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The Constitutionalisation of Free Trade by the High Court of Australia and the Court of Justice of the European Union[1]

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Abstract

Together with matters of multilateral and bilateral regulation, domestic regulation affects the law and policy of economic relations between the European Union (EU) and Australia. This article discusses the constitutional determinants of the Australian single market and the significance to its development of the free trade jurisprudence of the Court of Justice of the European Union. When Australia was federated, free trade between the States and the removal of barriers at the borders were at the forefront of constitutional objectives. They find expression in Section 92 of the Australian Constitution. It took some time for the jurisprudence to develop by reference to principles of competition. Recent decisions of the High Court of Australia highlight the need to prove that a law or measure may have anti-competitive effects within a market to hold it invalid. Application of this (unacknowledged) test of proportionality

1 This article is a revised and updated transcript of a seminar that The Hon Justice Susan Kiefel AC and Prof Dr Gonzalo Villalta Puig jointly presented at the Centre for Financial Regulation and Economic Development, The Chinese University of Hong Kong, on 14 January 2013 as part of a research project on the law and policy of economic relations between Australia and the European Union. See Gonzalo Villalta Puig, *Economic Relations between Australia and the European Union: Law and Policy* (Alphen aan den Rijn: Kluwer Law International, 2014). The first section of this article is written by Justice Kiefel and the second section by Professor Villalta Puig.

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invites comparison with EU law and opens to question the usefulness of protectionism as a criterion of constitutional invalidity for trade without borders in the 'new economy'.

Keywords

economic constitutional law – free trade – Commonwealth of Australia – European Union – High Court of Australia – Court of Justice of the European Union – Australian Constitution – Treaty on the Functioning of the European Union

1 Freedom of Trade and Commerce under Section 92 of the Australian Constitution (The Hon Justice Susan Kiefel AC)

1.1 *Background and History*

In the numerous public debates in the latter part of the 19th-century concerning the terms of a future Constitution for Australia, which would federate the existing colonies into States within a Commonwealth of Australia (Australia), the issue of border customs duties was at the forefront. The colonies had for a long time imposed taxes at the border on goods produced elsewhere in the country. An objective of federation was inter-colonial free trade on the basis of a uniform tariff and this objective required the removal of any burdens, fiscal or non-fiscal, which operated to discriminate against trade and commerce. The notion of a commercial federation was aligned with that of a political federation. The goals of the movement towards the federation of the Australian colonies included the elimination of border duties and any discriminatory preferences in inter-colonial trade and the achievement of inter-colonial free trade. Those framing the Constitution sought to create a national market which would be expressive of national unity.[2]

Thus it was that, at the Constitutional Convention held in Sydney in March 1891, one of the leaders of the movement to federation, Sir Henry Parkes, moved the motion '[t]hat the trade and intercourse between the federated colonies, whether by means of land carriage or coastal navigation, shall be absolutely free'.[3] This motion was to become Section 92 of the Australian Constitution of 1901. It appears in Chapter IV, which is headed 'Finance and

2 *Betfair Pty Ltd* v. *Western Australia* (2008) 234 CLR 418.

3 *Official Report of the National Australasian Convention Debates* (Sydney, 2 March 1891 – 9 April 1891), 23 (Henry Parkes, President) (4 March 1891).

Trade'. The guarantee contained in Section 92 is now understood to operate so as to restrict legislative power at both the federal and the sub-federal level. Where a legislative measure contravenes the implied prohibition in the section, it will be invalid.

1.2 *Comparisons*

At the time the Australian Constitution was drafted, there were then existing political and commercial federations which could provide something of a model for it. It has been thought that the attention of Sir Henry is likely to have been drawn to a decision in the United States[4] concerning what is called the 'dormant commerce clause' of the United States Constitution, where the Supreme Court held that no State could, constitutionally, impose on the products of other States more onerous public burdens or taxes than it imposes upon like products of its own territory.

The 20th century saw the development of the largest free trade area with the establishment of the European Union (EU). The Treaty on the Functioning of the European Union (TFEU) recognises a common market as an area without internal frontiers in which the free movement of goods, persons, services, and capital is assured (the 'four freedoms'). The approach of the Court of Justice of the European Union (European Court of Justice (ECJ)) to ensuring freedom of trade is economic and driven largely by competition law principles. Its basic approach derives from the concept of access to the market.

