative scheme were judged to be contrary to EU free movement law. Resting his argument on the observation that Denmark, like the UK, tended to favour the intergovernmental, rather than supranational, aspect of the EU, he continues that "[h]ad the ECJ frustrated Denmark's legislative environmental aims", he continues, "it and the [European] Community generally would have had to endure the wrath of the Danes". In light of subsequent developments with the UK's soon-to-be-former membership of the EU, such predictions do not now appear quite as unlikely as they may have when originally made.

In each jurisdiction, necessity is effectively 'reasonable necessity', and this appears to be for similar reasons in each case. In Australia, although the Court initially seemed to back away from the concept of necessity in the justification of relevant restrictions, viewing a judicial determination of necessity as an improper usurpation of legislative power[1019], 'reasonable necessity' was later confirmed as part of the doctrine of the Court[1020]. These indications may not be as contradictory as they first appear, however, because if the Court is willing to accept *reasonable* necessity without going into minute detail to determine *absolute* necessity, this presumably represents the due deference to the legislature which was a cause of earlier concern, as it acknowledges that there is a scope of reasonableness and that this scope is to be defined *by the legislature* in assessing what means can be used without unreasonable administrative hassle. In EU law, the position is much the same, as the necessity element does not require that laws create an administrative burden or expenditure for the Member State which "clearly would exceed the limits of what can reasonably be required"[1021]; this appears to represent the CJEU's deference to the right of Member State governments to set limits on the scope of measures which may be adopted without unreasonable administrative hassle.

The Relevance of Comparisons with Other States' Laws:

At this point, it is instructive to consider the degree to which the Court in Australia and the EU analyses the necessity of a certain State's law by reference to the laws of other States on the same subject matter. In Australia, after *Cole v Whitfield* (1988) determined that the higher

[1019] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 472-473.

[1020] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 477 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[1021] Case C-104/75 *Adriaan de Peijper, Managing Director of Centrafarm BV* [1976] ECR 613, para 18.

minimum catch size for lobsters in Tasmania was not rendered unjustified merely because of the existence of a lower minimum catch size in South Australia, it was clear that the Court wold not blithely engage in a 'race to the bottom' for legislation, finding a law unjustified if any other State had chosen to pass a less restrictive law. Nevertheless, two decades later in *Betfair Pty Ltd v Western Australia*, an important gloss was placed on this principle: although the existence of a less restrictive law in another State will not automatically preclude justification, it will be in practice be very difficult to justify more restrictive treatment in pursuit of same objectives: "the 'fundamental consideration' identified in *Castlemaine Tooheys Ltd v South Australia* of a localised condition of well-being will not encompass much modern State regulatory legislation in the [internet economy]"[1022].

In the EU, the same formal principle applies that the mere existence of less restrictive legislation in another Member State does not preclude the given Member State law from being 'necessary', and thereby justified: "the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate"[1023]. As a matter of practice, the Court of Justice is more forgiving of legislative divergence between Member States, and does not typically compare impugned legislation against legislation on the same subject matter in *other* Member States; as was seen in Chapter VII, particularly on the subject of consistency and coherence, the Court in the EU rather tends to compare Member State legislation to other legislation from *that same* Member State, or indeed to assess the *internal consistency* of

[1022] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 474 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[1023] Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, para 51; repeated in Case C-262/02 *Commission v France ('Alcohol Advertising')* [2004] ECR I-6569, para 37, Case C-443/02 *Schreiber* [2004] ECR I-7275, para 48, and Case C-141/07 *Commission v Germany ('Hospital Pharmacy Supply Contracts')* [2008] ECR I-6935, para 51.

the impugned legislation. The immediate effect of the EU's significantly lesser tendency to cross-compare Member State laws on the question of justification is that it counterbalances the wider definition of *scope* which Chapter V showed EU law to have on certain species of law, compared to the relatively constricted modern Australian law which employs a discrimination test across all legislation. The broader effect is that it renders EU jurisprudence more tolerant of State legislative divergence than is Australian jurisprudence, which is arguably quite appropriate given the greater difference between the various legal and social cultures across the 28 EU Member States than exists between the 6 Australian States.

Balancing:

Having acknowledged that the suitability and necessity elements of proportionality are effectively the same in Australia and the EU, the real difference between these two jurisdictions until very recently was to be found in the fact that the EU contained the additional element of a proper balance between the importance of the achievement of the legitimate object and the burden imposed on interstate trade. This third element represents a significant curtailment on Member States' regulatory autonomy because in order to reach the third element of proportionality, the law must already have been suitable to a legitimate purpose and necessary achieve that legitimate purpose (that is, it must be the only legally permissible means of achieving that legitimate purpose); if the Court then rules that the law is nevertheless incompatible with EU law because the burden on interstate trade is too great for that legitimate purpose to justify, the Court will have effectively ruled that even though the Member State was pursuing a clearly legitimate purpose and was doing so in the least burdensome manner possible, *it is nevertheless impossible under EU law for the Member State to achieve that legitimate purpose*.

As was noted in Chapter VI, Australian law has recently adopted this third, balancing element of the proportionality test, in respect of the implied freedom of political communication contained within the Constitution. Given the Court's analogising of its jurisprudence on justification with respect to burdens on the implied freedom of political communication and the freedom of interstate trade under s 92, it is likely that this third element will find its way into the s 92 jurisprudence soon. (It is to be noted, however, that the cases which established the modern Australian jurisprudence on justification under s 92[1024] did not endorse the addition of a balancing element to the justification test.) The arguments against the adoption of the balancing element in Australian law were explored in Chapter VI, and if and when it is to be formally adopted for s 92 the Court will need to be careful not to apply it in so muscular a way as to risk incompatibility with the federal principles of the Constitution, potentially undermining State legislative autonomy by making legitimate State legislative purposes unachievable when the (federal) High Court thinks them too unimportant compared to the burden they impose on interstate trade.

Even if the balancing element is to be incorporated into justification under s 92, there is an important contrast here between Australia, in which the operation of the balancing element would need to be acutely sensitive to the structural principles of the Constitution, and the European Union, which has adopted the balancing element without apparent concern as to whether it undermines the structure of the Union. The reason for this is the political difference between Australia and the European Union: in Australia, the States are united into "one indissoluble Federal Commonwealth"[1025] under a constitutional document (the Constitution)

[1024] *Cole v Whitfield* (1988) 165 CLR 360 and *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

[1025] Preamble to the Australian Constitution.

which does not require unanimity between the States to change[1026]; in the European Union, on the other hand, a Member State may choose to withdraw from the constitutional documents (the TEU and the TFEU) at any time[1027], and alteration of that document is only possible with the consent of all Member States. The EU legal order, then, does not create the same federal structure, and so it is not so clearly the task of the judges of the Court of Justice to preserve the legislative autonomy of Member States within a federal balance. Within the EU legal order, Member States have more ability to defend their legislative autonomy for themselves by threatening to withhold their consent to the relatively frequent changes in the Treaties, by threatening to withdraw from the Union or, as the UK has done in purported defence of its sovereignty and legislative autonomy, by actually invoking art 50 TEU with the intent of leaving the Union. The fact that the Member States remain the 'Masters of the Treaties' in this way means that there is simply less need for the CJEU to go hunting around the Treaties looking for structural principles which might guide their interpretation of the provisions on free movement of goods and services. Even the principle of subsidiarity in art 5(3) TEU (discussed in Chapter V), which is in the broader sense applicable across the institutions of the Union (including the CJEU)[1028], has not been pressed into service by the Court to act as a preservation of Member State legislative autonomy. Instead, the Court has preferred to treat subsidiarity as a principle of general application but lacking any practical judicial bite in cases where Member States seek to defend their regulatory autonomy against the encroaching demands of free movement law. In

[1026] A referendum is required to alter the Constitution and the proposed amendment must be approved by a majority of States (that is, a majority of voters in each of the approving States) and a majority of Australian voters overall: Constitution s 128.

