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The Constitutionalisation of Free Trade in Federal Jurisdictions

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The Constitutionalisation of Free Trade in Federal Jurisdictions

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Introduction

Free trade is a norm that conceives the trade in goods, services, labour, and capital among or within sovereign states as a flow without government discrimination. The norm of free trade constitutionalises the political economy of jurisdictions.

The establishment of the World Trade Organization (WTO) suggests that global systems of political economy have the constitutional norm of free trade at their foundation. The European Union (EU), for example, and other regional and sub-regional systems also have that normative foundation. It is an implicit assumption that local systems have that normative foundation too. The assumption holds true for unitary states. It also holds true for the United States of America (USA), Commonwealth of Australia (Australia), Dominion of Canada, Republic of India, Federal Republic of Germany, Kingdom of Belgium, Federal Republic of Brazil, United Mexican States, Argentine Republic, Federal Republic of Nigeria, Malaysia, and other federal, con-federal (Swiss Confederation), quasi-federal (Kingdom of Spain), and non-unitary states.

However, unlike unitary jurisdictions, non-unitary jurisdictions rely on a constitutional guarantee of free movement of goods, services, labour, and capital among their constituent states. That guarantee is not always reliable because its judicial interpretation is subject to multiple considerations: doctrinal, practical, political, economic, and other. It is, therefore, the mission of constitutional courts in non-unitary jurisdictions to reconcile their sometime contradictory jurisprudence with the constitutional norm of free trade.

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The successes and the failures of that mission can assist supranational and international jurisdictions to further develop their preferential and free trade areas, customs unions, single markets, and economic and monetary unions. Conversely, the free trade jurisprudence of supranational and international jurisdictions can assist the mission of constitutional courts in non-unitary jurisdictions to further develop their political economies. Thus, the judicial interpretation of the constitutional freedom of interstate trade comprises a valuable and viable subject of comparative study. A comparative study of the law of different legal systems serves two valuable purposes. First, it identifies the values and principles that inform the laws of a particular legal system and, second, it assists that legal system to correct the defects in its laws by reference to the values and principles of the other legal system.[1]

Further to that research hypothesis, my research thesis and the subject of this paper is that the free trade jurisprudence of supranational and international jurisdictions is significant to the constitutional development of the political economy of federal (non-unitary) jurisdictions (and vice versa). That research thesis finds support in my investigation into the role of constitutional courts in the constitutionalisation of free trade in my two home jurisdictions, namely, Australia, as a federal market jurisdiction, and the EU, as a supranational market jurisdiction.

There are apparent similarities between the EU and Australia, which make a comparison of their respective legal systems appropriate. The relationship between the two jurisdictions dates back to 1982:

> On 26 February 1982, the Government of the Commonwealth of Australia formally recognised the European Communities (EC) as a subject of public international law and granted accreditation to the Communities' permanent delegation in Canberra.[2]

Since then, commentators have continued to identify the apparent but, nonetheless, symbolic similarities between Australia and the EU:

> Both are federations, both occupy continents, both are 'western', advanced industrialised economies, predominantly Judeo-Christian-secular liberal democratic societies … [B]oth entities have constitutions in a state of development, with some critical choices to be made … There are even some similarities in the reasons why the entities were formed. Both fostered political unity through free trade ... In both the EU and Australia, supreme courts have stepped in to flesh out the constitution and effect constitutional change where it has not been possible by other means … Whereas the High Court has undergone many changes of heart, the ECJ has … been steadfastly pro-integration.[3]

The similarities are not only apparent. They are also real:

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[1] S Kiefel, 'English, European and Australian law: Convergence or Divergence?' (2005) 79 *Australian Law Journal* 220, 227. See also G Villalta Puig, 'Free Movement of Goods: The European Experience in the Australian Context' (2001) 75 *Australian Law Journal* 639, 640.
[2] D D Knoll, 'From the Inside Looking Out: Comparing the External Capacities, Powers and Functions of the Commonwealth of Australia and the European Communities' (1985) 15 *Federal Law Review* 253, 253.
[3] M Harvey, 'Australia and the European Union: Some Similar Constitutional Dilemmas' (2001) 6(2) *Deakin Law Review* 312, 312-5. See further M Harvey and M Longo, *European Union Law: An Australian View* (2008).

> Neither Australia nor the EC fit the traditional model of international legal person, that being the unitary nation-state. The Commonwealth of Australia is a multi-state structure with a written constitution embodying a federal allocation of powers. The EC is a *sui generic* international organization exercising powers 'transferred' to it by its member states. It is not through the eyes of public international law alone that the framework for legal relations between Australia and the EC can be analysed, but also through a comparative constitutional law approach. By analysing the perspectives from the inside looking out, an identification can be made of both common ground and potential sources of difficulty.[4]

These real similarities extend to the constitutional principle of free trade. Both Australia and the EU united in free trade. Indeed, '[b]oth Australia and the EC established customs unions with a view to political solidarity.'[5] Their subsequent development of that principle is equally similar:

> International pressures have forced similar structural and legal solutions to problems which are common to non-unitary international actors. Coming from different historical origins, two common markets are in the continual process of developing structures ever better able to cope with an exceedingly complex international arena.[6]

In conclusion, then, the EU and Australia are similar jurisdictions. Like the EU, Australia has several component States[7]. Both the EU and Australia are in a constant process of constitutionalisation, albeit in different respects.[8] Both had the ambition of political unity through economic co-operation in order to protect their lands against the threat of foreign powers.[9] Both have worked to secure the free movement of goods, services, persons, and capital between their various States and Member States, and the inviolability of free trade in both entities is paramount.[10] Indeed, arguably, the EU may be heading somewhere near where Australia was at the time of its federation.[11] Ironically, the EU is Australia's

[4] Knoll, above, 254.
[5] Ibid 300.
[6] Ibid 302.
[7] The States of Australia are Victoria, New South Wales, Queensland, South Australia, Western Australia, and Tasmania.
[8] Harvey, above, 313.
[9] Ibid. It is true, however, that, in the rare occasions when constitutional proposals have been put to European electorates, the result has, in some cases, been a majority vote against any attempt to further federalise the EU at the expense of national sovereignty (examples include the French and Dutch rejection of the Treaty establishing a Constitution for Europe in 2005 and the Irish rejection of the Treaty of Lisbon in 2008). In contrast, at the turn of the nineteenth century, the Australian federation project had the support of the electorate in the colonies, even in New South Wales, where the first referendum failed because the size of the affirmative vote majority did not pass the requisite threshold.
[10] Many are the critics of the economic value of free trade who, despite the work of David Ricardo and his law of comparative advantage (*On the Principles of Political Economy and Taxation* (1817)), complain that, at the personal level, unskilled workers do not profit from competitive and integrated markets. Whatever critical economists argue, the Australian and EU constitutional imperative of economic integration is beyond challenge.
[11] Harvey, above, 313.

largest trade partner.[12] For the EU, Australia is a similarly valuable trade partner.[13]

The Anti-Protectionist Norm of the High Court of Australia and The Non-Discrimination Norm of the Court of Justice of the European Union

This paper shows the significance of the free trade jurisprudence of the Court of Justice of the EU (ECJ) to the constitutional development of the Australian political economy. Thus, it shows the significance of the free trade jurisprudence of a supranational jurisdiction to the constitutionalisation of free trade in a federal jurisdiction.