In Australia, however, the development of a theory concerning Section 92 was somewhat retarded. In the first half of the 20th century, the jurisprudence of the High Court of Australia (HCA) focused upon a now discredited theory concerning the individual rights of traders.[5] For a long time, Section 92 was considered to be concerned not with the effects of statutory regulation on competition within markets, but with the effects on individual traders. Section 92 was taken to guarantee the rights of an individual to engage in trade and commerce. Much of the problem, no doubt, arose because of the language of Section 92, which is cast as a freedom rather than as a prohibition and thus partakes of the nature of a right. Even in the cases which later moved away from that theory, the HCA was divided as to how Section 92 should operate. In an important decision of the HCA in 1988, *Cole* v. *Whitfield*,[6] the individual rights theory was laid to rest and a new approach to Section 92 was taken – one

4 *Guy* v. *Baltimore* 100 US 434 (1879).

5 See, for example, *O Gilpin Ltd* v. *Commissioner for Road Transport and Tramways (NSW)* (1935) 52 CLR 189.

6 *Cole* v. *Whitfield* (1988) 165 CLR 360.

which applied Section 92 so as to eliminate protectionism. As I have already indicated, the guarantee is now taken to imply a prohibition on legislative power which discriminates against interstate trade and seeks to protect intrastate trade from that competition.

1.3 *Cole* v. *Whitfield*

The Tasmanian law in question in *Cole* v. *Whitfield* prohibited a person taking, buying or selling, or having in their possession crayfish of less than the prescribed size. The prohibition operated whether or not the crayfish were taken in Tasmanian waters. In the course of his interstate trade, a person brought crayfish from South Australia to Tasmania for the purpose of their sale on the mainland and overseas. The crayfish were less than the prescribed size.

The HCA held that the object of Section 92 is the elimination of the protection of trade. To achieve that objective, it prohibits measures which burden interstate trade and which also have the effect of protecting local trade and commerce of the same kind. The hallmark of measures which so contravene Section 92 is that they discriminate between interstate trade in a protectionist sense. Harking back to 19th-century theory, it was said[7] that 'free trade' commonly signified an absence of protectionism, which is to say the protection of domestic trade from foreign competition.

However, the regulation in question in *Cole* v. *Whitfield* was held not to contravene Section 92. The limitation on the size of the crayfish which could be sold in Tasmania was unquestionably a burden on interstate trade;[8] but, importantly, the regulation applied alike to all crayfish – whether caught in Tasmanian waters or imported. On its face, the legislation had no discriminatory purpose. Further, the purpose of the legislation could objectively be seen to be the conservation of a valuable natural resource. The prohibition against sale and possession, which extended to imported crayfish, was necessary to enforce the prohibition against the taking of undersized crayfish in Tasmanian waters, which is the activity to which the regulation was directed.

1.4 *Competition Principles?*

Despite this important development in *Cole* v. *Whitfield*, it may be observed that the interpretation of Section 92 was still approached through the perspective of the Convention Debates, rather than the economic theory of competition. The emphasis remained on protectionism and discrimination in that

7 *Ibid.* 392–393.

8 *Ibid.* 409.

sense, rather than looking to the effects of discrimination within the market. Nevertheless, competition principles could be seen to be in play.

For example, in *Cole* v. *Whitfield*, the HCA enquired whether the legislation operated to provide the domestic crayfish industry with a competitive or market advantage over interstate rivals. In another case, in 1993,[9] the HCA explained that a purpose of Section 92 was to ensure that trade is not discouraged and competition not distorted. But it was in the decision of the HCA in *Betfair Pty Ltd* v. *Western Australia*,[10] in 2008, that notions of protectionism were aligned with barriers to entry to a market.