[1027] Such choice becomes effective after the effluxion of two years from the date when the withdrawing state notifies the European Council unless the withdrawing state and all the other Member States agree to prolong the period: art 50(3) TEU.

[1028] See discussion at footnote 568 above.

contradistinction, it is natural that the High Court of Australia should have developed a more comprehensive system for maintaining the proper balance between economic integration and State autonomy and that, in particular, it should be more concerned to preserve a degree of State autonomy because, unlike in the EU, Australian States cannot defend their own autonomy by unilaterally withdrawing from the Constitution or blocking changes to it by withholding their consent (such changes being far less frequent in the case of the Australian Constitution anyway). This is not to suggest that the High Court of Australia has a *policy* of preferring State autonomy to economic integration, nor that the Court of Justice of the European Union has a *policy* of favouring economic integration over State autonomy. Rather, the political fact that Australia is a federation in the sense described above invites consideration of how that federal status should guide judicial decision making, and the political fact that the Member States of the European Union are not bound together in a federal compact means that considerations proper to federalism, such as the preservation of the existence, and ability to function, of each polity in the federation, do not have the same relevance in determining how to interpret provisions of the EU Treaties and how to balance economic integration and Member State autonomy. Nevertheless, even though the two courts do not entertain contrary policies as such, the fact remains that federal principles do tend to encourage Australian law to contain the effect of the balancing element of the proportionality test out of concern for the curtailment of State power inconsistent with the maintenance of the federal structure of the Constitution, whereas EU law, not being guided by a federal principle in this way, has long chosen to include the balancing element and has thereby diminished Member State autonomy.

We must be careful, however, not to overstate this difference. Even though the EU has entertained this balancing element for longer than Australia, and even though Australian jurisprudence may need to circumscribe the operation of the newly-adopted balancing element more closely than has the EU due to the federal principles underlying Australia's constitutional structure, the actual operation of the balancing element in practice – to actually strike down otherwise justified legislation – has been nil in either jurisdiction. The fact of its non-use in practice at least suggests that the Court of Justice has some sensitivity to the necessity of maintaining a degree of Member State legislative autonomy, even if this sensitivity does not manifest itself in a robust 'federal principle'.

Section 3 – Forensic Considerations:

Burden of Proof:

It has already been discussed in Chapters I to V why an expanded definition of scope is not merely counterbalanced by an expanded definition of justification, because a catching a broader range of laws as *prima facie* invalid/inapplicable tends to make judicial inroads into legislative power by placing more laws under the Court's jurisdiction and having a chilling effect on the legislature. In addition to this, there is another reason why scope and justification do not balance each other: for the question of scope, the burden of proof lies with the claimant (the interstate trader), whereas for the question of justification, the burden of proof lies with the defendant (the State). Thus, the restrictive effect which the expansion of both scope and justification has on State legislative power is all the greater, as it is upon the State itself that the burden of proving justification falls, and opening the door of scope wider simply necessitates more preparation time and legal costs on the part of the defendant State on this question of justification – especially given that the State's costs are rarely recoverable from the claimant, even where the State is successful in defending itself against a claim of unjustified restriction of free movement of goods or services.

<u>Evidence:</u>

It also bears noting how the above elements of the test for justification are actually to be proven, in an evidential sense. In both Australia and the EU, the Court looks for expert scientific or economic evidence (where it is available) to support a claim that restrictive legislation is justified, rather than just 'taking a State's word for it' that the impugned legislation achieves the purposes it is said to achieve: in *Castlemaine Tooheys Ltd v South Australia*, for instance, the High Court was unwilling to blithely accept that South Australian energy reserves would be protected by the higher bottle deposit levy on single-use bottles than refillable bottles or that litter in South Australia would be reduced by the measures, because such expert evidence as there was related only to *existence* of energy supply and litter problems, and did not prove that the measure actually addressed these problems. Likewise, the lack of hard data and rigorous studies to back up the State's case in *Betfair Pty Ltd v Western Australia* undermined the argument, pled in justification, that the complete prohibition of betting exchanges was necessary to maintain the integrity of horse racing and prevent unlawful nobbling of horses. In the EU, in a factual situation strikingly similar to *Castlemaine Tooheys Ltd v South Australia*, in *Commission v Germany ('Bottle Deposit')* (2004)[1029] Germany subjected single-use bottles to a mandatory €0.25 deposit (or €0.50 for larger bottles) if the proportion of refillable bottles in the German market fell below 72% for two successive years[1030]; the law constituted a limitation of interstate

[1029] Case C-463/01 *Commission v Germany ('Bottle Deposit')* [2004] ECR I-11705.

[1030] In fuller detail, the German legislation prescribed that single-use bottles were subject to the €0.25/€0.50 deposit unless the producer partook in a so-called 'global collection system', that is, a general system by which bottles could be returned to points of sale for recycling. However, the exemption from the deposit was withdrawn in the event of trade because German producers were significantly less likely to use single-use bottles than producers in other EU countries[1031], and also the distance across which interstate bottles must be returned in order to claim the refund was that much greater. The Court found that there was insufficient evidence to justify the rapidity of the imposition of the mandatory deposit system (only six months' notice), and consequently rejected Germany's argument that the law was justified. Similarly, as was seen in Chapter VII, the Court of Justice decided in *Commission v United Kingdom ('Diseased Turkeys')* (1982)[1032] that the British legislation at issue was not justified because there was insufficient evidence in the form of scientific studies to warrant the imposition of the new scheme of mandatory slaughter of infected flocks (and banning of imports from any country which did not do the same), especially by comparison with the weight of scientific evidence that had been originally adduced to support the introduction of the existing scheme of preventative vaccination.

Standard of Proof:

In both Australia and the EU, within the justification of *prima facie* restrictions of interstate trade, the State has a measure of discretion as to how high a level of protection to afford the legitimate interests which form the basis of that justification. Accordingly, in the EU, the standard of proof in respect of justification is that it must be a 'reasonable conclusion from the facts' (although not necessarily *the only* reasonable conclusion from the facts) that the State measure is suitable and necessary for the protection of a legitimate interest. (Presumptively, the

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the proportion of refillable bottles in the German market falling below the specified 72% for two years in a row; in this case, the deposit on single-use bottles became mandatory and the only way of recovering the deposit was for the purchaser to return to their specific source.

[1031] Single-use bottles constituted only 10% of those used by domestic German beverage producers, whereas they constituted 71% of the broader EU beverage market.

[1032] Case C-20/82 *Commission v United Kingdom ('Diseased Turkeys')* [1982] ECR 2793.

same standard would apply in respect of the balancing element of the proportionality test too.) In Australia, the standard of proof has not been explicitly specified, but in the absence of such an explicit statement from the Court, it is the civil law standard of proof – that is, proof 'on the balance of probabilities' rather than the criminal law standard of 'beyond reasonable doubt' – that is implicitly applied. As such, the standard of proof for justification is very similar in the EU and Australian jurisprudence, as each system respects that the justification must be objectively demonstrated (the requirement of 'reasonableness') in order to warrant a partial fracturing of the internal market, but that some margin of appreciation must remain to the State to set the level of protection of legitimate interests.

On this point, however, recent case law in the EU limiting this margin of appreciation (*Laval* (2007)[1033], *Viking Line* (2007)[1034] and *Scotch Whisky Association* (2015)[1035] in particular) and in Australia sounding a note of general scepticism of the concept of 'the people of a State' and the prohibition of an activity which is permitted and regulated in another State (*Betfair Pty Ltd v Western Australia*[1036], *Betfair Pty Ltd v Racing New South Wales*[1037]) bears noting. Recent comments in the High Court[1038] that the concept of a 'margin of appreciation' is not appropriate for impugned State legislation (admittedly in respect of other constitutional provisions than s 92),

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[1033] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] I-11767.