Section 92 of the Australian Constitution guarantees the free movement of goods among the States of Australia. Over twenty years ago, in the case of *Cole v Whitfield*,[14] the High Court of Australia (HCA) developed a test of invalidity under s. 92. The test declares a law or measure invalid if it imposes a burden on interstate trade that is *discriminatory in a protectionist sense.*

Despite its reaffirmation by the HCA only recently,[15] the test of discriminatory protectionism remains inconsistent with the federal purpose of s. 92 to create and preserve a single market for Australia. This paper purposes that the HCA should follow the preference of the ECJ for discrimination as the only criterion of invalidity in the interpretation of Art. 34 of the Treaty on the Functioning of the European Union (TFEU) (formerly Art. 28 of the European Community Treaty (ECT)),[16] which guarantees free trade in goods among the Member States of the EU by prohibiting quantitative restrictions on imports and all measures having equivalent effect. In this way, the paper seeks to establish the significance of the free trade jurisprudence of the ECJ as a guide to the constitutional development of the Australian single market.[17]

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[12] In 2008, the EU accounted for 16.4 per cent of Australia's total trade in goods and services with a value of AUD 91.3 billion. See Australian Government, Department of Foreign Affairs and Trade, Trade and Economic Policy Division, Trade Competitiveness and Advocacy Branch, Market Information and Research Section, 'Australia's Trade with the European Union 2008' (August 2009) Canberra 1, 1.

[13] To a total value of EUR 53.3 million, Australia was the EU's nineteenth largest partner in two-way trade in goods and its tenth largest partner in two-way trade in services in 2008. See European Commission, Directorate-General for Trade, 'Eurostat (NewCronos)' (22 September 2009) Brussels.

[14] *Cole v Whitfield* (1988) 165 CLR 360.

[15] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.

[16] The Treaty of Lisbon 2007 renamed the European Community (EC) Treaty (Treaty of Rome 1957) as the Treaty on the Functioning of the European Union (TFEU). It entered into effect on 1 December 2009.

[17] Jurisdictional similarities and differences aside, like the HCA in *Cole v Whitfield* (1988) 165 CLR 360, this paper limits itself to a particular question in the interpretation of s. 92, namely, the constitutionality of State laws or measures that restrict the trade in goods imported from other Australian States. The prohibition against State laws or measures that impose customs duties and equivalent charges or that levy discriminatory taxes on interstate goods is well entrenched in the Australian Constitution and is not the subject of this paper. The paper does not consider either the constitutionality of State laws or measures that establish compulsory acquisitions or marketing schemes or that hinder the domestic production of goods destined for export interstate. Nor does it consider the constitutionality of Commonwealth laws or measures made under the auspices of s. 92.

The Cole v Whitfield *Test of Invalidity under Section 92*

Section 92 of the Australian Constitution guarantees free trade, commerce and intercourse among the States (and Territories) of Australia. The section reads (emphasis added):

> 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*.[18]

The problem is that the text of the section does not state what interstate trade is to be absolutely free from. As a solution to that problem, the *Cole v Whitfield* test of invalidity under s. 92 imposes a ban on discriminatory burdens of the protectionist kind. The test developed by the HCA in *Cole v Whitfield* applied in subsequent s. 92 cases such as *Bath v Alston Holdings Pty Ltd*,[19] *Castlemaine Tooheys Ltd v South Australia*,[20] *Barley Marketing Board (NSW) v Norman*,[21] and, more recently, *Betfair Pty Ltd v Western Australia*.[22]

The test is not concerned with the fact that a law or measure restricts the free movement of goods within Australia. Rather, for a law or measure to be found to contravene s. 92, the HCA must be satisfied that it imposes a burden on interstate (as compared to intrastate) trade *and* that such burden is discriminatory in a protectionist sense.[23] In other words, a burden is discriminatory in a protectionist sense if it confers a comparative competitive advantage on intrastate traders over interstate traders, or removes a comparative competitive disadvantage from intrastate traders.

A Critique of the Cole v Whitfield *Test of Invalidity under Section 92*

[18] This somewhat enigmatic declaration warrants guidance not from the first case on s. 92 but, ironically, to a later case. Indeed, despite being the sixth case heard by the HCA on s. 92, *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530 is, for many commentators, still the 'best beginning' for an examination of the section (J M Herlihy, 'Constitutional Restraints on Trade and Commerce in Australia and Canada' (1976) 9 *University of Queensland Law Journal* 188, 189). In that case, the majority judgement stated: 'The notion of a thing tangible or intangible, moving in some way from one State to another is no doubt a necessary part of the concept of Trade, Commerce and Intercourse among the States. But *all the commercial dealings and all the accessory methods in fact adopted by Australians to initiate, continue and effectuate the movement of persons and things from State to State* are also parts of the concept because they are essential to accomplishing the acknowledged end. Commercial transactions are multi-form and each transaction that is said to be interstate must be judged by its substantial nature in order to ascertain whether and how far it is, or is not of the character predicated.' (*W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 549 (Knox CJ, Isaacs and Starke JJ) (emphasis added)).
[19] *Bath v Alston Holdings Pty Ltd* (1987) 165 CLR 411.
[20] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.
[21] *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182.
[22] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.
[23] See J G Starke, 'The *Cole v Whitfield* Test for Section 92 Explained and Applied: The Demise of the Theory of "Individual Rights"' (1991) 65 *Australian Law Journal* 123.

Cole v Whitfield has attracted praise and criticism alike.[24] This paper is a comparative critique of the *Cole v Whitfield* test of invalidity under s. 92. As such, it is a critique of discriminatory protectionism. Thus, the paper calls for a future HCA judgement that removes, once and for all, the criterion of protectionism from the *Cole v Whitfield* test of invalidity under s. 92 and, in turn, converts the test into a norm against any kind of discrimination, either protectionist or not, (that is, a non-discrimination norm) similar to that employed by the ECJ in its jurisprudence on Art. 34 of the TFEU.

Discrimination alone should be the criterion of invalidity. Otherwise, resort to an anti-protectionist norm compromises the Australian single market because it can validate laws and measures that discriminate against interstate trade if they are not protectionist. Protectionism, as an additional (to discrimination) criterion of invalidity, renders the test of invalidity ahistorical, narrow, and economically inefficient. In brief, protectionism renders the test inconsistent with the federal purpose of s. 92, which is to create and preserve a single market for Australia.

This paper argues then that the HCA should revise the test of discriminatory protectionism altogether. Thus, the HCA should replace its anti-protectionist interpretation of s. 92 with an exclusively non-discrimination interpretation of the section. This argument is based on doctrinal, public policy, and economic reasons.

The doctrinal critique of discriminatory protectionism raises historical considerations. While the founders viewed s. 92 as a non-discrimination norm, the HCA in *Cole v Whitfield*, inexplicably and contradictorily, revised that vision of s. 92 into an anti-protectionist norm. Free trade was the intention of the founders.[25] In other words, the founders intended the federal purpose of s.