1.5 *Betfair Pty Ltd* v. *Western Australia*

Betfair Pty Ltd (Betfair) is a company which operates betting exchanges in Australia. A betting exchange differs from other forms of betting. A bet can be made not only on a future event occurring, such as a horse winning a race, but also on it not occurring. A betting exchange matches a bet that it *will* with a bet that it *will not* and charges a commission on the net winnings of a customer. A betting exchange does not take the same risks as other operators. What Betfair did have in common with other wagering operators, such as bookmakers and totalisators, was the need to use a list of the horses racing in the States in which it operated. Legislation in Western Australia provided that such information could only be made available by permission, which in Betfair's case could not be granted because legislation also made it an offence to use a betting exchange in Western Australia.

It was held that the provisions were invalid, as contrary to Section 92, because they imposed a discriminatory burden on interstate trade of a protectionist kind by operating so as to protect established wagering operators in Western Australia from competition from Betfair. In effect, a protective barrier was created around the local market. The interstate element necessary for Section 92 to apply was present because the relevant market for wagering was national and Betfair, which operated a call centre out of Tasmania, was competing in that market across a State boundary.

1.6 *Betfair Pty Ltd* v. *Racing New South Wales*

Emboldened by its success perhaps, Betfair brought another challenge (decided in 2012)[11] against Racing New South Wales and another authority, which were respectively responsible for the regulation of thoroughbred and

9 *Capital Duplicators Pty Ltd* v. *Australian Capital Territory (No. 2)* (1993) 178 CLR 561.

10 *Betfair Pty Ltd v. Western Australia* (2008) 234 CLR 418.

11 *Betfair Pty Ltd* v. *Racing New South Wales* (2012) 286 ALR 221.

harness racing in New South Wales. The legislation under which they operated required that a fee be paid by wagering operators for the use of the race field information. The fee was expressed as a percentage of the wagering operator's wagering turnover. Although the same fee was applied to all operators so that, on its face, it was neutral or non-discriminatory, Betfair claimed that the fee discriminated against it. It contended that because it derived its income by way of commission from its customers, the fee represented a numerically higher proportion of its gross revenue. One may be forgiven for thinking that the discredited individual rights theory, to which I referred earlier, had made another appearance.

The HCA held that it is not every legislative measure which has an adverse effect as between competitors that will attract the operation of Section 92.[12] All Betfair established was that, because of its pricing structures and the low margin of profit at which it operated, the fees imposed by the racing authorities absorbed a higher proportion of its turnover on interstate transactions than its competitors.

The HCA reaffirmed that, to invoke Section 92, it was necessary to establish that the practical effect of the fees was to discriminate against interstate trade in such a way as to protect intrastate trade. A measure which operated in a discriminatory sense would offend Section 92 if it could be classified by reference to the concept of protectionism. These are questions of fact and degree within what is, essentially, an objective enquiry. The question is whether an objective intention of protection can be discerned from the way in which the fees operate. For example: does the measure burden interstate trade and provide an advantage to local trade so as to raise a protective barrier around it? Relevantly, Betfair failed to establish that the practical effect of the fees was that it would lose market share or that they had some other observable effect upon its ability to compete in the market. Betfair did not establish how a cost effect translates as a competitive effect in the market. It did not explain how it would be affected if, for example, it absorbed the cost of the fee or passed it on to its customers. Such an explanation may have been difficult, of course, for its competitors were faced with the same question about how to respond to the fee.

1.7 *Proportionality Applied to Section 92*

The two Betfair cases are also useful to identify the extent to which a proportionality analysis is utilised in connection with Section 92. This may be relevant for the purposes of comparisons with the approach of the ECJ,

12 *Betfair Pty Ltd* v. *Racing New South Wales* (2012) 286 ALR 221, 231 [36].

which is the subject of discussion later in this article by Professor Gonzalo Villalta Puig.

Most, if not all, legal systems that are concerned with a mandated freedom of trade and movement of goods necessarily accept that such freedoms cannot be regarded as absolute. On occasions, it must be accepted that these freedoms will be burdened by some regulation which has a legitimate legislative purpose. This proposition, in turn, implies that not every legislative measure which burdens such freedoms will be acceptable. Some limit must be placed upon regulation if the freedom is to continue to be meaningful. Testing a legislative measure by reference to proportionality analysis is an obvious choice. And it involves reasonableness as a test.

