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Covid-19 Border Restrictions and Section 92 of the Australian Constitution

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ABSTRACT

This article considers whether the current Western Australian border restrictions implemented in response to the COVID-19 pandemic are consistent with section 92 of the Australian Constitution, and its promise that trade, commerce and intercourse among the states will be absolutely free. After charting developments in the jurisprudence of s 92, in particular the intercourse aspect, it concludes that there is a strong chance that the Western Australian laws will be declared invalid, because they are arguably not proportionate to their legitimate objective, and arguably cannot be shown to be reasonably necessary, at least in relation to intercourse with all jurisdictions other than Victoria. The article also suggests that the current factual scenario might cause the High Court to revisit its approach to s 92 questions. The current approach, where different tests are applied to the 'trade and commerce' and the 'intercourse' aspects of the section, is not desirable. This article suggests a new streamlined approach that applies consistent principles to both limbs of the section, focussed on discrimination and proportionality.

I INTRODUCTION

In March 2020, in response to the then nascent threat of the spread of coronavirus, some Australian states enacted border restrictions,

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greatly inhibiting movement across state borders. In the case of Western Australia, restrictions on movement within the state were also enacted. States that implemented such restrictions claimed that they were necessary measures in order to seek to curtail the spread of the virus. Certainly, those states which implemented such restrictions, such as Western Australia, Queensland and South Australia, have led relatively low case numbers, and are currently in a period of loosening restrictions as the number of case numbers continues to diminish. Queensland removed its border restrictions in July, except in the case of Victorian residents, given that state's problematic spike in numbers, and in respect of 'hotspots' in New South Wales, but then partly re-imposed them. At the time of writing, Western Australia has persisted with its interstate border restrictions, though it has lifted its restrictions on intrastate movement.

These recent and current examples of border restrictions raise a fundamental constitutional question. Section 92 of the *Australian Constitution* (*'Constitution'*) states that trade, commerce and intercourse among the states is to be 'absolutely free'. At the time of writing, legal challenges have been commenced, arguing in particular that Western Australia's current border restrictions infringe s 92 of the *Constitution.* It is expected that the challenge will focus on both the trade and commerce aspect, on the one hand, and the intercourse aspect, on the other hand, of s92. This article will consider the likely prospects of such a challenge.

II STATE BORDER RESTRICTIONS

The relevant regulations are found, in the case of Western Australia, in the *Quarantine (Closing the Border) Directions* ('*Directions*') issued in April 2020, following on from the declaration of a state of emergency under the *Emergency Management Act 2005* (WA) in March. That Act confers very broad powers on public officials in the case of such an emergency, including placing restrictions or prohibitions on the movement of individuals.[1] The *Directions* were issued pursuant

[1] *Emergency Management Act 2005* (WA) s 67.

to that legislation. They state simply that their purpose is to limit the spread of COVID-19.[2] Given space restrictions, I discuss only the essential provisions here.

Section 4 of the *Directions* states that a person must not enter Western Australia unless they are an exempt traveller. An exempt traveller is defined in s 27 in terms of various categories of individual. The list includes senior government officials, army personnel, members of the Commonwealth Parliament, someone carrying on responsibilities of the federal government, the State Premier and staff, a person who enters at the request of the Western Australian Chief Medical Officer, and those working in the field of transport, freight and logistics, those with certain specialist skills, those engaged on a fly-in fly-out employment contract and their families, emergency service workers, judicial officers, and those travelling for compassionate and/or medical or carer reasons. This is similar to regimes that previously operated in some other states.[3] Section 11 permits Western Australian residents to return to the state, provided they have been under supervised quarantine in another state for at least 14 days, are showing no symptoms of having contracted COVID-19, and agree to undergo another 14 day quarantine period upon returning to Western Australia. Breach of the *Directions* may attract a penalty of 12 months' imprisonment and/or a fine of $50,000 for an individual and $250,000 for an organisation.

Clearly, s 4 imposes a very significant restriction on the interstate movement of individuals (and, to some extent, trade and commerce) across the Western Australian border. It is also true that Western Australia has been very successful in containing the virus, with very few cases, and almost no community transmission. Of course, the Western Australian government will argue that its success has been due in no small part to it effectively isolating the state from the rest of Australia with the provisions the subject of this article.