[1034] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] I-10779.

[1035] Case C-333/14 *Scotch Whisky Association v The Lord Advocate and the Advocate General for Scotland* ECLI:EU:C:2015:845.

[1036] (2008) 234 CLR 418.

[1037] (2012) 249 CLR 217.

[1038] *Unions NSW v New South Wales* (2013) 252 CLR 530, 553 (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* (2015) 257 CLR 178, 220 and 235-236 (Gaegler J).

bear noting. Evidently, both the ECJ and the High Court will not allow justification to pass without close enquiry.

Adjudication of Facts:

Another significant difference of forensic procedure relates to how determinations of fact are made, after the court in question (be it the High Court of Australia or the Court of Justice of the European Union) has determined the question of law relating to the impugned measure's compliance with the Constitution or Treaty. In Australia, in the modern era, s 92 cases will typically come to the High Court through other courts in the federal judicial system[1039], and once the High Court is seized of a case, it will determine both the question of law at issue and any questions of fact thereunder. This means that it is the High Court itself which is finally and completely disposing of the question of whether or not the impugned law is compliant with the free movement provisions of the Constitution. By contrast, in the EU, the Court of Justice has a more complex procedural role: when operating under the preliminary reference procedure, it formally functions as something of an expert tribunal on EU law to which Member State courts refer the specific question of whether an impugned law from that Member State complies with the EU Treaties. It is the Member State courts which decide when and on what terms a preliminary reference will be made to the Court of Justice. After such a preliminary reference has been made, the Court of Justice disposes of the question of law raised in the case and then

[1039] As was seen in Chapter I, prior to the creation of the Federal Court of Australia in 1976 the High Court heard cases at first instance (although they were often preceded by litigation in State courts for infractions of the State law which was then to be subjected to constitutional challenge before the High Court). In the most recent cases on s 92, for example, *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 and *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, the cases originated before a single justice of the Federal Court, were appealed to the Full Federal Court, and thence to the High Court were final determination was given.

returns the case to the referring Member State court for adjudication on matters of fact within the scheme of law laid down by the CJEU. Thus, the Court of Justice allows specific decisions on questions of fact, particularly as to whether or not a Member State law is justified (after the EU Court itself has judged it to be within the scope of the Treaty's free movement provisions), to be decided at the Member State level. When operating under the direct action procedure, on the other hand, the Commission or a Member State lays a case regarding compliance with the free movement provisions directly before the Court of Justice, which then functions as the court of first and last instance, disposing of both the legal and factual questions itself. Under this latter procedure, the European Court functions similarly to the Australian Court, but it is the contrast between the former preliminary reference procedure and the procedure of the High Court which is of most relevance here. The minor contrast to be observed here is that the High Court thus has a deeper jurisdiction in matters of free movement law, as it hears such cases either in original jurisdiction or on appeal from the Federal Court, but in either case is always the final court on matters of law and fact, whereas the Court of Justice is sometimes the final court of law and fact but sometimes only an expert tribunal of law with questions of fact disposed of by other courts. The major contrast to be observed is the constitutional repercussion that flows from this situation: in the Australian court system, it is the federal courts, of which the High Court was for most of Australia's history the sole, and is still the final, court, which disposes of free movement questions and the delicate issue of maintaining the appropriate balance between State legislative autonomy and Australian traders' freedom to trade throughout the country without undue limitation on their commercial activity. In the European court system, on the other hand, the Court of Justice shares the role of disposing of free movement questions with the Member State courts. Indeed, for the most part it is Member State courts which do the day-to-day enforcement of EU law, only issuing a preliminary reference to the CJEU where a contentious question of EU law is raised. What is more, after that issue is disposed of, it typically falls to the national court to decide the factual question at hand, which is where the delicate balancing of national interest in legislative autonomy and broader European interest in freedom of trade must be undertaken in the contest of a particular set of factual circumstances. In this sense, the European legal order can be seen as attempting to limit its inroads on Member State sovereignty and thereby uphold the spirit of the principle of subsidiarity enshrined in art 5(3) TEU, by making legal decisions at the lowest level of judicature, closest to the persons affected[1040]. Indeed it is only where *there is no referring Member State court*, because the suit is brought between Member States or between an EU institution and a Member State, that the Court of Justice will dispose of the entirety of the free movement question. This interlocks with the point discussed in Chapter V about the difference between the High Court invalidating laws which contravene s 92 and the Court of Justice merely declaring laws incompatible with Treaty provisions and requiring that the Member State (or its courts) dis-apply them inasmuch as they relate to EU free movement. In this respect, the Australian system is more centralised than the EU system[1041], and thus effects a greater constriction of State legislative autonomy because in the Australian system it is the central judiciary which originally, finally and fully decides all free movement questions[1042].

[1040] See Thomas Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration*: Legal* Limits to Judicial Lawmaking' (2013) 50 Common Market Law Review 931. As discussed above and in Chapter V, even though the focus of the principle of subsidiarity is on the EU legislative process, nevertheless it can be understood as a principle of general application, also encompassing the Court of Justice.

[1041] See Michael Longo, 'Co-Operative Federalism in Australia and the European Union: Cross-Pollinating the Green Ideal' (1997) 25 Federal Law Review 127, 147-148.

[1042] It should also be recalled that it is the Member States which made, expand or restrict the terms of the CJEU pursuant to the EU Treaties in the first place (being the so-called 'Masters of the Treaties').

Structuring and Limiting of Discretion:

Moving beyond procedural questions, an important challenge which both Australia and the EU have had to confront as the jurisprudence of justification has developed is the question of how to monitor and adjudicate executive discretion embodied in State legislation (as when an impugned law has reposed authority in a Minister or other decision-maker to permit or prohibit certain interstate trade, or to impose conditions on it in the form of a fee or licence), and how to control the legislative discretion to pass restrictive regulation in a context of scientific and factual uncertainty. Both these kinds of discretion involve situations in which complete (or even sufficient) factual information is not available at the time of legislation, and so a State legislature must grapple with this uncertainty by legislating on the basis of such incomplete information as is available.

In Australia, the High Court in *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955)[1043] recognised that earlier case law which had allowed broad Ministerial discretion to be justified under s 92 needed to be constrained lest s 92 be rendered nugatory; in that case the exercise of discretion to license interstate trade was on grounds so vague as to be non-justiciable, and unfettered discretion was as good as no law at all. A properly-structured discretion would involve *indicia* such as a connexion between the calculation of the charge and the public services or infrastructure actually used, the devotion of fee income to upkeep of services or infrastructure being used, and the fee applicable to interstate trade being no greater than that applicable to intrastate trade. (These considerations apply *a fortiori* to the case of an unstructured discretion to

[1043] (1955) 93 CLR 127.

forbid interstate trade: *Hughes & Vale Pty Ltd v New South Wales (No 1)* (1954)[1044] and *Gratwick v Johnson* (1945)[1045].) It should be noted, however, that despite this judicial attempt to require structuring of executive discretion and the passage of legislation in some Australian jurisdictions requiring executive decision makers to provide reasons for their decisions, there is still no *common law* duty to for an administrative decision maker to provide reasons for the decision made[1046], which in this respect allows the spectre of 'secret' discrimination against interstate trade to continue to haunt s 92 jurisprudence[1047].

In the EU, the Court of Justice has been slower to recognise the need for structured discretion, but at length has ventured to limit justification *for the passage of regulation*. Specifically, the Court has stipulated that the precautionary principle cannot be used to cover merely hypothetical risks, but its exercise must be underpinned by the latest scientific evidence[1048] such as expert studies[1049] and statistical data on market share[1050].

While the cases in Australia and the EU do address somewhat different subjects, both the limiting of discretion to regulate and the structuring of executive discretion after legislation has been passed evince a principle that restrictions on interstate trade should be justified only when they are meaningfully justiciable by the Court, and that proper justification should rest on firmer

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[1044] [1954] UKPC 39, (1954) 93 CLR 1 (PC).