The HCA has, to date, adopted that aspect of proportionality analysis which involves a test of reasonable necessity; that is to say, a law which has a legitimate or constitutionally authorised object will be valid if it goes no further than reasonably necessary in the attainment of that object. It has not, however, embraced a proportionality analysis which permits a balancing exercise; but I do not understand the ECJ to have applied such an analysis in the context of the freedoms.

In *Betfair Pty Ltd* v. *Racing New South Wales*,[13] it was said that the question whether the regulations went further than was reasonably necessary was not reached but it was made plain that, if the fees had burdened interstate trade to its competitive disadvantage, they may, nevertheless, be valid if they were necessary to the achievement of a legitimate non-protectionist purpose. This decision followed *Betfair Pty Ltd* v. *Western Australia*[14] in which the HCA adopted the criterion of reasonable necessity. But, in that case, the legislation was held not to satisfy the test. Alternative legislative measures had been taken in Tasmania with respect to the regulation of betting exchanges which did not discriminate against interstate trade and commerce. These measures provided a large part of the answer to Western Australia's contention that its prohibitions were necessary to the preservation of the integrity of the racing industry.

The doctrine of reasonable necessity was regarded in *Betfair Pty Ltd* v. *Western Australia* as consistent with the explanation given in *Cole* v. *Whitfield* of the justification for the total prohibition in the Tasmanian legislation of the sale of all undersized crayfish, irrespective of their origin, as supplied by the legislation's objective of the conservation of the stock of Tasmanian crayfish.[15]

13 *Betfair Pty Ltd* v. *Racing New South Wales* (2012) 286 ALR 221, 235 [52].

14 *Betfair Pty Ltd* v. *Western Australia* (2008) 234 CLR 418, 477 [102]–[103].

15 *Betfair* v. *Western Australia* (2008) 234 CLR, 477 [103].

This was regarded as a necessary measure to enforce the prohibition against the catching of undersized crayfish in Tasmanian waters because Tasmania could not undertake inspections other than randomly and local fish were indistinguishable from those imported from interstate.

In another case, *Castlemaine Tooheys Ltd* v. *South Australia*,[16] what might be thought to be the laudable objectives of the protection of the environment and the conservation of energy resources, in legislation concerned with recycling beer bottles, were held not to provide a justification for the differential treatment of products. Again, alternative means were identified so that it could not be concluded that the legislative measures were reasonably necessary.

1.8 *Protectionism and its Limitations*

In Australian law, despite the growing importance of competition principles to the application of Section 92, a protectionist effect remains a requirement of a law if it is to be held invalid. However, protectionism may be considered to be unnecessary to the economic theory of competition.

There are, of course, limits to the concept of protectionism as a classification of invalid discriminatory laws. It is insufficient to cover every kind of regulatory conduct which has an anti-competitive effect in a market. By way of example, a State halves the imports of the products of another State. The first mentioned State does not itself produce the particular product or a substitutable product. No advantage is, therefore, gained by local producers but the measure restricts the flow of trade. On the other hand, not all discriminatory measures will have a protectionist effect.

I do not understand the ECJ to require that a measure be seen to have a protectionist purpose or effect. Measures which impose burdens will restrict the flow of trade and, therefore, have a prohibited effect under the TFEU. It is enough that a measure creates barriers to intra-Union trade.[17] This approach is similar to the approach taken by United States decisions which hold that restrictions on competition are unconstitutional.[18] Yet, the HCA has held[19] that such an interpretation would give a wider operation to Section 92 than *Cole* v. *Whitfield* would accord it.

The ECJ appears to focus more upon the economic consequences of measures taken by Member States upon competition in the market. Although the

16 *Castlemaine Tooheys Ltd* v. *South Australia* (1990) 169 CLR 436.