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[2] *Quarantine (Closing the Border) Directions 2020* (WA) s 1.

[3] Eg *Border Restrictions Direction No 5*, issued under the *Public Health Act 2005* (Qld) s 362B.

This question of possible cause and effect is important, and will be considered later in the article. It will be relevant to the question of the constitutionality of the relevant provisions, to which this article now turns.

III THE AUSTRALIAN CONSTITUTION

I will turn specifically to s 92 of the Constitution, the specific provision under which the Western Australian legislation is being challenged, shortly. However, at the macro level, the nature of the *Constitution* must be acknowledged. It reflected an attempt to bring together the people of six disparate colonies, separated by the tyranny of distance, and beset by limited communication opportunities and means among them, and limited transportation options. It attempted to forge one nation from a loose collection of colonies. This attempt to bring together people into one nation is noticeable in several different sections of the *Constitution*. Apart from s 92, it is reflected in s 117 of the *Constitution*, prohibiting a state law from subjecting an out of state resident to disability or discrimination on that basis. It is reflected in s 51(2), prohibiting the Commonwealth Parliament from discriminating in terms of taxation between states, and in s 99, prohibiting trade and commerce laws that preference one state or part of a state over another state or part of state.

This aspect of the *Constitution* was reflected upon in several of the judgments of the High Court in a leading s 117 case, *Street v Queensland Bar Association*.[4] Though the specific constitutional context there differed from the present, it is submitted that some of the macro-level expressions of the purpose of the *Constitution* are of universal application in regards its interpretation, including s 92. That section has some analogies with s 117 in terms of its concern over the retention of 'walls' (thankfully, figuratively only, but still of concern) between states.

Mason CJ in that case spoke of the object of federation being to

[4] (1989) 168 CLR 461.

'bring into existence one nation and one people'.[5] He referred to the framers of the Australian *Constitution* wishing to 'bring into existence a national unity and a national sense of identity transcending colonial and state loyalties'.[6] The other important lesson in Street for current purposes is that members of the court favoured a substantive and broad, rather than formal and narrow, approach to constitutional freedoms. This led members of the court to reject an approach to s 117 based on whether the legislation applied an impermissible 'criterion' (relating to the interstatedness of the interest),[7] in favour of a consideration of how the legislation applied in fact. Three other justices specifically held that the section had to be applied in a practical, not technical, matter.[8] This is of importance here because there is evidence of a 'criterion' approach to s 92 questions, and there is also evidence of narrowness in approach, which sometimes eschews practical operation of legislation, as opposed to its prima facie appearance. The *Street* case is a reminder that this should not occur in the constitutional law realm.

Brennan J was also conscious of the undesirability of 'barrier(s) to the legal and social utility of the Australian people'. He would only permit them, in relation to the purposes of the *Constitution*, in cases involving 'the need to preserve the institutions of government and their ability to function'.[9] Dawson J said that states were constitutionally required to operate on the basis there was 'one nation and that the citizens of that nation carry their citizenship with them from state to state'.[10] McHugh J referred to the 'single economic region which is a prime object of federation'.[11] The intent of the founding fathers of the Australian Constitution in melding together one nation is very clear.

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[5] Ibid 485.

[6] Ibid 485; and a constitutional object of Australian nationhood and national unity: at 492-493.

[7] Ibid 487.

[8] Ibid 488 (Mason CJ), 569 (Gaudron J) and 581 (McHugh J)

[9] Ibid 513.

[10] Ibid 548.

[11] Ibid 589.