[1045] (1945) 70 CLR 1.

[1046] *Public Service Board (NSW) v Osmond* [1986] HCA 7, (1986) 159 CLR 656.

[1047] See James Stellios, *Zines's The High Court and the Constitution* (6th edn, Federation Press 2015) 188.

[1048] Case C-95/01 *Criminal Proceedings against Greenham and Abel* [2004] ECR I-1333.

[1049] Case C-463/01 *Commission v Germany ('Bottle Deposit')* [2004] ECR I-11705.

[1050] Case 90/86 *Criminal Proceedings against Zoni* [1988] ECR 4285.

ground than effectively just Ministerial discretion (whether that be the government's discretion to pass a law in the absence of factual information or the reposing of broad discretion to regulate interstate trade in the hands of a Minister). On this latter issue, the ECJ would do well to study the Australian jurisprudence on the structuring of executive discretion (particularly *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955)) and *Buck v Bavone* (1976), as this could help to develop EU law in an area still quite unexplored, but surely necessary for the effective functioning of an internal market – after all, how can trade be free unless any restriction of it, even Ministerial, be justified in non-arbitrary terms? Surely the ECJ would find themselves in agreement with their Australian judicial brethren on the principle that executive discretion should be "defined with sufficient particularity, precision and intelligibility"[1051].

A *De Minimis* Exception?:

Another area of contrast between Australian and EU jurisprudence is the question of whether or not there exists (or should exist) a *de minimis* exception by which small infringements of the free movement provisions can be justified because they fall beneath this threshold of 'minimality'. Indeed, the two systems evince a noteworthy contrast even in the significance granted to the issue of a *de minimis* exception within the free movement jurisprudence in the first place.

In Australian law, it is difficult to declare with certainty that there is a *de minimis* rule in the modern era, given that it has not been the subject of litigation since *Cole v Whitfield*. Even in the

[1051] *Hughes & Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 165 (Dixon CJ, McTiernan and Webb JJ; Williams, Fullagar and Taylor JJ concurring).

historical jurisprudence, there was not much judicial exegesis of such a *de minimis* justification, with the major example being the discussion in *The Bank Nationalisation Case* (1948)[1052] of what proportion of interstate trade must be affected by the impugned legislation for any breach of s 92 to be 'substantial' enough to warrant judicial intervention. As was seen in Chapter VI, the Court declined to elaborate on the concept by setting specific criteria for this threshold of substantiality, and simply declared that the threshold was not merely a matter of percentages. Indeed, the impugned law in that case was not judged to come within a *de minimis* exception, and no subsequent cases have been decided on the basis of such a *de minimis* exception. Thus, even in the pre-*Cole v Whitfield* era the existence and operation of a *de minimis* justification was questionable, and all the more so in the modern post-1988 jurisprudence given the enduring judicial silence on the issue.

The existence of a *de minimis* justification is somewhat more prominent in EU jurisprudence, particularly in respect of the free movement of services, where it has actually been employed to excuse restrictive legislation which would otherwise have been contrary to art 56 TFEU in *Viacom II* (2005)[1053]. That said, the *de minimis* justification is not a particularly prominent element of EU jurisprudence, and *Viacom II* represents the only forthright employment of it; by comparison with the other heads of justification (the enumerated justifications in art 36 and 52(1) TFEU such as protection of public health, the environment, etc., mandatory requirements in the public interest, and the justifications arising from the Charter of Fundamental Rights and the fundamental rights deriving from the ECHR), *de minimis* has a relatively limited role in EU free movement law. It is also an open question whether the *de*

[1052] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1.
[1053] Case C-134/03 *Viacom Outdoor Srl v Giotto Immobilier SARL (Viacom II)* [2005] ECR I-1167.

minimis test extends beyond free movement of services and into free movement of goods: on the one hand, the CJEU has denied its existence, both in respect of measures which had a discriminatory effect against traders from another Member State[1054] and in respect of measures which were non-discriminatory[1055]. On the other hand, as will be recalled from Chapter III, Advocate-General Jacobs in his Opinion in *Leclerc-Siplec* did argue that art 34 TFEU should encompass measures which hindered access to the Community-wide market to a *substantial* degree[1056], and it has been argued that some form of *de minimis* test must apply to those aspects

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[1054] Case 16/83 *Criminal Proceedings against Karl Prantl* [1984] ECR 1299: "it is not necessary that [breaches of art 34 TFEU] should have an appreciable effect on intra-Community trade" (para 20); Case C-49/89 *Corsica Ferries France v Direction générale des douanes français (Corsica Ferries II)* [1989] ECR 4441: "As the Court has decided on various occasions, the articles of the [TFEU] concerning the free movement of goods, services, persons and capital are fundamental Community provisions, and any restriction, even minor, is prohibited" (para 8); Case C-141/07 *Commission v Germany ('Hospital Pharmacy Supply Contracts')* [2008] ECR I-6935: "Since the contested provisions are liable to hinder intra-Community trade, they must be considered as a measure having equivalent effect to a quantitative restriction on imports within the meaning of [art 34 TFEU], without it being necessary to prove that they have had an appreciable effect on such trade" (para 43).

[1055] Joined Cases C-177/82 and C-178/82 *Criminal Proceedings Against Jan van der Haar and Kaveka de Meern BV* [1984] ECR 1797: "It must be emphasised that…[art 34 TFEU] does not distinguish between measures having an effect equivalent to quantitative restrictions according to the degree to which trade between Member States is affected. If a national measure is capable of hindering imports it must be regarded as a measure having an effect equivalent to a quantitative restriction, even though the hindrance is slight and even though it is possible for imported products to be markets in other ways" (para 13); Case C-126/91 *Schutzverband gegen Unwesenin der Wirtschaft eV v Yves Rocher GmbH* [1993] ECR I-2361: "…it has been consistently held that [art 34 TFEU] does not make a distinction between measures which can be described as measures having equivalent effect to a quantitative restriction according to the magnitude of the effects they have on trade within the Community" (para 21); Case C-166/03 *Commission v French Republic (' 'Gold' and 'Gold Alloy' Designations')* [2004] ECR I-6535: "[The impugned provision] should be considered a measure having equivalent effect to a quantitative restriction on imports within the meaning of [art 34 TFEU], without it being necessary to prove that it has had an appreciable effect on intra-Community trade" (para 15).

[1056] Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* [1995] ECR I-179, Opinion of AG Jacobs, paras 39, 42 and 44. The Advocate-General was clear that he applied this 'substantiality' requirement – i.e. the clearing of the *de minimis* threshold – to measures which weren't simply discriminatory against foreign traders in the first place (at para 44):

> Only in relation to measures which are applicable without distinction to domestic goods and goods from other Member States would it be necessary to introduce a requirement that the restriction, actual or potential, on access to the market must be substantial. The impact on access to the market of measures applicable without distinction may vary greatly, depending on the nature of the measure in issue. Where such a measure prohibits the sale of goods lawfully placed on the market in another Member State (as in 'Cassis de Dijon'), it may be presumed to have a substantial impact on access to the market, since the goods are either denied access altogether or can gain access only after being modified in some way; the need to modify goods is itself a substantial barrier to market access.

of free movement of goods which operate according to a trade restriction analysis (i.e. selling arrangements and possible usage restrictions), lest 'hindering access to the market, actually or potentially' be an infinitely wide definition catching all Member State laws[1057]. Language similar to that employed by Advocate-General Jacobs has indeed been used by the Court, on occasion, in some of its subsequent case law on free movement of goods[1058], although without actually relying on *de minimis* as a justification for a law which would otherwise have been prohibited.