17 See, for example, *Procureur du Roi* v. *Dassonville* (*Dassonville*), Case No. 8/74 [1974] ECR 837.

18 See, for example, *Pike* v. *Bruce Church Inc* 397 US 137 (1970).

19 *Barley Marketing Board* (*NSW*) v. *Norman* (1990) 171 CLR 182, 203–204.

judgments of the HCA to date may not provide much encouragement to litigants to raise such arguments, it will be interesting to see whether, in future cases concerning Section 92, more is sought to be made of effects upon markets rather than to maintain reliance on more limited principles of competition such as protectionism. A factor which may militate against mounting a market-based case is that it is likely to require evidence. To date, litigation before the HCA in this area has been conducted on the basis of agreed facts.[20] It is unlikely that facts relating to effects upon competition within the relevant markets would be the subject of agreement. In that event, it would be necessary that a matter be remitted to another lower court for the determination of economic effects.

Another aspect of protectionism, as understood in the context of Section 92, is that it requires that there be an interstate element. In Section 92, it may be recalled, trade is spoken of as occurring 'among the States'. On one view, this phrase could be read to deny the existence of State boundaries altogether in this context. Whilst those words continue to be understood to require that there be an interstate element to trade, the requirement of protectionism will continue to have force. But Section 92 also comprehends a national market and, increasingly, that concept is emerging in the cases. In both *Betfair* cases, the question centred upon competition within a national market, although an interstate element was identified as required.

I understand the ECJ's 'internal rule' to have involved a different approach but, in any event, the rule's acceptance has been in decline for some time. I believe it is now acknowledged that a measure can have a substantial negative impact on interstate trade even if there is no cross-border element.[21]

1.9 *Conclusion*

In conclusion, it was observed in *Betfair Pty Ltd* v. *Western Australia*, that, in the 'new economy', Internet businesses operate without regard to geographical boundaries. This observation was, perhaps, the most significant development in the 20 years between *Cole* v. *Whitfield* and *Betfair Pty Ltd* v. *Western Australia*. As was pointed out in the latter case, to focus on geographical boundaries when considering competition in a market in Internet commerce presents practical and conceptual difficulties.[22] This reality may necessitate further

20 This circumstance has, on occasions, dictated a particular result. See, for example, *Castlemaine Tooheys Ltd* v. *South Australia* (1990) 169 CLR 436, 474.

21 See, for example, *Jersey Produce Marketing Organisation Ltd* v. *States of Jersey and Jersey Potato Export Marketing Board*, Case No. C-293/02 [2005] ECR I-9543.

22 *Betfair Pty Ltd* v. *Western Australia* (2008) 234 CLR 418, 453 [18].

consideration of Section 92 jurisprudence and whether it is capable of dealing with the notion of a single market. This would not be inconsistent with early notions about the operation of Section 92. A single, national market, it will be recalled, was after all an objective of those who drafted Section 92.

2 Free Movement of Goods under Article 28 of the Treaty on the Functioning of the European Union (Prof Dr Gonzalo Villalta Puig)

I suppose that the topic of this article is reflective of my own background. As a Spaniard who, for many years, practised and taught law in Australia, I have long had an interest in relations between Australia and Europe, an interest that I have translated into several studies on the relevance of the free trade jurisprudence of the ECJ to the constitutional development of the Australian single market.

This belief in comparative law is one that I share with my co-author. Justice Kiefel has a fond appreciation of the utility of comparative approaches to law, an appreciation which her Honour persistently shows in her judgments and extra-curial works.[23]

On the occasion of the ceremonial sitting to mark her swearing-in as a Justice of the High Court of Australia, her Honour remarked:

> The process of comparison is ... valuable. It is sometimes, I think, possible to learn more about one's own legal system by that method than by mere reflection.[24]

Justice Kiefel read Comparative Law at the University of Cambridge under the counsel of Professor Sir David Williams. She has maintained a fruitful association with such eminent comparative lawyers and Cambridge dons as the late Professor Tony Jolowicz, Professor Sir Basil Markesinis now of the University of Texas, and Professor Horst Lucke in retirement at the University of Queensland.

23 See, in particular, Susan Kiefel, 'Section 92: Markets, Protectionism and Proportionality: Australian and European Perspectives', *Monash University Law Review* 36(2) (2010) 1. See also Susan Kiefel, 'Lessons From a "Conversation" About Restitution', *Australian Law Journal* 88(3) (2014) 176, and Susan Kiefel, 'English, European and Australian Law: Convergence or Divergence?', *Australian Law Journal* 79(4) (2005) 220.