[24] See M Coper, Commonwealth of Australia, *The Curious Case of the Callow Crayfish: The New Law Relating to Section 92 of the Australian Constitution*, Parliamentary Library Discussion Paper No 1 (1989-90) 2; M Coper, 'Section 92 of the Australian Constitution Since *Cole v. Whitfield*' in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives* (1992) 129; D Rose, '*Cole v Whitfield*: "Absolutely Free" Trade?' in H P Lee and G Winterton (eds), *Australian Constitutional Landmarks* (2003) 335; P D Connolly, '*Cole v Whitfield* – The Repeal of Section 92 of the Constitution?' (1991) 16 *University of Queensland Law Journal* 290; Villalta Puig, 'Free Movement of Goods: The European Experience in the Australian Context', above, 639; A Simpson, 'Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone' (2005) 33 *Federal Law Review* 445; G Villalta Puig, 'A European Saving Test for Section 92 of the Australian Constitution' (2008) 13 *Deakin Law Review* 99; G Villalta Puig, *The High Court of Australia and Section 92 of the Australian Constitution* (2008); A Simpson, '*Betfair Pty Ltd v Western Australia*' (2008) 19 *Public Law Review* 191; E Ball, 'Section 92 and the Regulation of E-Commerce: A Casenote on *Betfair Pty Ltd v Western Australia*' (2008) 36 *Federal Law Review* 265; G Villalta Puig, 'Section 92 since *Betfair Pty Ltd v Western Australia*' (2009) 11(4) *Constitutional Law and Policy Review* 152; N Oreb, 'Betting Across Borders: *Betfair Pty Limited v Western Australia*' (2009) 31 *Sydney Law Review* 607.

[25] The National Australasian Convention met in Sydney in March, 1891. As its President and, most importantly, as the 'Father of Federation', Henry Parkes, then Premier of New South Wales, declared: 'I seek to define what seems to me an absolutely necessary condition of anything like perfect federation, that is, that *Australia, as Australia, shall be free – free on the borders, free everywhere – in its trade and intercourse between its own people; that there shall be no impediment of any kind – that there shall be no barrier of any kind between one section of the Australian people and another; but, that the trade and the general communication of these*

92 to be the creation and preservation of a single market free from discrimination of any kind against interstate trade. It is argued that the test of discriminatory protectionism is inappropriate because, unlike a non-discrimination norm, it incorporates protectionism as the primary criterion of invalidity. An anti-protectionist norm compromises the single market because it risks validating laws and measures *that discriminate* against interstate trade *if they are not protectionist.*

The critique of discriminatory protectionism as a matter of public policy suggests that, unlike a non-discrimination norm, it is a narrow concept. It is argued that discriminatory protectionism is an unnecessarily narrow concept because its scope does not encompass all laws and measures that can compromise the single market. For example, businesses engaged in interstate trade are likely to face a range of laws and measures, which may not necessarily qualify as protectionist but which, nonetheless, compromise the single market by discriminating in favour of local trade.[26] Also for example, judicial concern with discriminatory protectionism does not take into account the significant administrative burden now facing businesses engaged in interstate trade. For these businesses, the burden arises in the course of having to comply with multiple, even if not necessarily protectionist, legal requirements imposed by each local jurisdiction in which they are engaged in trade.

The economic critique of discriminatory protectionism highlights the economic benefits of free trade in the sense of an absence of discrimination of any kind, either protectionist or not. It is argued that an anti-protectionist norm is not efficient. In brief, 'protectionism is inefficient because it diverts business away

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people shall flow on from one end of the continent to the other, with no one to stay in its progress or to call it to account … It is, indeed, quite apparent that time, and thought, and philosophy, and the knowledge of what other nations have done, have settled this question in that great country to which we must constantly look, the United States of America. The United States of America have a territory considerably larger than all Australasia – considerably larger, not immensely larger … There is absolute freedom of trade throughout the extent of the American union … Now, our country is fashioned by nature in a remarkable manner – in a manner which distinguishes it from all other countries in the wide world for unification of family life – if I may use that term in a national sense. We are separated from the rest of the world by many leagues of sea – from all the old countries, and from the greatest of the new countries; but we are separated from all countries by a wide expanse of sea, which leaves us with an immense territory, a fruitful territory – a territory capable of sustaining its countless millions – leaves us compact with ourselves. *So that if a perfectly free people can arise anywhere, it surely may arise in this favoured land of Australia*. And with the example to which I have alluded, of the free intercourse of America … I do not see how any of us can hesitate in seeking to find here absolute freedom of intercourse among us.' (*Official Report of the National Australasian Convention Debates* (Sydney, 2 March 1891–9 April 1891) 24–25 (Henry Parkes, President) (emphasis added). See also J A La Nauze, 'A Little Bit of Lawyers' Language: The History of "Absolutely Free" 1890–1900' in A W Martin (ed), *Essays in Australian Federation* (1969) 70). Indeed, in *Cole v Whitfield* (1988) 165 CLR 360, the HCA studied the convention debates and concluded that 'the principal goals of the movement towards the federation of the Australian colonies included … the achievement of intercolonial free trade' (*Cole v Whitfield* (1988) 165 CLR 360, 392) and that '[t]he purpose of the section is clear enough: to create a free trade area throughout the Commonwealth.' (*Cole v Whitfield* (1988) 165 CLR 360, 391).

[26] In the EU, see *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* (Case C–254/98) [2000] ECR I-151. See also G Carney, 'The Re-Interpretation of Section 92: The Decline of Free Enterprise and the Rise of Free Trade' (1991) 3 *Bond Law Review* 149, 173.

from presumptively low cost producers without any ... federally cognizable benefit'.[27]

For these doctrinal, public policy, and economic reasons, the future, then, rests on a test of invalidity that does not discriminate against different kinds of discrimination, one that targets discrimination *per se*, protectionist in kind or not.

A Comparative Critique of the Cole v Whitfield *Test of Invalidity under Section 92: The Significance of the Free Trade Jurisprudence of the Court of Justice of the European Union*

In brief, this paper argues that protectionism, as a criterion of invalidity, renders the *Cole v Whitfield* test of invalidity under s. 92 ahistorical, narrow, and economically inefficient. It is, therefore, not a surprise that Geoffrey Sawer once remarked:

> The handling of this section by the Courts has been one great constitutional failure … The failure may be partly due to the bad drafting of s. 92, but it is also due partly to limitations of our legal technique, which make it difficult for our Courts to handle complex political and economic conceptions.[28]

This is not so much an exoneration of the HCA as it is a recognition of its own technical shortcomings. Thus, Christopher Staker wrote:

> Given the difficulties which have always surrounded the interpretation of s. 92, and the inherent difficulty of giving concrete application to such abstract notions as 'free trade', comparative studies of provisions similar to s. 92 in jurisdictions outside Australia are bound to be of assistance in any consideration of how the interpretation of s. 92 may further develop.[29]

A comparative critique of the *Cole v Whitfield* test of invalidity under s. 92 can, therefore, be very valuable:

> A comparative approach to the law of different systems has a number of uses … [I]t may be useful to assist domestic law in areas where difficulty has been experienced in identifying guiding principles or legal rules. … [T]he process of comparison itself serves to elucidate what concepts and values truly shape our own laws.[30]

That is why, insofar as '[t]here are … areas of law which have attracted a comparative treatment … The topics are often chosen because they represent an area where one or other of the legal systems is experiencing difficulty.'[31] The point is that '[i]t is interesting to see how other nations than Australia have their constitutional problems, and to see how they may be led to deal with them

[27] D Regan, 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause' (1986) 84 *Michigan Law Review* 1091, 1118.
[28] G Sawer, 'Constitutional Law' in G W Paton (ed), *The Commonwealth of Australia: The Development of its Laws and Constitution* (1952) 71, 76.
[29] C Staker, 'Section 92 of the Constitution and the European Court of Justice' (1990) 19 *Federal Law Review* 322, 323. See also C Staker, 'Free Movement of Goods in the EEC and Australia: A Comparative Study' (1990) 10 *Yearbook of European Law* 209.
[30] Kiefel, above, 227.
[31] Ibid, 229.

according to the special requirements of the time.'[32] Thus, it is only against a critique of the *Cole v Whitfield* test of invalidity under s. 92 that the value of a comparative analysis is best appreciated.