III SECTION 92 OF THE AUSTRALIAN CONSTITUTION

Section 92 of the Australian *Constitution* is absolutely integral to the founders' plan. That section states quite starkly that on the imposition of uniform duties of customs, trade commerce and intercourse among the states of Australia is to be absolutely free. Uniform customs duties were first implemented in 1901.[12] It is one of the most litigated provisions in the *Constitution.* It is often said that two factors motivated federation in the colonies, that of perceived threats to border security, and dissatisfaction with trade among the colonies, with some states such as Victoria pursuing protectionist agendas, incurring the ire of other states such as New South Wales, which was generally more committed to free trade. It was argued that the colonies should join together to create both a customs union and 'common market', removing the economic borders that had been assembled at the physical borders between states, in order to get the benefit of free trade which was by this stage of human knowledge very evident.[13] These economic goals are reflected in ss 90 and 92, the former section removing the ability of colonies/states to impose excise duties on goods, and the latter preventing them from imposing taxes and charges on goods travelling from interstate. Members of the High Court have described the free trade and intercourse guarantee in s 92 as 'perhaps the most notable achievement of the *Constitution*'.[14] Its importance was noted by the person known as the 'father' of federation in Australia, Henry Parkes, at one of the Constitutional Conventions.[15]

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[12] Peter Lloyd 'Customs Union and Fiscal Union in Australia at Federation' (2015) 91 *Economic Record* 155, 160.

[13] *Street v Queensland Bar Association* (1989) 168 CLR 461, 589 where McHugh J refers to the creation of the 'single economic region which is the prime object of federation'.

[14] *Ex Parte Nelson* (No1)(1928) 42 CLR 209, 218 (Knox CJ Gavan Duffy and Starke JJ).

[15] 'I seek to define what seems to be an absolutely necessary condition of anything like perfect federation, that is, that Australia shall be free … free on the borders, free everywhere – in its trade and intercourse between its own people, that there should be no impediment of any kind – that there shall be no barrier of and kind between one section of the Australian people and another; but, that the trade and the general communication of these 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: *Official Report of the Nation-*

Of course, there is a compelling economic argument underpinning s 92. The benefits of free trade were most obviously noted in the work of Adam Smith[16] and David Ricardo.[17] They spoke of the advantages of a country specialising in producing particular goods or services, in the production of which they might enjoy a comparative advantage, and trading with other countries which have specialised in the production of other goods or services in which they enjoy a comparative advantage. This would maximise efficiencies. Though these economists were speaking of the advantages of free trade globally, clearly such thinking could also be applied to free trade within a nation, across state borders.

Of course, the movement of people across borders is intrinsically linked with the movement of goods and services. The movement of goods and services could be effectively precluded or hampered if restrictions on the movement of individuals (for example, owners or distributors of the goods, providers of the services) were permitted. This spells trouble for an interpretation of s 92 that apparently imposes different tests for the trade and commerce part of s 92, on the one hand, and the intercourse aspect of s 92, on the other. This is explained further below, as will be a way to remove this differentiation.

As well as being linked to movement of goods and services, there is also a non-economic argument in favour of freedom of intercourse among the states. It is clear that the founding fathers wanted to create a unified nation, where individuals would see themselves as Australians first, and residents of a state second. One essential means of unifying the nation was to break down, literally and figuratively, borders between the states.[18] It is, for many, an unfortunate consequence of

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al Australasian Convention Debates (Sydney, 2 March 1891–9 April 1891), 24-25.

[16] Adam Smith, *The Wealth of Nations* (1776) 485-486.

[17] *The Works and Correspondence of David Ricardo* (1952) 128-149; Alan Sykes 'Comparative Advantage and the Normative Economics of International Trade Policy (1988) 1 *Journal of International Economic Law* 49.

[18] *Harris v Wagner* (1959) 103 CLR 452, 476-477 (Windeyer J): 'the effect for the Australian economy which s92 was designed to secure is that, for purposes of trade, commerce and intercourse, State boundaries should not exist. For the flow of trade

the current COVID crisis that these borders have been reconstructed, more than 100 years after a document was agreed upon that apparently sought to see them vanish, at least in relation to trade, commerce and intercourse around Australia. The boundaries themselves have become somewhat difficult to defend. They were drawn up in the early 19th century, apparently by someone who had never visited the Australian continent. They do not, as some federal boundaries elsewhere do, reflect strong regional differences, whether of culture, religion, belief or other kind.[19] They never did. Their imposition was always a matter of administrative convenience, not a reflection of deep-seated difference. Modern technology, including very fast transport and communication links, arguably has made them redundant. The spectre of state premiers 'pulling up the drawbridge' is, for many, a regrettable throwback and backward step. It is not what Australia is, or should be. It does not reflect the nation that the founding fathers thought they were creating in, and surely would be proud to see today – a modern, integrated nation of one people, people who can seamlessly move around Australia, with seamless trade and commerce activity within Australia, for the benefit of all, and a rejection of narrow-minded parochialism.