24 High Court of Australia, Ceremonial Sitting on the Occasion of the Swearing-in of The Honourable Susan Mary Kiefel as a Justice of the High Court of Australia at Canberra on Monday, 3 September 2007, at 2.15pm (Ceremonial Sitting – Swearing-in of Kiefel J [2007] HCATrans 493 (3 September 2007)).

Indeed, it was a common commitment to the comparative study of the legal system of the EU in Australia and for Australia that brought us together. Notable is her research into free trade, proportionality, and like constitutional principles of the ECJ for consideration in Australia, research that her Honour has presented at the Max Planck Institute for Comparative and International Private Law, the International Association of Constitutional Law, and academia at large.

Free trade, I have said, is a constitutional principle and it is the subject of this article, which is part of my wider research into the law and policy of economic relations between Australia and the EU. The EU is Australia's second largest trading partner and Australia's largest investment partner. More particularly, the EU is Australia's third largest partner for trade in goods and Australia's largest partner for trade in services.[25]

Australia and the EU trade under the dictates of the World Trade Organization and its dual principle of most-favoured-nation treatment and national treatment as they do not have a bilateral trade and investment agreement in place. The EU remains the only major trading and investment partner with whom Australia does not have an Economic Integration Agreement or even a Preferential Trade Agreement, either in force or under negotiation. Without one, the legal and policy systems that regulate trade and investment between Australia and the EU must function in the complexity of different levels of political economy: non-unitary internal and external market constitutions against bilateral sectoral and multilateral general agreements on trade and investment. I argue in my most recent monograph, *Economic Relations between Australia and the European Union: Law and Policy*, that a trade and investment agreement is necessary to remove the agricultural tariffs and quarantine requirements and to harmonise the regulatory divergences that bar bilateral trade. It is further necessary to facilitate and guarantee two-way investment.[26] That the EU and Australia have not signed a bilateral trade and investment agreement is unfortunate, such would its potential be for further wealth creation ... but that is a subject for another article, another day.[27]

Rather, this article debates the principle of free trade not between customs territories but within customs territories; that is, it discusses the

25 Villalta Puig, *Economic Relations between Australia and the European Union* (n 1) 8–19.

26 *Ibid.* 263–297.

27 See also Gonzalo Villalta Puig, 'Trade and Investment Relations between the European Union and Australia: For a Bilateral Economic Integration Agreement', *European Foreign Affairs Review* 17(2) (2012) 213.

constitutionalisation of free trade by the HCA and the ECJ. We can ask: are Australian goods free to move among the 28 Member States of the EU after they clear their customs? And are EU goods free to move among the States of Australia after they clear customs? The answer to both questions is behind the borders; it is in the economic constitution of these two non-unitary jurisdictions.

The TFEU is the economic constitution of the EU.[28] The aim of the EU, as the Preamble to the TFEU states, is 'to lay the foundations of an ever closer union among the peoples of Europe ... by thus pooling their resources to preserve and strengthen peace and liberty'. Further to that aim, the objective of the EU is the integration of the economies of the Member States into an internal – single – market. Article 26(2) of the TFEU states:

> 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.

The policies of the EU to achieve this objective and, thereby, establish the internal market are the 'four freedoms': the economic freedoms of the internal market (the free movement of goods, persons, services, and capital).

Of the 'four freedoms', the most relevant for the purposes of a comparison with Section 92 of the Australian Constitution is the free movement of goods.[29] The freedom functions as a customs union under Article 28 of the TFEU:

> The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

Article 34 of the TFEU with its prohibition of non-fiscal barriers to trade in goods, be they at the border (quantitative restrictions) or behind the border (measures having equivalent effect to a quantitative restriction (MEQRS)), gives substantive expression to the freedom:

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

28 Villalta Puig, *Economic Relations between Australia and the European Union* (n 1) 193-238.

29 *Ibid.* 195–226.