Against this background of contrary indications, the best view is that if *de minimis* exists for services (as *Viacom II* provides), then it should also exist for goods. The spectre of one rule for services and a different rule for goods – on what is the very same question of whether there is a threshold of minimality – is another example of the potential for jurisprudential bifurcation which is engendered by the TFEU dealing with the free movement of goods and the freedom to provide services in different sections, in contrast to the unity of the Australian jurisprudence engendered by the unity of free movement of goods and services under the Constitution. Nevertheless, putting that theoretical point to one side, the tendency to view the four Treaty Freedoms of goods, services, capital and persons as interrelated suggests that *de minimis* would, in principle, be available under EU law to justify breach of the free movement of goods too[1059].

1057 Max Jansson and Harri Kalimo, '*De Minimis* Meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?' (2014) 51 Common Market Law Review 523, 531.

1058 Case C-28/09 *Commission v Austria ('Heavy Lorry Restrictions')* [2011] ECR I-13525: "the sectoral traffic prohibition is liable to have a substantial effect on the transit of goods between northern Europe and northern Italy" (para 116).

1059 While the Court has been at best equivocal on the convergence of the jurisprudence of the Four Freedoms on the question of *scope* – as Chapters III and IV show at length, the jurisprudence remains distinct for goods on the one hand and services on the other – on the question of *justification*, the Court is much readier to develop a converged jurisprudence.

Moving on from the availability to the operation of such a *de minimis* test, in one of the most detailed treatments of the subject, in their 2014 article[1060] Dr Max Jansson and Prof Harri Kalimo prise out three different elements of a *de minimis* test as it may apply in EU law[1061]: the absolute magnitude of the market affected by the impugned law, the proportion of traders within the market affected, and the gravity of the impost on individual traders. It is not clear what combination of these elements is necessary for a restriction of trade to clear the threshold of minimality and become the kind of restriction which the Treaty prohibits[1062]. One can look, initially, to competition law, where questions of minimality of effect on the market are successfully addressed, as proof that the concept of *de minimis* need not decay into imprecision of definition and mere judicial intuition[1063]. However, one should not be too quick to read across specific *de minimis* principles from competition law to free movement law, given that the focus in competition law is on the dynamics at play in the market as a whole, whereas a *de minimis* test in free movement law would focus on the degree of restriction of *individual interstate traders*, such that a grave effect on a small number of individuals could clear the *de minimis*

[1060] Max Jansson and Harri Kalimo, '*De Minimis* Meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?' (2014) 51 Common Market Law Review 523.

[1061] Note that Dr Jansson and Prof Kalimo treat the *de minimis* question as pertaining to *scope* rather than *justification*, but for the purposes of analysing whether it exists and what its components are, this question is moot, save for the above-noted issue of that the burden of proof lies on the complainant in respect of scope and on the defendant in respect of justification: see discussion above and Niamh Nic Shuibne and Marsela Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2013) 50 Common Market Law Review 965, 972. In other respects, the analysis is the same whether *de minimis* is regarded as part of scope or justification, since it essentially 'forgives infractions of free movement law because they are minimal'. In the opinion of the author of this thesis, however, *de minimis* is better regarded as pertaining to justification, as justification better captures the idea that a *prima facie* limitation of free movement has technically been committed, but the limitation is forgiven because its impact is so small.

[1062] Max Jansson and Harri Kalimo, '*De Minimis* Meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?' (2014) 51 Common Market Law Review 523, 534 and 539.

[1063] Max Jansson and Harri Kalimo, '*De Minimis* Meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?' (2014) 51 Common Market Law Review 523, 540.

threshold[1064]. Looked at in this way, the references to the effect of the impugned laws in *Mickelsson and Roos* and *Italian Motorcycle Trailers* on individual traders and their market share starts to look like a surreptitious entry of *de minimis* jurisprudence into the Court's case law. If this is so, it would be better that the Court simply admit outright the existence of a *de minimis* threshold – as Jansson and Kalimo pithily express it, "The Court should cease consistently denying the existence of any *de minimis* thresholds, while letting considerations of degree in through the back door"[1065].

It is evident, then, that the existence and operation of any *de minimis* test as part of justification of *prima facie* breaches of free movement are unclear in both Australian and EU law. Both systems have made feints towards the existence of a threshold of minimality, beneath which technical restrictions on freedom of interstate trade are not severe enough to warrant abrogating State legislative autonomy. However, neither system has fully and openly embraced the concept, much less defined it with sufficient precision, and in practice *de minimis* is not a concept frequently employed either system of jurisprudence.

There is, of course, a more pragmatic way to view the operation of a *de minimis* exception to free movement provisions: realistically, the considerable expense of court proceedings tends to function as a financial bar to the litigation of small, insubstantial claims – if the restriction of trade is small enough, it isn't worth the trader's time, money and effort to bring the case to court. That said, this does not exclude the possibility of a deep-pocketed, determined litigant like South Australia's implacable Mr Frederick James, though!

[1064] Max Jansson and Harri Kalimo, '*De Minimis* Meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?' (2014) 51 Common Market Law Review 523, 532-533.

[1065] Max Jansson and Harri Kalimo, '*De Minimis* Meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?' (2014) 51 Common Market Law Review 523, 557.

Uncertain or Indirect Effect:

Both Australia and the EU have also wrestled with the idea that some State laws which might, at a theoretical level, restrict interstate trade might be justifiable because their effect on that trade is too uncertain or indirect. As distinct from a *de minimis* justification, which would acknowledge the existence of a restriction but find it to be so small that it does not sufficiently affect interstate trade (a question of quantum), an uncertainty/indirectness justification would operate where it cannot be certain what effect the State law actually had on interstate trade (a question of evidential certainty). Obviously, while these are two distinct concepts, there is an overlap between them inasmuch as if the law's effect on interstate trade is uncertain, then any effect that there might have been must have been fairly minimal[1066].

In the early Australian jurisprudence of justification, the Court did entertain the concept of justifying otherwise restrictive State laws by reference to the fact that their effect on interstate trade was 'too uncertain and indirect' (*Roughley v New South Wales; Ex parte Beavis* (1928)), but the real content of this justification was not well explored. Over the middle of the 20th Century, several of the various strands of justification which the Court had earlier employed seemed to come together under a unified concept of whether or not the 'real object' of the

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[1066] In Case C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop arl* [1998] ECR I-3949, the Court refers to the connexion between minimality and uncertainty of effect, although duly keeping the concepts separate. Dr Jansson and Prof Kalimo, on the other hand, would subsume uncertainty and indirectness under the concept of *de minimis* on the grounds that uncertainty relates to minimal *probability* and indirectness relates to minimal *causation*; together with *de minimis sensu stricto,* "they all build on the idea of a (quantifiable) scale": Max Jansson and Harri Kalimo, '*De Minimis* Meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?' (2014) 51 Common Market Law Review 523, 541-544. While there is an obvious attraction to this notion of combining specific heads of justification under broader rubrics where possible, on fuller consideration it is better to consider *de minimis stricto sensu* as separate from uncertainty and indirectness; there is a useful distinction at a theoretical level between minimality of an *acknowledged* effect on interstate trade and uncertainty as to *whether there is any effect at all*. Additionally, at a doctrinal level, it would be necessary for the Court to confirm the existence and applicability of *de minimis* first before subsuming other, also somewhat ambiguous, concepts within it.

impugned law was restriction of interstate trade (*The Bank Nationalisation Appeal* (1949)), in the sense that if the effect of a law were 'too uncertain and indirect' then its 'real object' was not the restriction of interstate trade. The content of the 'too uncertain and indirect' portion of the test was further elucidated with the Court's decision in *Hospital Provident Fund Pty Ltd v Victoria* (1953) that directness was assessed by whether or not the restriction applied to an aspect of the trader's business which was integral to interstate trade. However, in the modern, post-*Cole v Whitfield* jurisprudence, 'too uncertain and indirect' has not been a head of justification, although the recent case of *Betfair Pty Ltd v Racing New South Wales* did canvas the issue of the plaintiff failing to prove that there was indeed a demonstrable (i.e. not uncertain) effect on their interstate trade.