Regarding the history of s 92 interpretation, there have been many attempts to have declared invalid various statutory schemes, typically involving licensing or other kinds of business regulation. The High Court endured periods of chronic disagreement as to the purpose/s of the section, and (sometimes, relatedly) the correct approach to its interpretation. Perhaps fortuitously, much of that case law was effectively removed when the High Court appeared to settle upon a new approach to interpretation of s 92. In the landmark decision in *Cole v Whitfield*,[20] ('Cole') the court swept away much of the previous case

and commerce among the States, Australia is one place and in their comings and goings among the States, Australians are one people. In this sense and for this purpose, s92 obliterates state boundaries'.

[19] Anthony Gray *Excise Taxation in the Australian Federation*, PhD Thesis, University of New South Wales (1997) 36-37; Leslie Crisp *Australian National Government* (1970) 4; Gerard Carney *The Story Behind the Land Borders of the Australian States*, Public Lecture Series, High Court of Australia (2013).

[20] (1988) 165 CLR 360, 394-395 (all members of the Court).

law. It settled upon a two-stage test to assess the validity of most laws challenged under s 92. It considered (a) whether the relevant provision discriminated against interstate trade, compared with intrastate trade and, if so, (b) whether it was passed for a protectionist purpose. If the answer to both of these questions was 'yes', the challenged measure was constitutionally invalid.

There is support for the adoption of a non-discrimination norm in this context in comparable jurisdictions. The United States *Constitution* does not contain an express provision like s 92. It simply provides Congress (the federal parliament) with power with respect to interstate and overseas commerce. However, the Supreme Court has interpreted that provision to include a 'negative' or 'dormant' aspect. This aspect precludes states from enacting provisions which discriminate against interstate trade and commerce, compared with intrastate trade and commerce.[21] There is evidence that the founding fathers who constructed Australia's *Constitution* were heavily influenced by the United States *Constitution*, including its arrangements regarding commerce regulation.[22] Sir Owen Dixon acknowledged this.[23] This makes

[21] *Guy v Baltimore* 100 US 434, 449 (1879): 'no state can, consistently with the Federal *Constitution*, impose upon the products of other states ... or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory (Harlan J).

[22] Henry Parkes specifically spoke to the *Guy v Baltimore* decision at the 1890 Constitutional Convention in Melbourne: 'the case seems to put at rest, in the most emphatic manner, what is sometimes disputed – the question of existence of entire freedom throughout the territory of the United States. As the members of the Conference know, she has created a tariff of a very severe, and in some cases almost prohibitive character against the outside world, but as between New York and Massachusetts, and as between Connecticut and Pennsylvania, there is no customs house and no tax collector. Between any two of the States – indeed from one end of the States to the other – the country is as free as the air in which the swallow flies. We cannot too fully bear in mind that doctrine of the great republic, a doctrine supported in the most convincing manner by the case to which I have alluded': *Official Record of the Proceedings and Debates of the Australasian Federation Conference* (Melbourne, 10 February 1890) 46.

[23] 'The framers of our own federal Commonwealth *Constitution* ... found the American instrument of government an incomparable model. They could not escape from its fascination': *Jesting Pilate* (1965) 44; 'to Australians no small part of the consti-

sense, given that the United States adopts a federal structure which was also adopted in Australia. In turn, the concern of the United States with free trade makes sense given its strong attachment to capitalism, as well as deep memory of, and unpleasant experience with, the United Kingdom *Navigation Acts* in pre-revolutionary times, and disastrous interstate trade wars upon which the American confederation largely foundered.[24] Similarly, the European Union is built around non-discrimination norms in relation to goods, services, capital and people.[25]

The High Court had effectively adopted the suggestion of an esteemed Australian constitutional lawyer, Michael Coper, as to how the section should be interpreted, consistent with the original intent behind the section.[26] There has been much academic discussion of the new test, including some criticism.[27] I have suggested some ways in which the new test might insufficiently protect the fundamentally important consideration of free trade.[28] In particular, the requirement that a purpose of protectionism be shown may give the restriction less scope than it otherwise would. Such a requirement does not appear in equivalent provisions elsewhere. I will return to these criticisms near the end of this article.