The paper seeks to demonstrate that an analysis of the judicial interpretation in a foreign jurisdiction of a constitutional provision similar to s. 92 can assist to determine the approach that the HCA may take to the interpretation of s. 92 in future case law. Thus, in *Castlemaine Tooheys Ltd v South Australia*, the HCA had recourse to several decisions of the Supreme Court of the USA interpreting the 'commerce clause' in that country's Constitution.[33] The HCA noted that:

> Although the American cases cannot be treated as an accurate guide to the interpretation of s. 92, they *identify in a useful way considerations which may be relevant* in the process of characterization which an Australian Court is called upon to undertake.[34]

Indeed, of the USA, it was observed that:

> Neither the adoption nor (with some fluctuation) the subsequent interpretation of the *Commonwealth of Australia Constitution Act 1900* has been free of American influence. Some parallels with the American constitutional system are obvious enough. Both systems are 'rigid', based upon written provisions. In both systems the drafting history is well known or capable of being known. Both allot specific powers to the federal government, leaving the residue to the States. Both entail dubious reliance on the separation of judicial from other powers. Both systems, by allotting power over … commerce beyond the limits of a State to the federal authority, have required difficult determinations as to the scope of these concepts … And in both systems, these and other judicial determinations of governmental power are raised to the level of momentous statecraft by the difficulty of constitutional amendment, which experience in both countries has shown to reach almost the point of political impossibility.[35]

However, the USA would be too obvious and derivative a choice of jurisdiction to be the subject of a comparison with Australia. Accordingly, this paper compares the current interpretation of s. 92 with the judicial definition of 'free trade' not in the USA, but in another jurisdiction altogether: the EU.[36]

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[32] Lord Wright, 'Section 92 – A Problem Piece' (1954) 1 *Sydney Law Review* 145, 151.

[33] Article 1.8.3 (dormant commerce clause). See, for example, *McCulloch v Maryland* 17 US 316 (1819); *Pike v Bruce Church Inc* 397 US 137, 142 (1970). See also DT Coenen, *Constitutional Law: The Commerce Clause* (2003) and BI Bittker and BP Denning, *Bittker on the Regulation of Interstate Commerce and Foreign Commerce* (1999).

[34] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 471 (emphasis added).

[35] Julius Stone, 'A Government of Laws and Yet of Men: Being a Survey of Half a Century of the Australian Commerce Power'(1948-50) 1 *University of Western Australia Law Review* 451, 451-2.

[36] The European Communities came into existence on 1 July 1967, in the merger of the European Coal and Steel Community (Treaty of Paris 1951), the European Economic Community (Treaty of Rome 1957) (renamed the European Community on 1 November 1993), and the European Atomic Energy Community (Euratom) (Treaty of Rome 1957). Previously, each of these three organisations had its own Commission and its own Council. The merger created a single Commission of the European Communities as well as a single Council of Ministers of the European Communities. Other executive, legislative, and judicial bodies were also under the European Communities. The Treaty on European Union 1992 (TEU) renamed the European Communities as the European Community (EC), which, in turn, became the basis for the EU. The EU had three pillars. They comprised the EC (ie, the European Coal and Steel Community, the European Economic Community, and Euratom), a Common Foreign and Security Policy and Police and Judicial Co-operation in Criminal Matters. With the entry into force of the Treaty of Lisbon 2007 on 1 December 2009, the EU and the EC merged together. In particular, the Treaty of Lisbon 2007 has collapsed the three pillars and unified the EU into a

The choice of the EU as the jurisdiction that is, in this paper, the subject of comparison should not shock. English courts have long shown an interest in continental judicial practices:

> Some English judges have shown a preparedness, for some time, to look to foreign systems. Lord Diplock, speaking extra-judicially, and before England joined the European Community, said that he believed the common law could gain from a closer contact with, and an understanding of, the civil law.[37]

Even the HCA has referred to European jurisprudence and, in particular, the jurisprudence of the ECJ: [38]

> Australian … judges have shown some preparedness to refer to materials from European legal systems, although I do not think it could be suggested that they have informed the Australian common law to any great extent … In *Baker v Campbell* (1983) 153 CLR 52 at 105, Brennan J compared the procedure for discovery prescribed by the European Court of Justice. In *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, concerning misuse of market power, reference was made to the decisions of the Court of Justice.[39]

Amelia Simpson agrees:

> [Some] High Court decisions … reveal an interest in and familiarity with European jurisprudence spanning a range of legal fields. See, eg, *Queensland Wire Industries* Pty *Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177, 188 (Mason CJ and Wilson J); *Street Queensland Bar Association* (1989) 168 CLR 461, 571 (Gaudron J); *Attorney-General (NT) v Maurice* (1987) 161 CLR 475, 490 (Deane J).[40]

Such interest and familiarity is warranted. Accordingly, this paper seeks to demonstrate the significance of the free trade jurisprudence of the ECJ to the constitutional development of the Australian single market and, in particular, for the *Cole v Whitfield* test of invalidity under s. 92. It also seeks to persuade the HCA to revise the test in order to secure the doctrinal, public policy, and economic benefits of free trade.

The significance of the free trade jurisprudence of the ECJ is already known. Simpson, for example, has written: 'The free trade norms administered by the

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single entity with legal personality. In fact, to symbolise the merger, the Treaty of Lisbon has renamed the EC Treaty as the TFEU. See G Villalta Puig, 'The European Constitution: Past and Future' (Working Paper No 115, Centre for European Studies – The Australian National University, 2003).

[37] See 'The Common Market and the Common Law' (1972) 6 *The Law Teacher* 3, 16. Kiefel, above, 228.

[38] Article 19 of the TEU establishes the Court of Justice of the European Union (ECJ). The role of the ECJ is to provide the judicial safeguards necessary to ensure that the law is observed in the interpretation and application of the Treaties and, generally, in all of the activities of the EU. See A G Toth, *The Oxford Encyclopaedia of European Community Law* (1990) vol 1, 211-18.

[39] Kiefel, above, 230.

[40] Simpson, 'Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone', above, 478.

European Court of Justice afford useful examples. Those principles are grounded explicitly in a desire to secure the economic benefits of free trade.' [41]

However, the reality is that its significance for the possible future development of the *Cole v Whitfield* test of invalidity under s. 92 is not yet widely appreciated. This situation does not prejudge the merits or demerits of the free trade jurisprudence of the ECJ. Rather, it reveals the insular environment in which the HCA operates:

> One of the most notable features of any legal system is its insulated method of examining possible solutions to various legal problems. For example, the great majority of papers examining the 'correctness' of the decision in *Cole v Whitfield* have done so against the backdrop of the court's previous decisions.[42]

Whilst '[s]ome commentary on the High Court's approach to section 92 has praised the European free trade jurisprudence and urged the High Court to take guidance from it',[43] the reality is that most commentary on the *Cole v Whitfield* test of invalidity under s. 92 has ignored the EU experience in the Australian context:

> In examining the climate in which the High Court would have to determine the answers to such questions, one cannot help but note the relative dearth of literature and judicial comment investigating the approaches taken in other legal systems to the free movement of goods. One such system that has been ignored by the High Court and most commentators in the field is that of the European Community (EC).[44]

Now, after the very recent refusal of the HCA in *Betfair Pty Ltd v Western Australia* to reject protectionism as the primary criterion of invalidity under s. 92,[45] the time is ripe to survey the free trade jurisprudence of the ECJ:

> With the increased tendency of the High Court to consider broad principles ahead of 'tiny points of doctrine', the time has become ripe for a consideration of the free movement of goods within the Community.[46]

After all, Art. 34 of the TFEU is the equivalent of s. 92 of the Australian Constitution.[47] Both guarantee free trade and both bind the central and regional governments. Thus, as far back as 1969, Barwick CJ equated the single market of the EU with that of Australia in *Samuels v Readers' Digest Association Pty Ltd*:

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[41] Simpson, 'Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone', above, 477.
[42] P J Smith, 'Free Movement of Goods within the EC and s 92 of the Australian Constitution' (1998) 72 *Australian Law Journal* 465, 466.
[43] Simpson, 'Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone', above, 477.
[44] Smith, above, 465.
[45] See G Villalta Puig, 'Section 92 since *Betfair Pty Ltd v Western Australia*' (2009) 11(4) *Constitutional Law and Policy Review* 152.
[46] Smith, above, 466.
[47] Section 92 primarily applies to the free movement of goods and so this paper does not address the caution of the ECJ to extend its mutual recognition approach to labour and services (see the controversy in *Rüffert* (Case C-346/06) [2008] ECR I-1989 and its line of cases).