In the EU jurisprudence, there has also been consideration of the proper use of the concepts of uncertain or indirect effect. As to directness, *Dassonville*'s assertion that direct *or indirect* restrictions of interstate trade fall foul of the Treaty has at least made clear that indirectness is not a head of justification for *prima facie* breaches of free movement law. As to uncertainty, looking at free movement as a whole, the case law does not provide a clear threshold for what constitutes such justificatory uncertainty: a hypothetical event is sometimes regarded as too difficult to quantify and thus 'too uncertain'[1067], but in other cases a hypothetical event is regarded as sufficiently certain to nullify any justification based on supposed uncertainty[1068]. Dr Jansson and Prof Kalimo suggest applying an economic lens to this question, which would tend to constrict the availability of any uncertainty justification: any uncertainty of effect from the

[1067] Case C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-493 (a case on free movement of workers under what is now art 45 TFEU).

[1068] Joined Cases C-282/04 and 284/04 *Commission v Netherlands (KPN and TPG)* [2006] ECR I-9141 (a case on free movement of capital under what is now art 63 TFEU).

Court's point of view would also be uncertainty of effect from the interstate trader's point of view, and such a trader would naturally price such uncertainty into his or her trade as with any other risk: "even the risk may have economic value and such negative value (cost) would amount to a restrictive effect. The probability of the event is therefore monetized [*sic*] in the perceived risk"[1069]. On that basis, uncertainty would not be much of a justification, as even an uncertain risk would be meaningfully restrictive of interstate trade. The Court can be seen to have warmed to such market analysis in *Mickelsson and Roos* (2009), in which consumer behaviour analysis was used to overcome any uncertainty about the effect of the Swedish limitation on where jetskis could be used (i.e. consumers probably wouldn't buy the product in the first place if there were few or no places in which to lawfully use it). The use of trader or consumer behaviour analysis has not been without controversy, and it must be used cautiously, to take into account the multifarious motivations for traders' and consumers' decisions:

> In cases on free movement of goods and services, the decisions of firms obviously tend to predominantly follow an economic rationale. However, Corporate Social Responsibility expands their range of interests, values and objectives also beyond the mere bottom line: environmental protection and community development are but few examples. Even more important, consumers, who form the demand for such goods and services, also operate on the basis of values much broader than just price.[1070]

Market analysis, in particular the analysis of trader and consumer behaviour, will be increasingly relevant in the Court's analysis, and consequently it can be expected that the utility of 'uncertainty' as a basis for justification will diminish.

In both Australian and EU law, then, the courts have had occasion to consider the proper role of uncertainty and indirectness as grounds for justification of otherwise restrictive measures.

[1069] Max Jansson and Harri Kalimo, '*De Minimis* Meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?' (2014) 51 Common Market Law Review 523, 547.

[1070] Max Jansson and Harri Kalimo, '*De Minimis* Meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?' (2014) 51 Common Market Law Review 523, 553.

Poor definition of what constitutes uncertainty and indirectness has similarly affected both systems, although the EU jurisprudence at least has been clear since *Dassonville* about the unavailability of an indirectness justification. As to uncertainty, it is not clear that it does indeed exist as a basis for justification in modern Australian or EU law; although it is invoked with some regularity in the ECJ, the Court's treatment of it has not been decisive enough to definitively add it to the list of justifications for *prima facie* breaches of free movement law. Assuming, though, that the concept of uncertainty does have an ongoing role to play within the jurisprudence of free movement in both systems, it is interesting to note that both the High Court and the Court of Justice show increasing receptiveness to market analysis when confronted with the question of uncertainty of effect of an impugned law, and it is likely that both courts will expect, if not demand, data on the behaviour of interstate traders and their consumers. This continues the general trend, particularly observable in the 21st Century decisions of the Australian High Court, of an increased judicial appetite for economic concepts and market data, as distinct from merely 'strict legalism'.

Section 4: The Connexion between Scope and Justification:

One of the consistent themes of this thesis has been the connexion between the question of scope of free movement provisions and the question of justification of impugned laws judged to fall within that scope, and as was seen in earlier chapters, over time, an expansion of the definition of scope has usually been associated with an expansion of the breadth of justification. This holds true most obviously in the case of the Australian jurisprudence, given its greater length (beginning as it does in 1909, with the first case on s 92) and discursiveness (allowing as it does individual judgements, and embodying the common law tradition of extensive judicial reasoning for decisions) as compared to EU law. Nevertheless, as a principle, it can be observed to exist within EU jurisprudence as well. As discussed in Chapter VII, the 'margin of appreciation' for justification of Member State laws coming within the scope of artt 34, 35 or 56 TFEU appears to expand as the definition of scope expands, with *Italian Motorcycle Trailers* (2009)[1071] having given an expansive definition of scope in respect of laws restricting the use of goods (i.e. employing a trade restriction analysis) and then also showed greater acceptance of arguments raised by way of justification which relied on simplicity of comprehension and ease of enforcement, as compared to previous case law relating to administrative convenience as a feature of justification. The Court of Justice was not explicit in tying together the breadth of scope and justification – but then, neither was the High Court across the many decades of its pre-*Cole v Whitfield* jurisprudence in which scope and justification moved in parallel. The comparison with the early Australian jurisprudence can be seen in respect of the development of justification as a distinct line of legal enquiry in *James v South Australia* (1927)[1072], centred on looking for the 'real object' of the legislation, just as scope was being defined in more explicit trade restriction terms – the wider the scope, the greater the role for, and width of, justification. Similarly, *Roughley v New South Wales; Ex parte Beavis*[1073] expanded the width of justification by introducing the concept of justification by virtue of the restriction being indirect, and *Peanut Board v Rockhampton Harbour Board* (1933)[1074] synthesised the real object and directness

[1071] Case C-110/05 *Commission v Italy ('Motorcycle Trailers')* [2009] ECR I-519.

[1072] (1927) 40 CLR 1.

[1073] (1928) 42 CLR 162.

[1074] (1933) 48 CLR 266.

schemes of justification, as the scope question was being more firmly decided in favour of the wider trade restriction analysis. In *The Bank Nationalisation Case*[1075], one of the landmark cases for confirming the dominance of the trade restriction analysis of scope at the time, the Court expanded justification by importing a *de minimis* justification in the form of the requirement that restriction of interstate trade be 'substantial' in order to qualify as a prohibited restriction under s 92. In both Australia and the EU, there is an observable connexion between expansion of the definition of scope and expansion of the definition of justification, although the relationship between the two, especially in the case of the historical Australian jurisprudence, is also influenced by other factors[1076].

Section 5: Conclusion:

Overall, there is more similarity between Australian and EU jurisprudence on the question of justification than on the question of the scope of free movement provisions. Unlike for scope, there have not been the decades-long struggles between fundamentally different definitions of justification stemming from fundamentally different views of the role of the internal market and State legislative autonomy within it.

The basic structure of the jurisprudence of justification is the same in both systems: after it has been determined that the impugned law has come within the scope of the free movement

[1075] *Bank of NSW v Commonwealth ('The Bank Nationalisation Case')* (1948) 76 CLR 1.