Although it is said that the current challenge to the Western Australian provisions will deal with both the trade and commerce aspect and the intercourse aspect of s 92, I believe that the chances of a successful challenge are much greater under the intercourse aspect of s 92 than the trade and commerce aspect of s 92. As a result, I will focus this article mainly on the intercourse aspect of s 92.

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tutional law of the United States must be of first importance ... lawyers whose work calls for any consideration of Australian constitutional questions cannot neglect the decisions of the Supreme Court of the United States': at 180-181.

[24] *The Federalist No 22* (Alexander Hamilton).

[25] *Treaty on the Functioning of the European Union* (2012) art 28, 45-48.

[26] *Freedom of Interstate Trade Under the Australian Constitution* (1983).

[27] Gonzalo Villalta Puig *The High Court of Australia and Section 92 of the Australian Constitution: A Critique of the Cole v Whitfield Test* (Lawbook Co, 2008).

[28] Anthony Gray 'Section 92 of the Australian *Constitution*: The Next Phase' (2016) 44(1) *Australian Business Law Review* 35, 44-48.

There are two main reasons why I view the possible challenge under the trade and commerce aspect of s 92 as being less likely to succeed. The first is based on an assumption that the High Court would continue to apply the two-stage test agreed upon in *Cole v Whitfield.* This appears to be reasonable, given there has been no suggestion to the contrary in the s 92 case law determined since then. Given this assumption, a challenge will be very difficult. The challenger will need to show that the provision discriminates against interstate trade and commerce, compared with intrastate trade and commerce. This might be possible – the provision only applies to travel across state lines. This would overwhelmingly, if not totally, apply to interstate trade and commerce, rather than intrastate trade and commerce. On the other hand, the prohibition contains an exemption for transport and logistics movement across state lines, provided the person only remains in Western Australia for as long as necessary to perform those duties. On balance, it would be possible to demonstrate that the provision is relevantly discriminatory, because it subjects interstate goods to greater restrictions than local goods.

However, it would be extremely difficult to demonstrate that the law is 'protectionist'. Now, protectionist in this sense means that the law is designed to, or has the effect of, protecting local trade and commerce from competition, as compared with interstate trade and commerce. It is rare that the High Court has found that a law has a protectionist purpose; in those cases where it has occurred, the evidence is very strong that the object of the law was to reduce competition from an interstate provider.[29] The fact that a law might have been passed in order to 'protect' Western Australians from the virus does not mean the law is 'protectionist' in the sense in which it informs s 92 analysis.

This would be extremely difficult for the challenger to show. The government could demonstrate quite convincingly that the purpose of the provision was to protect Western Australians from COVID-19. It was not to protect local industry from competition, as in *Castlemaine*

[29] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 ('*Castlemaine Tooheys*').

Tooheys and *Betfair* where s 92 was offended, but to protect the health and welfare of local people. That is a purpose quite consistent with the trade and commerce aspect of s 92. The government could also demonstrate that its Directions contain an exception for transport and logistics, thus reinforcing its argument that its aim is not to keep interstate trade and commerce away, but to keep the virus at bay. It is not a case where the scope of the law, being larger than necessary in order to achieve the claimed legitimate objective, betrays an agenda of protecting local traders from interstate competition, like in *Castlemaine Tooheys*.

As a result, it is considered that any s 92 challenge based on the trade and commerce aspect is likely to fail. I will devote most attention to the question whether a challenge based on the intercourse aspect of s 92 might have a greater chance of success. The court in *Cole v Whitfield* indicated that the intercourse aspect of s 92 might be protected to a greater extent than the trade and commerce aspect of s 92.[30] It also recognised, without much elaboration, that it may not be appropriate to apply concepts such as discrimination and protectionist purpose to the intercourse aspect of the section.[31]

IV INTERCOURSE ASPECT OF SECTION 92

The intercourse aspect of s 92 has been considered on only a small number of occasions. The first case was *R v Smithers; Ex Parte Benson*[32] ('*Smithers*'). The case involved a challenge to the validity of New South Wales legislation. The legislation made it an offence for a person, other than a resident of that state, to enter New South Wales if, within the past three years, they had been convicted of a crime which carried a maximum possible punishment of 12 months' imprisonment or more. The challenger was convicted of a crime against the

[30] (1988) 165 CLR 360, 393 (all members of the Court).