The ECJ reads Article 34 to mean a non-discrimination norm[30] in a test that rules out laws and measures that hinder market access to goods that are otherwise lawful. The concern of the ECJ is to safeguard equal market access for all traders within the EU and, therefore, to establish an internal market. Thus, measures that discriminate against imported goods (the trade rules of *Dassonville*),[31] measures that impose dual requirements on imported goods (the product rules of *Cassis de Dijon*),[32] or measures that simply hinder, impede, obstruct, restrict or altogether prevent market access (*Trailers*)[33] through certain discriminatory (and, perhaps, even non-discriminatory) selling arrangements (the market circumstances rules of *Keck and Mithouard*[34] and, in particular, *De Agostini*[35] and *DocMorris*[36]) or use restrictions (*Mickelsson*)[37] are all MEQRs in breach of Article 34 of the TFEU. In *Trailers*, the ECJ summarised the case law thus:

> It is also apparent from settled case-law that Article [34 TFEU] reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of [Union] products to national markets.[38]

Australia also provides for the free movement of goods among its States. Section 92 of the Australian Constitution, as I already noted, is the reference.[39] The HCA reads Section 92 to mean not an anti-discrimination norm but an anti-protectionist norm in a test that rules out discriminatory laws and

30 *Ibid.* 221–226.

31 *Procureur du Roi* v. *Dassonville* (*Dassonville*), Case No. 8/74 [1974] ECR 837.

32 *Rewe-Zentral AG* v. *Bundesmonopolverwaltung fur Branntwein* (*Cassis de Dijon*), Case No. 120/78.
[1979] ECR 649.

33 *Commission* v. *Italy* (*Trailers*), Case No. C-110/05 [2009] ECR I-519.

34 *Criminal Proceedings against Keck and Mithouard* (*Keck and Mithouard*), Case Nos C-267/91 and C-268/91 [1993] ECR I-6097.

35 *Konsumentombudsmannen* (*KO*) v. *De Agostini* (*Svenska*) *Forlag AB and TV-Shop i. Sverige AB* (*De Agostini*), Case Nos C-34/95, C-35/95 and C-36/95 [1997] ECR I-3843.

36 *Deutscher Apothekerverband eV* v. *0800 DocMorris NV and Jacques Waterval* (*DocMorris*), Case No. C-322/01 [2003] ECR I-14887.

37 *Aklagaren* v. *Percy Mickelsson and Joakim Roos* (*Mickelsson*), Case No. C-142/05 [2009] ECR I-4273.

38 *Commission* v. *Italy* (*Trailers*), Case No. C-110/05 [2009] ECR I-519, para 34.

39 Villalta Puig, *Economic Relations between Australia and the European Union* (n 1) 135–163.

measures of a protectionist kind, a test that the case of *Cole* v. *Whitfield*[40] introduced in 1988 after very many years of uncertain interpretation.

I argue that an interpretation of Section 92 as an anti-protectionist norm is inconsistent with the federal purpose of the section to establish a national market for Australia because it can allow laws and measures that discriminate against interstate trade if they are not protectionist. Only a non-discrimination norm, I further argue, can translate the idea of free trade into a principle of market access as in the EU.[41] It is a question of neither form nor substance. Quite simply, a non-discrimination norm is better than an anti-protectionist norm because a non-discrimination norm can better integrate a non-unitary market than an anti-protectionist norm, be it in Australia or in the EU.

The difference between the approaches of the ECJ and the HCA to the application of Article 34 of the TFEU and Section 92 of the Australian Constitution, respectively, lies in the reluctance of the HCA to do away with the protectionist element of the *Cole* v. *Whitfield* test of invalidity.[42] The ECJ will hold a national law or measure to contravene Article 34 so long as it hinders market access in an unjustifiably unreasonable manner. However, the HCA will only invalidate a State law or measure under Section 92 if the law or measure in question

40 *Cole* v. *Whitfield* (1988) 165 CLR 360.