[1076] It is not a precise and infallible connexion, however, as shown by the divergent tendencies of 'individual rights' and 'free trade' judges: in contentious cases such as *Peanut Board v Rockhampton Harbour Board*, Dixon CJ found an impugned law to be within the scope of s 92 but unjustified, whereas Evatt J would have found the law to be outside the scope of s 92 or, even if it were within that scope, nevertheless justified. Similarly, in *Clark King & Co Pty Ltd v Australian Wheat Board* (1978), Barwick CJ would have found the law within the scope but unjustified, whereas Mason J, who accepted the prevailing authority that the law was within the scope of s 92 (although personally inclined to the opposite conclusion), found it to be justified.

provisions and there is a *prima facie* breach of those provisions, the Court will examine whether the purported justification satisfies one of the legitimate purposes, and whether it is proportional to the achievement of that purpose in the sense that it is suitable for the purpose and necessary for the purpose. EU law has, in theory, a third element of the proportionality enquiry whereby there must be an overall balance between the restriction imposed and the importance of the legitimate purpose, but the fact that it has never actually been used to declare Member State legislation inapplicable for incompatibility with EU law suggests that the ECJ is alive to how great an inroad this would make against Member State legislative autonomy.

The legitimate purposes entertained by Australian and EU jurisprudence are effectively the same, although with the important restriction that in the EU directly discriminatory laws cannot avail themselves of the 'mandatory requirements' justification. In theory, this means that EU law constrains State legislative autonomy to a greater degree than Australian law here, but in practice it would be difficult for directly discriminatory State measures to be successfully justified in Australian law anyway, so the difference is limited in practice.

EU law has considered the question of suitability in more depth than Australian law, with the ECJ's decisions on the importance of consistency and coherence of State legislation a potential source of guidance for the High Court should it be faced with a State law which does not seem to form part of a genuine suite of policy measures all pursuing the same legitimate purpose. As to the question of necessity, both Australia and the EU have traditionally observed some margin of appreciation as the sensitivity of the subject matter increases, but in EU law at least this seems to have diminished in several recent cases. The effect of this diminution may be to constrain State legislative autonomy more in the EU than in Australia, although Australian law has also seen recent pronouncements against the existence of a 'margin of appreciation'.

Other potential routes of justification such as *de minimis*, uncertainty and indirectness do not have a clear role in either Australian or EU jurisprudence. While each of these routes would have implications for the balance between the internal market and State legislative autonomy, the limited use of these concepts means that this impact is more a matter of speculation than fact at this juncture.

One important area of which the High Court took notice relatively early in the history of s 92 was the importance of providing some structure and limitation on executive decision making which limits free movement, and the Court of Justice could profit from looking at the principles enunciated by their Australian brethren in this regard. This is particularly significant as unstructured executive discretion has a significant potential to impede interstate trade, and if reasons are not (or need not be) provided by the executive decision maker, then the potential for surreptitious restriction is all the greater.

A trend which was observed in respect of scope in Chapter V is also discernible in respect of justification: both the High Court and the Court of Justice are becoming more demanding in terms of the economic, scientific and sociological evidence which they require of plaintiffs and defendants. In addition to the observations made in the earlier Chapter, in respect of justification the ECJ has made forthright demands of the defendant Member State to provide economic, scientific or sociological data to prove the necessity of their restrictive legislation; given the opportunity, it can be expected that Australia would make similar demands. While this trend represents an increasing economic sophistication on judicial benches, the consequence is that the States are less able to rely on deference from judges of the Australian Commonwealth and

European Union[1077] – although given that the courts are simply requiring *facts* to back up States' arguments, this development is to be welcomed.

Stepping back from the specific elements of justification in Australia and the EU, an interconnexion between scope and justification is observable in each system, in that as the former expands the latter tends to expand as well so as to – at least superficially – balance increased judicial oversight of State laws with increased 'forgiveness' for restrictive laws. This interconnexion is more obvious in Australian jurisprudence because of the transparency with which the ideological and doctrinal battles over the definition of scope were waged throughout the 20th Century, when the trade restriction (i.e. wider) definition was met with expansions in the 'mere regulations' which were capable of being justified. Nonetheless, even within the much more reserved and caliginous jurisprudence of the ECJ, there can be seen some indication, particularly in the cases on restrictions on the use of goods, that the margin of appreciation expands as scope has expanded to trade restriction analysis. It is worth restating, however, that *expanded justification does not cancel out expanded scope*; while they may cancel each other out at the micro-level, in respect of a particular State law under judicial consideration, they do not cancel each other out at the macro-level, in respect of central and State authority (internal market vs State legislative autonomy) because the double expansion simply erodes more State legislative autonomy as against central judicial power.

Justification, as a whole, can be seen to be a complex system of jurisprudence, which in both Australia and the EU functions as a sophisticated machine for making sure that the advance of the internal market does not excessively limit State legislative autonomy nor render impossible

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[1077] See Catherine Barnard, "Derogations, justifications and the four freedoms: Is State interest really protected?" in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009) 295.

the legitimate diversity of State laws. This jurisprudential machine has many ‘pressure release valves’ in the form of legitimate purposes, necessity, margin of appreciation, standard and burden of proof, evidential data requirements, and so forth, which help to keep it functioning even while under the two eternal opposing forces of centralisation of an internal market and fragmentation of the market due to State legislative autonomy.

CONCLUSION

CONCLUSION

On opposite sides of the world, two political entities have evolved a strikingly similar jurisprudence to deal with the common problem of how to build an internal market across a continent while preserving the legislative autonomy of the constituent States. The federal (or federal-like) structure in which both the Commonwealth of Australia and the European Union are organised is intended to mediate between the persisting, contradictory and legitimate interests of 'globalism', in the sense of breaking down State-by-State fragmentation and removing borders to free movement of goods and services, and 'localism', in the sense of State legislative autonomy and the maintenance of State-to-State diversity which it enables.

In the course of this thesis, it has been seen that Australia and the European Union, without sharing any great amount of direct jurisprudential interaction, have each responded to the task of interpreting their system's constitutional guarantees of free movement of goods and services by distinguishing between two questions: firstly, what is the scope of the freedom, and secondly what laws within that scope may nevertheless be justified. Within these questions of scope and justification, both Australian and EU jurisprudence bear a great many similarities, but some notable differences.

While the opacity of judicial reasoning in cases decided by the Court of Justice of the European Union, a product of its forced *in banco* judgments, does make it more difficult to identify overarching trends than in the more discursive, and indeed sometimes voluble and fractious, jurisprudence of the High Court of Australia, the powerful shifts in judicial thinking about the role and functioning of free trade in an internal market can nonetheless be detected.

When standing on the deck of a ship, one cannot feel every wave striking the side of the hull, but one can certainly sense the great currents through which the vessel rides, and see the effect of the flow and ebb of the tides.

It is not particularly useful to speak of either Australia or the European Union as being, in a universal sense, more tilted towards the central power than the other: the detailed analysis of the High Court and Court of Justice's jurisprudence on free movement of goods and services has shown that the issue is much more complicated than that. By contrast, it is instructive to take note of the particular features of that jurisprudence in which Australia is more centralised than the EU (i.e. judicial decisions more tightly limit State legislative power), or the EU more centralised than Australia. This is both more accurate and more useful in the further development of each system's jurisprudence.

In both Australia and the EU, the very early jurisprudence begins with a discrimination analysis being applied to the question of scope, and the newly-created courts showed caution in not over-extending themselves against State legislative autonomy; in EU terms, this was still a period in which the European project was chiefly viewed through an intergovernmental, rather than supranational, lens. As each system matured, scope came to be defined by a trade restriction analysis, representing a different view of the internal market. In Australia, this was motivated by a philosophical conception of s 92 as protecting the individual rights of interstate traders with a *laissez-faire* economic model, saving such traders from the interference of other States' legislation. In the EU, this was motivated by a growing sense of confidence in the 'European identity', but more immediately by the failure of legislative leadership at the EU level, meaning that the Court of Justice saw itself as having to assume the mantle of completing the internal market envisioned by the Treaty by the vigorous use of negative harmonisation.