> The inhibition of the freedom of trade … can take such multifarious and at times seemingly innocent forms and its prevention is so vital to the commercial life of the members of the federation as well as of the federation as a whole that only sweeping and absolute language is appropriate to express the necessary constitutional provision … Perhaps there is no need in the nature of a common market to deny to the central Government or authority any power to inhibit such freedom, though in the market set up by the Treaty of Rome which has a provision to protect the freedom of trade … between the members, the common market authorities themselves have in fact no such power, not because it is expressly denied but because it is not given. But the founders of the Australian Constitution were empathic that no government in the federation should have the power to inhibit the freedom of trade … between the constituent members.[48]

Leslie Zines too commented:

> [S]ection 92 binds both the Commonwealth and State Governments. There is in Australia, therefore, a gap in total legislative competence. In this respect the Treaty of The European Economic Community resembles the Australian Constitution.[49]

Thus, borrowing from the words of the HCA in *Castlemaine Tooheys Ltd v South Australia*, the paper argues that the free trade jurisprudence of the ECJ identifies, in a useful way, 'considerations'[50], that is, principles of constitutional interpretation, which may be relevant to the development of the *Cole v Whitfield* test of invalidity under s. 92. These considerations demonstrate the superiority of discrimination over protectionism as the only valid criterion of invalidity under s. 92.

It could be argued that the structure and objectives of the EU are different from those of Australia, thereby, making a comparative analysis inappropriate. Indeed, differences do exist. For example, Zines has argued that:

> While comparisons and contrasts between the High Court and the ECJ are interesting, their significance should not be overestimated. The High Court, unlike the ECJ, makes and moulds the nation's common law, interprets both federal and State legislation and can decide all issues that are part of any matter in cases before it. Furthermore, it has power to declare legislation to be null and void. The ECJ is faced with diverse legal systems and is, to a large degree, reliant on the courts of those systems to ensure that Community law prevails.[51]

Likewise, David Knoll has noted that:

> The High Court of Australia pursues a relatively literal enumerated powers approach to Commonwealth powers and restricts the powers to validly governable subject matters. The ECJ adopts an integrative teleology limiting EC powers by reference to legislative purpose rather than subject matters.[52]

However, there is no reason to suggest that such differences will enlighten one any less than the similarities that exist between the two systems.[53] Although

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[48] *Samuels v Readers' Digest Association Pty Ltd* (1969) 120 CLR 1, 14-5 (Barwick CJ) (emphasis added).
[49] L Zines, 'The Balancing of Community and National Interests by the European Court' (1973) 5 *Federal Law Review* 171, 175.
[50] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 471.
[51] L Zines, 'Federalism and Administrative Discretions in Australia, With European Comparisons' (2000) 28 *Federal Law Review* 291, 302.
[52] Knoll, above, 301.
[53] Smith, above, 466.

similar problems justify similar solutions, ultimately, the utility of comparative studies depends on their capacity to discover differences. Otherwise, the comparative analysis of distinct legal systems would not 'renew and refresh the study of national law, which suffers from confining itself to the interpretation of positive rules and neglecting broad principles in favour of tiny points of doctrine.'[54]

Lord Bingham has recounted an explanation of the approach of English courts to foreign law, or at least the former approach, as explained by Lord Wilberforce in the course of a hearing:

'Our approach to overseas authorities is very straightforward. If the foreign judge says what we are ourselves inclined to think, then we pay tribute to his erudition and adopt what he says, observing that we could not have hoped to express the point as well as he has done. If, on the other hand, the judge's thinking does not coincide with our own, we point out that it was a decision given against a different statutory background in a place where different social conditions obtain, and that we are in the circumstances unlikely to derive any substantial assistance from it.'[55]

Another anecdote illustrates this caution. It is from Scalia J of the Supreme Court of the United States. In *Conroy v Aniskoff*, his Honour noted that 'Judge Harold Leventhal used to describe the use of legislative history [or comparative law] as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.'[56]

Free Movement of Goods in the European Union

The EU is a supranational and intergovernmental organisation with 27 Member States. It is founded not upon an express constitution but upon several treaties, chief amongst which is the TFEU because it constitutes the legal order of the EU.

The aim of the TFEU is 'to lay the foundations of an ever closer union among the peoples of Europe … by pooling their resources to preserve and strengthen peace and liberty'.[57] Further to that aim, the objective of the EU is the integration of the economic and monetary policies of the various Member States for the establishment and preservation of an internal market free from internal barriers to trade.[58]

The policies of the EU achieve this objective and, thereby, establish and preserve the single market. The most important of the policies in this respect are the 'Four Freedoms': the Free Movement of Goods, the Free Movement of Workers, the Freedom of Establishment and to Provide Services, and the Free Movement of Capital.

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[54] T Weir (tr), K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd ed, 1998), vol 1, 3.
[55] See Lord Bingham of Cornhill, 'The Break with the United Kingdom and the Internationalisation of the Common Law' in P Cane (ed), *Centenary Essays for the High Court of Australia* (2004) 85. See Kiefel, above, 228.
[56] *Conroy v Aniskoff* 507 US 511, 519 (1993).
[57] Preamble, TFEU.
[58] Article 3.3, TEU. See K-D Borchardt, *European Integration: The Origins and Growth of the European Community* (1995).

The principal freedom and the subject of this paper is the Free Movement of Goods. It applies to all products (whether manufactured or not) that have a monetary value and are taken across member state border into another member state border.[59] This freedom is governed by Arts. 28 – 37 of the TFEU.[60]

There are two types of barriers to the free movement of goods: fiscal barriers and non-fiscal barriers. Under Art. 30, fiscal barriers include customs duties and charges having equivalent effect.[61] More importantly for the purposes of this paper, under Art. 34, non-fiscal barriers include quantitative restrictions and measures that have an equivalent effect on imports.[62] Article 34 reads: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'[63] A measure that infringes Art. 34 is contrary to EU law.[64]
Two phrases lie at the core of Art. 34. These are 'quantitative restrictions' and 'measures having equivalent effect'. The ECJ has interpreted both phrases in a large body of cases, chief of which are *Geddo v Ente Nazionale Risi* for quantitative restrictions and *Procureur du Roi v Benoit and Gustave Dassonville* in conjunction with *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* for measures having equivalent effect.[65]