41 I argue this now and I have argued it many times before ... not without some objection from Professor Michael Coper, who defends the approach of the HCA in *Cole* v. *Whitfield*. See, in particular, Gonzalo Villalta Puig, *The High Court of Australia and Section 92 of the Australian Constitution* (Sydney: Thomson Lawbook, 2008). See also Gonzalo Villalta Puig, 'The Boundaries of the Free Trade Jurisprudence of the High Court of Australia: The *Cole v. Whitfield* Test of Section 92 of the Australian Constitution', in: Christian Twigg-Flesner and Gonzalo Villalta Puig (eds), *Boundaries of Commercial and Trade Law* (Munich: Sellier European Law Publishers, 2011) 75; Gonzalo Villalta Puig, '*Betfair* and *Sportsbet*: The Remains of the Federal Purpose of s 92 of the Australian Constitution', *Australian Law Journal* 87(3) (2013) 178; Gonzalo Villalta Puig, 'Intercolonial Free Trade: The Drafting History of Section 92 of the Australian Constitution', *University of Tasmania Law Review* 30(2) (2011) 1; Gonzalo Villalta Puig, 'Section 92 since *Betfair Pty Ltd v Western Australia*', *Constitutional Law and Policy Review* 11(4) (2009) 152; Gonzalo Villalta Puig, 'The Significance of the Free Trade Jurisprudence of the Court of Justice of the European Union to the Constitutional Development of the Australian Single Market', *The Irish Journal of European Law* 16(1/2) (2009) 131; Gonzalo Villalta Puig, 'A European Saving Test for Section 92 of the Australian Constitution', *Deakin Law Review* 13(1) (2008) 99; Gonzalo Villalta Puig, 'Free Movement of Goods: The European Experience in the Australian Context', *Australian Law Journal* 75(10) (2001) 639. For Professor Coper's argument, see Michael Coper, '*Betfair Pty Ltd v Western Australia* and the New Jurisprudence of Section 92', *Australian Law Journal* 88(3) (2014) 204, 210–211.

42 Villalta Puig, *Economic Relations between Australia and the European Union* (n 1) 237–238.

imposes an unreasonable burden on interstate trade and, 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.

Fortunately, through the judgment of Justice Kiefel in *Betfair Pty Ltd v Racing New South Wales*[43] and *Sportsbet Pty Ltd v New South Wales*,[44] the HCA now hints at a future re-interpretation of Section 92 into a market competition norm without the requirement for protectionism. A market competition norm would support a test to rule out laws and measures that substantially lessen competition – laws and measures that, in other words, reduce sales. The judgment is visionary but the concern of the HCA ought to be with non-discrimination or, more accurately, equal opportunity of market access and not with competitive disadvantage. I would like to stress that market access should be the controlling criterion.[45] To be sure, market competition is not the same as market access but the removal of protectionism from the test may well have the same effect in practice.

Even though the HCA hints at the future recognition of a market competition norm in Section 92 like a substitute for its protectionist requirements, the present interpretation does not facilitate interstate trade. It impedes it. An anti-protectionist norm compromises the internal market of Australia because it can give way to laws and measures that discriminate against interstate trade if they are not protectionist.

A non-discrimination norm, ultimately, translates into a market access test for Section 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.[46] Only with the same concern that the ECJ shows for discrimination and, ultimately, market access as the only criterion of invalidity in the interpretation of Article 34 of the TFEU can the *Cole* v. *Whitfield* test of invalidity under Section 92 of the Australian Constitution realise the benefits of free trade for the Australian single market. Non-discrimination for market access is true to the federal purpose of Section 92 for only on that interpretation can the section create and preserve a national market for Australia.

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43 *Betfair Pty Ltd* v. *Racing New South Wales* (2012) 286 ALR 221.

44 *Sportsbet Pty Ltd* v. *New South Wales* (2012) 286 ALR 404.

45 Villalta Puig, *Economic Relations between Australia and the European Union* (n 1) 161–163.

46 Villalta Puig, '*Betfair* and *Sportsbet*' (n 41) 179, 184–185, 192, 197–199.

In conclusion, market access is the norm that ought to regulate the internal market in Australia, as in the EU. An internal market can only be a truly single market if access to it is full for all and so any law or measure that could impede the access of goods and services – products – and the factors of production from one market to another, whether or not it has a differential impact on locals and non-locals, should be contrary to the constitutional principle of free trade without justification. This call is not for a general freedom to trade but for a freedom to move goods and services without restriction.