However, in both Australia and the EU, the history of the jurisprudence of free movement shows that it was never a simple case of one analysis of scope succeeding and completely replacing the other. In the case of Australia, the dominance of the trade restriction analysis during much of the 20th Century did not preclude several judges from openly arguing in favour of the discrimination analysis, and the confusion of the jurisprudence which resulted from these competing definitions ultimately resulted in the triumph of the discrimination analysis in the case which marks the beginning of the settled, contemporary era of s 92 jurisprudence, *Cole v Whitfield*. In the EU, the case law on free movement of goods has been split into three streams, with product requirements automatically coming within the scope of art 34 TFEU, selling arrangements being subject to the discrimination analysis to determine whether they come within the scope of the Treaty article, and usage restrictions seemingly being subject to the trade restriction analysis. (Export of goods under art 35 TFEU is now governed by the discrimination analysis.) Services, on the other hand are as a whole subject to the trade restriction analysis. In both Australia and the EU, these two competing analyses reveal the 'shear forces' of globalism and localism operating in judicial conceptions of the role of the internal market, with the trade restriction analysis tending towards an expansive (globalist) view of the internal market and the discrimination analysis tending towards the more limited (localist) view. This thesis has suggested that Australia should not imitate the EU in trifurcating its jurisprudence on the free movement of goods, nor in allowing a split to develop between the case law on goods and on services, as there is no textual or principled basis for this in the case of s 92. While it can be recognised that the EU established the automatic inclusion of legislation on product requirements within the scope of art 34 TFEU partially for practical reasons, so as to streamline what is otherwise a large volume of rather basic cases, automatic inclusion also sidesteps the question of discrimination analysis versus trade restriction analysis in this area. The ratcheting effect of the ECJ's *in banco* decisions makes a broader synthesis of the jurisprudence of scope between the various streams of product import, product export and services unlikely, and unity of jurisprudence between these two of the Four Freedoms is more readily found in the question of justification.

The question of justification indeed shows a marked similarity between Australia and the EU. In each system, the Court first examines whether the restrictive legislation (which is within the scope of the free movement provisions and so *prima facie* invalid) pursues a legitimate purpose. If it does, the Court will then examine whether it pursues that legitimate purpose in a proportional manner, in the sense that it is suitable to the achievement of the purpose (it actually does have a rational, causal connexion to it) and necessary to the achievement of the purpose (there is no less restrictive mode of legislation which could achieve it). Further similarity has emerged with the recent Australian acknowledgment of a third, balancing element to the question of justification in terms similar to the EU (there must be an overall balance between the importance of the legitimate purpose pursued and the severity of the restriction on interstate trade). The set of legitimate purposes is, at its broadest, the same in both Australia and the EU, although that fact that 'mandatory requirements in the general interest' are only available in the EU when the legislation is not discriminatory on its face does mean that justification would be more difficult to achieve for such a law in the EU than in Australia. On the other hand, it is worth noting the *obiter dicta* in recent Australian case law as to whether 'the welfare of the people of a State' can have much meaning as a legitimate purpose in the Internet Age, when the presence of a person in a particular State for a particular transaction is less essential and permanent than when the concept was originally developed. Nothing has yet come of these comments, but if the law were to be developed in this manner, it could make justification significantly more difficult to achieve under Australian law; it is not likely that the EU will soon echo such doubts, given that the concept of distinct and persisting peoples of the various EU countries is a fundamental one to the European project.

The tests for suitability and necessity are also effectively the same in Australia and the EU, and a law which would pass these tests in one system would pass them in the other. Likewise, the third element of the proportionality test, namely the overall balance between the legitimate purpose pursued by suitable and necessary legislation and the importance of interstate trade in the internal market, is formulated similarly in both Australia and the EU, although its operation is unclear in both systems as such a 'balancing element' has not actually been employed to declare Australian State laws incompatible with the Constitution or EU Member State laws incompatible with the Treaty – though even in this unused form it can have a chilling effect on the passage of State legislation. Australia, in its recent adoption of this 'balancing element', would do well to learn restraint from the EU in actually employing it: all the more in Australia's federal structure, it may make an inroad against State legislative autonomy for which a court is forensically ill-equipped and democratically unjustified.

The different roles of the High Court of Australia and the Court of Justice of the European Union with respect to *invalidation* or *incompatibility* of State legislation have also been observed, with the Court of Justice operating, at least in a technical sense, in a manner which leaves the disapplication of the offending law to the Members State's own court system. Combined with the ECJ's remission of preliminary references to national courts for factual determination, this is another subtle manner in which the European legal order seeks to moderate the power of the central authorities of the EU and thereby preserve Member State legislative autonomy. The High Court will sometimes remit matters to a lower court for factual determination, but this will be to a federal court, meaning that it does not serve to protect State power as such; however, the conjunction of the State and federal law systems in the High Court was a deliberate design feature of the Court in its creation by the federating States under the Constitution.

Furthermore, the connexion between the definitions of scope and justification has been observed in both Australia and the EU, with advances in the law of justification often following major developments on the law of scope: in Australia in particular, where the philosophical competition between judges is open to analysis, it can be observed that justification served as a 'pressure release valve', and when an expanded definition of scope in the form of trade restriction analysis prevailed, the build-up of pressure within the system caused by including so many more State laws within the scope of s 92 led to the expansion of justification to release some of that pressure, and normalise the balance between central power and State power – to shift metaphor slightly from fluid dynamics to solid physics, to balance the shear forces which are in tension in a federal (or federal-like) system. With that said, it bears reiterating that an expanded definition of justification *does not perfectly balance out* an expanded definition of scope: while a parallel expansion of scope and justification may mean that the likelihood of an individual law being judged to be ultimately valid is maintained at a constant level, such a parallel expansion effects a net increase in the power of the central court as against the State legislature. By including a wider range of State laws within the scope of the free movement provisions, more such laws are subjected to the Court's power of review, and by expanding the range of justification more such laws will find their ultimate validity determined by that central court. The central court (the High Court of Australia or the Court of Justice of the European

Union) thereby intrudes further upon State legislative autonomy. For the time being, the settlement of the question of scope within the Australian jurisprudence means that the impetus for such parallel expansion is not present; however, the contested nature of the question of scope within the EU, especially as regards laws restricting the usage of goods, means that the Court of Justice should bear in mind the true effect of such parallel expansion, and not be over-eager to use the law of justification as a sop to State legislative autonomy if expanding the definition of scope.

These conclusions open up as many questions as they answer, and it has been the intention of this thesis to contribute to the advancement of scholarship on such issues, not to bring all such scholarship to finality. Of particular utility would be the furtherance of sociological research into the motivation of State lawmakers in Australia and the European Union when passing contestable legislation, and how much such legislators consider the possibility than the courts may strike down legislation when they consider whether, and in what form, to pass it. In practice, such research would be well directed to the clerks and legal officers of the respective State parliaments, the public servants working in the office of the government solicitor, and other like persons, as it is quite likely that technical points of free movement law are most closely considered at this level, but given the 'shear forces' operative within a federal polity and the sensitivity to these forces at this particular moment, there is an inescapable *political* dimension to such an enquiry which would find its expression in the decisions of elected lawmakers themselves, and they cannot be excluded from such research.

Finally, it is hoped that Australia and the European Union will deepen their judicial acquaintance with one another. This thesis has shown that the two systems have much to learn from each other, and their similarities and differences allow for meaningful comparative analysis to be made. This will not simply happen of its own accord, but must be led by the members of the academy, continuing the tradition of the scholars whose work has been cited herein, and by the members of the judiciary, who will surely find themselves doctrinally – and philosophically – enriched by looking to the continent which stands at their respective antipodes, and considering how other legal minds have confronted problems so similar to their own. Such has been the pleasant and enriching experience of the author himself over these last ten years.

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May 2019

APPENDICES

Appendix I – Tables of Cases and Legislation

Table of Cases

AUSTRALIA

EUROPEAN UNION

OTHER JURISDICTIONS

Table of Legislation

AUSTRALIA

EUROPEAN UNION

❧

OTHER JURISDICTIONS

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