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[59] *Commission v Belgium* (*Walloon Waste*) (Case C-2/90) [1992] ECR I-4431; *Chemische Afvalstoffen Dusseldorp BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (Case C-203/96) [1998] ECR I-4075. The provisions apply equally to goods either manufactured or produced in the EU and to those goods in 'free circulation' in the EU, regardless of their country of origin: *Suzanne Criel (née Donckerwolcke) and Henri Schou v Procureur de la République* (Case 41/76) [1976] ECR 1921.
[60] See F Burrows, *Free Movement in European Community Law* (1987); C Barnard, *The Substantive Law of the EU: The Four Freedoms* (2nd ed, 2007). For an Australian statement, see G Moens, 'Free Movement of Goods in the European Community' (1990) 17 *Melbourne University Law Review* 733.
[61] A charge having equivalent effect is any charge, however small, whatever the destination and mode of application, that is imposed unilaterally on goods because they cross a border.
[62] Article 34 has direct effect: *Ianelli & Volpi SpA v Meroni* (Case 74/76) [1977] ECR 595.
[63] Article 35 does the same for exports. It reads: 'Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.'
[64] Articles 34 and 35 are addressed to the Member States and, therefore, apply only to acts or omissions on behalf of the Member States. The actions of, at least, six entities have been held capable of infringing Arts. 34 and 35: local governments (*Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* (Cases C-1/90 and 176/90) [1991] ECR I-4151); semi-public bodies (*Apple and Pear Development Council v K J Lewis Ltd* (Case 222/82) [1983] ECR 4083); nationalised industries (*Commission v France* (Case 21/84) [1985] ECR 1355); regulatory agencies and professional bodies under statutory authority (*R v Pharmaceutical Society of GB, ex parte Association of Pharmaceutical Importers* (Cases 266 and 267/87) [1989] ECR 1295); the police force (*R v Chief Constable of Sussex, ex parte ITF Ltd* [1998] 3 WLR 1260); EU institutions (*Denkavit Nederland BV v Hoofdproduktschap voor Akkerbouwprodukten* (Case 15/83) [1984] ECR 2171; *Criminal Proceedings against Rene Kieffer and Romain Thill* (Case C-114/96) [1997] ECR I-3629).
[65] For these and other case citations, see the footnotes below. For commentary on the cases, see P Oliver, 'A Review of the Case Law of the Court of Justice on Articles 30 to 36 EEC in 1984' (1985) 22 *Common Market Law Review* 301; P Oliver, 'A Review of the Case Law of the Court of Justice on Articles 30 to 36 EEC in 1985' (1986) 23 *Common Market Law Review* 325; T Van Rijn, 'A Review of the Case Law of the Court of Justice on Articles 30 to 36 EEC in 1986 and 1987' (1988) 25 *Common Market Law Review* 593; L W Gormley, 'Recent Case Law on the Free Movement of Goods: Some Hot Potatoes' (1990) 27 *Common Market Law Review* 825;

The phrase 'quantitative restrictions' in Art. 34 was defined in *Geddo v Ente Nazionale Risi* as 'measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit.'[66] One example of a quantitative restriction is the imposition of a quota on the importation of selected goods.[67] Another example is the imposition of outright ban on the importation of selected goods.[68]

The phrase 'measures having equivalent effect'[69] in Art. 34 was defined in *Procureur du Roi v Benoit and Gustave Dassonville*:[70]

> 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 an effect equivalent to quantitative restrictions.[71]

The *Dassonville* formula extends Art. 34 to any measure that might affect trade as well as measures that either definitely or probably would affect trade or have actually done so.[72] Measures that expressly discriminate against goods imported from other Member States or that obstruct the act of importation will fall within the ambit of Art. 34.[73] Similarly, the ambit of Art. 34 is wide enough to encompass measures that discriminate against particular goods imported from other Member States notwithstanding that they are expressed to apply equally to

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and, R Rawlings, 'The Eurolaw Game: Some Deductions from the Saga' (1993) 20 *Journal of Law and Society* 309. See also P Oliver and M Jarvis, *Free Movement of Goods in the European Community* (4th ed, 2002) (see P Oliver (ed), *Free Movement of Goods in the European Union* (5th ed, 2010)).

[66] *Geddo v Ente Nazionale Risi* (Case 2/73) [1973] ECR 865.

[67] *SpA Salgoil v Italian Ministry of Foreign Trade* (Case 13/68) [1968] ECR 453.

[68] *Commission v Italy* (Case 7/61) [1961] ECR 635; *Commission v United Kingdom (French Turkeys)* (Case 40/82) [1982] ECR 2793; *Kemikalieinspektionen v Toolex Alpha AB* (Case C-473/98) [2000] ECR I-5681. See S Bronitt, F R Burns and D Kinley, *Principles of European Community Law: Commentary and Materials* (1995) 233. In this regard, positive actions will infringe Art. 34.

[69] Lesley Zines has observed that: 'in relation to quantitative restrictions and "all measures having equivalent effect" there has been some disagreement as to whether the measures referred to are those which have the purpose or effect of reducing the volume of trade between the States, or all measures which prevent the individual from trading … This debate is somewhat reminiscent of the dispute in the High Court in the 1930's regarding the correct interpretation of section 92 of the Commonwealth Constitution. Evatt J was the principal proponent of the view that section 92 did not strike at a State law that did not have as its aim or substantial effect the reduction in volume of inter-State trade. Sir Owen Dixon on the other hand, regarded section 92 as guaranteeing the right of the individual to trade inter-State … whatever the purpose or effect of the law that purported to prevent him and whether it was likely to increase or decrease the total volume of inter-State trade.' Zines, 'The Balancing of Community and National Interests by the European Court', above, 190.

[70] *Procureur du Roi v Benoit and Gustave Dassonville* (Case 8/74) [1974] ECR 837.

[71] Ibid 852.

[72] *Criminal Proceedings against Jan Van de Haar* (Joined Cases 177-178/82) [1984] ECR 1797; *Criminal Proceedings against Karl Prantl* (Case 16/83) [1984] ECR 1299.

[73] See *International Fruit Co NV v Produktschap voor Groenten en Fruit [No 2]* (Joined Cases 51-54/71) [1971] ECR 1107; *Commission v United Kingdom (Re UHT Milk)* (Case 124/81) [1983] ECR 203. See also *Commission v Ireland (Re 'Buy Irish' Campaign)* (Case 249/81) [1982] ECR 4005; *Apple and Pear Development Council v K J Lewis Ltd* (Case 222/82) [1983] ECR 4083.

domestic and imported goods.[74] Consequently, measures that are expressed to apply equally to domestic and imported goods but that, by their terms, discriminate against particular categories of traders from other Member States fall within the ambit too.[75] In other words, any measure that could hinder trade with other Member States will be held to be a measure having equivalent effect even if it applies equally to domestic and imported goods.[76]

The Anti-Protectionist Norm of the High Court of Australia and the Non-Discrimination Norm of the Court of Justice of the European Union

The difference between the approaches of the ECJ and HCA to the application of Art. 34 and s. 92 respectively lies in the reluctance of the latter to do away with the protectionist element of the *Cole v Whitfield* test of invalidity.[77] The ECJ will hold a national law or measure to contravene Art. 34 so long as it hinders interstate trade in an unjustifiably unreasonable manner. However, the HCA will only invalidate a State law or measure under s. 92 if the law or measure in question not only imposes an unreasonable burden on interstate trade *but* also that, as a result of the burden, local trade obtains a competitive advantage. In most cases, an unreasonable burden on trade will also be protectionist in character. However, no matter how unreasonable it may be, the HCA will not characterise a burden as protectionist if it affects intrastate and interstate trade alike, or if local trade has a monopoly free from interstate competition.

Thus, the test of discriminatory protectionism leads to results that are absurd in the extreme, even by international standards, so much so that it justifies the

[74] *Commission v Italy (Re Aged Buses)* (Case 50/83) [1984] ECR 1533 and *Italy v Gilli and Andres* (Case 788/79) [1980] ECR 2071.
[75] *Officier van Justitie v de Peijper* (Case 104/75) [1976] ECR 613 and *Procureur du Roi v Benoit and Gustave Dassonville* (Case 8/74) [1974] ECR 837; see also *Criminal Proceedings against Oosthoek's Uitgeversmaatschappij BV* (Case 286/81) [1982] ECR 4575.
[76] *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* (Case 120/78) [1979] ECR 649; *Commission v Germany (Re Beer Purity Laws)* (Case 178/84) [1987] ECR 1227; *Walter Rau Lebensmittelwerke v De Smedt PvbA* (Case 261/81) [1982] ECR 3961; and, *Ludomira Neeltje v Barbara Houtwipper* (Case C-293/93) [1994] ECR I-4249. See further the Communication of the Commission of 3 October 1980, extracted in D Wyatt and A Dashwood, *The Substantive Law of the EEC* (2nd ed, 1987) 136 and L W Gormley, '*Cassis de Dijon* and the Communication from the Commission' (1981) 6 *European Law Review* 454. For the scope of measures having equivalent effect, see also Art. 2 of Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (70/50/EEC).
[77] Arguably, the protectionist element of the *Cole v Whitfield* invalidity test is more respectful of the federal (vertical) division of powers and, in particular, state autonomy than the *Dassonville* formula, which confers on the ECJ a kind of veto on national laws and measures for the regulation of the free movement of goods. For the HCA, as long as the states do not make laws or measures that confer a competitive advantage on intrastate traders to the exclusion of interstate traders, they are free to legislate irrespective of the effect of those laws or measures on interstate trade. In this respect, note that the ECJ did, subsequently, limit the encroachment of the *Dassonville* formula on the regulatory powers of Member States in *Keck and Mithouard* (Case C-267/91) [1993] ECR I-6097 and the distinction between (illegal) marketing requirements and (legal) selling arrangements.

assertion that the Australian national single market is less free than the EU supranational single market.

> If it were the case that a State law can never be invalid under s. 92 unless it gives a competitive advantage to domestic goods or traders over imported goods or traders, the result would be that the freedom of interstate trade within a single nation that is guaranteed by s. 92 would be less than the freedom of trade between [twenty-seven] separate nations that is guaranteed by Art [34] of the [TFEU]. This would be remarkable.[78]

An added consideration relates, somewhat surprisingly, to Australia's trading relations with overseas markets. It seems logical to infer that the higher the inefficiency of the national market, the lower would be the overall competitiveness of Australia in the global economy:

> Of all the reasons *for* further comparative analyses, one is particularly important from a practical point of view. Australia is playing an increasingly important part in world trade with the window of opportunity for exporters becoming ever larger and more transparent. It is obviously in the interests of those traders and of Australia as a whole to ensure that obstructions to the free movement of goods *within* Australia are kept to a minimum. Indeed, ensuring the free movement of goods (and the process of economic integration to which it relates) within the EC has been a major factor underlying its status as one of the most powerful trading blocs in the world.[79]

In sum, protectionism, as a criterion of invalidity, renders the *Cole v Whitfield* test of invalidity under s. 92 ahistorical, narrow, and economically inefficient.

Hence, the success of the ECJ's test of invalidity in striking a balance between the principle of the free movement of goods and the right of Member States to exercise their legislative powers of regulation could persuade the HCA to drop its requirement for protectionism and to apply what would, thereby, evolve into a non-discrimination norm. By replicating the approach of the ECJ, that is, by following its preference for discrimination as the only criterion of invalidity in the interpretation of Art. 34, the *Cole v Whitfield* test of invalidity under s. 92 would secure the doctrinal, public policy, and economic benefits of free trade for the Australian single market.

Fortunately, recent HCA *obiter dicta* indicate that there would now be a greater reception to the proposal to drop the criterion of protectionism from the test of invalidity. In two of the cases on s. 92 after *Cole v Whitfield*, *Bath v Alston Holdings Pty Ltd* and *Castlemaine Tooheys Ltd v South Australia*, the HCA declared that, in order to meet the criterion of protectionism, a law or measure does not need to extend any actual or measurable advantage to goods produced locally over those produced interstate.[80] Similarly, a law or measure may be protectionist for the purposes of s. 92 even if it does not extend advantages exclusively to locally produced goods or impose burdens exclusively on goods produced interstate.[81] A law or measure may also be protectionist for the purposes of s. 92 where there are no locally produced goods competing with the

[78] Staker, above, 347 (emphasis added).
[79] Smith, above, 477.
[80] *Bath v Alston Holdings Pty Ltd* (1987) 165 CLR 411, 426 (Mason CJ, Brennan, Deane and Gaudron JJ); see also *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 476 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); Staker, above, 346.
[81] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 475.

interstate goods affected by it provided that the law or measure extends an advantage to *potential* local producers of the goods.[82]

Conclusion

Section 92 of the Australian Constitution guarantees the free movement of goods among the States of Australia. The text of the section reads: 'trade, commerce … among the States … shall be absolutely free'.

The problem is that the text is logically incomplete. It does not state what interstate trade is to be absolutely free from. As a solution to that problem, the decision of the HCA in *Cole v Whitfield* developed the test of discriminatory protectionism. A cross between a prohibition on discrimination and a prohibition on protectionism, discriminatory protectionism is a test of invalidity. The test declares a law or measure invalid if it imposes a burden on interstate trade that is *discriminatory in a protectionist sense.* However, protectionism, as a criterion of invalidity, renders the test of invalidity ahistorical, narrow, and economically inefficient.

Thus, in an attempt at determining the many possible directions that the interpretation of s. 92 may take in future case law, jurists have considered how the judiciary in foreign jurisdictions has approached the construction of provisions for the freedom of interstate trade in goods. This paper has examined the approach of the ECJ to the application of Art. 34, which is the equivalent of s. 92:

> It is to be hoped that when the High Court does address the various questions that are bound to arise in future s. 92 cases that it does not ignore the case law of the ECJ concerning the free movement of goods.[83]

There are differences between the approaches of the ECJ and HCA to the interpretation of free interstate trade norms. Most significantly, the ECJ will hold a national law or measure to contravene Art. 34 so long as it hinders interstate trade in an unjustifiably unreasonable manner. However, the HCA will not invalidate a State law or measure under s. 92 unless it is deemed to impose a discriminatory burden in a protectionist sense.

That the Art. 34 jurisprudence allows the ECJ to strike a balance between the free movement of goods and the right of Member States to exercise their legislative powers of regulation could, perhaps, persuade the HCA to drop its requirement for protectionism. Hence, this paper calls on the HCA to replicate the ECJ approach and do away with the criterion of protectionism and, thereby, convert the *Cole v Whitfield* test of invalidity under s. 92 into a non-discrimination norm.

[82] Staker, above, 347.
[83] Smith, above, 477.

This difference between the approaches of the ECJ and HCA to the interpretation of free interstate trade norms supports the thesis of the paper, namely, that the free trade jurisprudence of the ECJ is significant to the constitutional development of the Australian single market.

Despite the gravity of the problems, proposals to solve them will find some opposition. In many ways, it is only a natural reaction. Staker has summed up this feeling of resistance:

> Given the general assumption that *Cole v Whitfield* represents a definitive solution to one of the most intractable problems of Australian constitutional law, suggestions that the test of 'discriminatory protectionism' might be abandoned in future may be *particularly unwelcome*.[84]

Notwithstanding the possibility of some opposition, reform is inevitable. It is inevitable because 'nothing in the interpretation of section 92 can be taken for granted.'[85] The law on s. 92 is anything but static:

> Despite the solution of the great problems … recent cases show that although there is at present a tendency not to extend the section, *the position with respect to s. 92 cannot be said to be static*. The very last thing that ever could be said of it is – '*sedet aeternumque sedebit*'. *New decisions seem to be continually giving rise to further questions.*[86]

In fact, as Staker acknowledged, '[e]ven if the "discriminatory protectionism" formula is to be retained, it may, in the future, need to be further explained, qualified and subjected to exceptions.'[87] Departing from this premise, he made the following observation:

> The more pessimistic might wonder whether the *Cole v Whitfield* interpretation will in fact prove more durable than any of its predecessors. Certainly, the subsequent s. 92 decisions of the High Court, *Bath v Alston Holdings Pty Ltd* and *Castlemaine Tooheys Ltd v South Australia* show that *the formulation adopted by the Court in Cole v Whitfield cannot be relied upon to produce a clear result from its automatic application to any fact situation. If the Cole v Whitfield test is to be with us permanently, it will still require development and refinement in subsequent case law.*[88]

Therefore, clearly and resolutely, 'the decision in *Cole v Whitfield* … is *by no means the end of the road*.'[89]

Reform is inevitable because the law on s. 92 is, as its history demonstrates, in a constant state of flux. In one sense, it is inevitable by default. Perhaps more importantly, reform is inevitable also because, in the final analysis, it is necessary. Simply, the HCA cannot continue to ignore the doctrinal, public policy, and economic flaws that riddle discriminatory protectionism as the concept that underpins the test of invalidity under s. 92. First, the HCA is obliged to solve the problems that it created in *Cole v Whitfield* and later entrenched in *Castlemaine Tooheys Ltd v South Australia*:

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[84] Staker, above, 346 (emphasis added).
[85] M Coper, 'Constitutional Obstacles to Organised Marketing in Australia' (1978) 46 *Review of Marketing and Agricultural Economics* 71, 95.
[86] G L Hart, 'Some Aspects of Section 92 of the Constitution' (1957) 30 *Australian Law Journal* 551, 563 (emphasis added).
[87] Staker, above, 346.
[88] Ibid 322-3 (emphasis added).
[89] Coper, *The Curious Case of the Callow Crayfish*, above, 3 (emphasis added).

> An erroneous interpretation can and must be put right for the future as soon as the error is made clear. You cannot change the Constitution simply on the maxim *communis error facit jus*. *The general good must prevail over precedent … errors of interpretation of the words of the Constitution can be put right by the courts. It is their duty to do so.* To change the Constitution (i.e., the words) is one thing, to change and correct the interpretation is quite another.[90]

Secondly, the HCA is now ready, willing, and able to solve the problems that ensued in the aftermath of *Cole v Whitfield*. It is ready because, by now, members of the HCA have taken enough steps in the right direction. For example, *obiter dicta* in *Bath v Alston Holdings Pty Ltd* and *Castlemaine Tooheys Ltd v South Australia* indicate that there would now be a greater reception to the proposal that this paper makes to drop the criterion of protectionism from the test of invalidity.[91] Indeed, as recently as 2008, Heydon J, perhaps inadvertently, suggested in his separate but concurrent judgment in *Betfair Pty Ltd v Western Australia* a test of invalidity that does not discriminate between different kinds of discrimination, one that targets discrimination *per se*, protectionist in kind or not:

> The plaintiffs correctly submitted that where the practical effect of a law is to *burden inter-State trade to a significantly greater extent than it burdens intra-State trade*, the law contravenes s. 92 unless there is some other end achieved by the law which is compatible with s. 92.[92]

Thus, the HCA is now ready to reform the law on s. 92. It is also willing. As Robert Menzies remarked a great many years ago, '[t]he High *Court has always maintained the right of overruling its own prior decisions where in its opinion, those decisions were "manifestly erroneous"* … [T]his state of affairs … has the virtue of keeping alive the critical study of the Constitution itself'.[93]

The HCA is not only ready and willing to reform the law on s. 92 but also able to do so. It is an established principle of constitutional interpretation that 'though the words which expressed the choice of the people of Australia at the *date* of the Constitution cannot be altered, *the interpretation of those words given afterwards by the judges can be altered by a subsequent and revised interpretation given by later courts*.'[94]

It is, perhaps, appropriate at this point to voice the words of Lord Wright when he declared:

> I cannot help thinking that *if my heresies were adopted* or alternatively if the Constitution were amended *there would be an end to some at least of the complexities* which could be dispensed with and which might otherwise, even in a small degree, hamper the triumphant progress of a great nation in its development and advance.[95]

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[90] Lord Wright, above, 146 (emphasis added).
[91] *Bath v Alston Holdings Pty Ltd* (1987) 165 CLR 411, 426 (Mason CJ, Brennan, Deane and Gaudron JJ) and *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 475-6 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
[92] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 483 (Heydon J) (emphasis added).
[93] R Menzies, 'The Commonwealth in Relation to Section 92 of the Constitution' (1927) 1 *Australian Law Journal* 36, 36 (emphasis added).
[94] Lord Wright, above, 149 (emphasis added).
[95] Ibid 171 (emphasis added).

There is no doubt that the application of the proposals that this paper makes may give rise to problems but, in the words of Michael Coper, 'that is the least one can expect from a process of conversion of a bald political slogan into a workable legal precept.'[96]

Further, there is also no doubt that, notwithstanding the application of the proposals here, the 'little bit of laymen's language which comes in here very well' will continue to puzzle all those who inadvertently cross its path. In fact, even the eminent constitutionalist, Geoffrey Sawer, was puzzled by s. 92 as the following anecdote from his visit to London with the Australian delegation in the *Bank Nationalisation* case[97] in 1949 demonstrates:

> Dr Evatt then sent me on another pilgrimage in search of guidance to Oxford, where my friend the late George Paul was a Fellow. He was a Wittgensteinian philosopher, and since that tribe concerned itself a good deal with words and speech usages, Bert and I thought he might have some insights about the word 'freedom', particularly when as in s. 92 it is associated with the uncompromising adjective 'absolute'. George, in the manner of that tribe, moved his lips for a considerable time without uttering, and communed with the spirit of logical positivism; I looked out the window and communed with Spring in Oxford. After a time, Paul had to confess that his communings had produced no result, but he would write me if any thoughts occurred. I never heard from him again.[98]

I would be content then if this paper goes some way to show that the free trade jurisprudence of the ECJ is significant to the constitutional development of the Australian single market. The experience of the ECJ can help rescue practitioners and scholars alike from the lamentable state in which John Latham, a former Chief Justice of the HCA, found himself when, in his 1952 retirement address, solemnly declared: 'When I die, section 92 will be found written on my heart'.[99] Indeed, in the words of Judge David Edward formerly of the ECJ:

> If Europe's experience can help build prosperity and stability in a well-established federation on the other side of the world, the old continent will have repaid some of the debt it owes to those who helped it regain its freedom.[100]

The free trade jurisprudence of supranational and international jurisdictions is significant to the constitutional development of the political economy of non-unitary jurisdictions

[96] M Coper, *Freedom of Interstate Trade under the Australian Constitution* (1983) 307.
[97] *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.
[98] M Coper, *Encounters with the Australian Constitution* (1988) 289.
[99] Ibid 259.
[100] Bronitt, Burns and Kinley, above, Foreword.