[31] Ibid 394: 'There is no reason in logic or commonsense for insisting on a strict correspondence between the freedom guaranteed to interstate trade and commerce and that guaranteed to interstate intercourse'.

[32] (1912) 16 CLR 99.

New South Wales legislation because he entered that state. He was not a resident of New South Wales, and had a conviction within the past three years of a crime which carried a maximum punishment of 12 months' imprisonment. The High Court declared the New South Wales legislation to be invalid, contrary to s 92 of the *Constitution*.

Griffith CJ said that the past power that colonies had to prohibit others from entering the colony was now circumscribed by s 92 of the *Constitution*. Citizens now enjoyed the right to move around the nation to engage in business or to access government facilities and services. Griffith CJ suggested the right was not absolute, but any limitation would have to be based on a test of 'necessity'.[33] Here New South Wales had not shown the necessity to keep out non-residents who wished to travel to the state but who had been convicted of criminal activity. Barton J took a similar view.[34] Isaacs J viewed s 92 as an 'absolute' prohibition on state and federal governments using state borders as barriers to intercourse among Australians.[35] This word typically means that no exceptions would be permitted. Higgins J said that it was the fact that the provision was 'pointed directly at' the movement into the state that was constitutionally problematic.[36] He declined to consider the question of any possible powers in state governments to control border movement along the lines contemplated by Griffith CJ or Barton J.

The matter was next considered in *Gratwick v Johnson* ('*Gratwick*'), probably the factual scenario closest to the current situation. During wartime, federal regulations were passed stating that a person should not without a permit travel by rail or passenger vehicle from one state to another. A Commonwealth official could approve or deny permits. The regulations did not provide criteria by which an application for a permit would be assessed. Dulcie Johnson was charged

[33] Ibid 109; further confirmation that the intercourse aspect of s 92 is not absolute appears in *W and A McArthur Ltd v State of Queensland* (1926) 28 CLR 530, 550 (Knox CJ Isaacs and Starke JJ).

[34] (1912) 16 CLR 99, 110-111.

[35] Ibid 117.

[36] Ibid 118.

with an offence against the regulation. It was alleged she crossed the state border between South Australia and Western Australia on a train, without a valid permit. She had been travelling to Perth to visit her fiancé. She had sought to obtain a permit, but was advised that her reason for travel did not warrant one. The fact that the events occurred during war time is significant, because it is typically the case that during such times, the Court is more deferential to claims by government of a need to deny individuals fundamental rights.

Despite this, all members of the High Court declared that the relevant provision was invalid, as being contrary to s 92 of the *Constitution*. Latham CJ drew a distinction between mere restrictions on interstate movement, on the one hand, and outright prohibitions, on the other.[37] He said prohibitions on interstate movement were invalid.[38] He viewed the regulation at issue here as a prohibition. He took a similar position to that of Higgins J in *Smithers*, noting that the regulation was 'directed at' interstate trade and commerce. This also suggested its invalidity. Latham CJ also expressed concern that the regulation did not state what criteria were relevant to an assessment of an application for a permit.[39] Rich J said the offensive provision was a 'direct and immediate' invasion of the s 92 freedom.[40] Starke J agreed that legislation pointing directly at interstate intercourse was invalid. He seemed also to take an absolutist view:

> It is immaterial ... that the object or purpose of the legislation ... is for the public safety or defence of the Commonwealth or any other legislative purpose if it be pointed directly at the right guaranteed and protected by the provisions of s92 of the *Constitution*.[41]

Dixon J agreed that the legislation was directed at the interstatedness of the journey and did not seem to be related to any specific de-

[37] (1945) 70 CLR 1, 14.

[38] Ibid 14.

[39] Ibid 15.

[40] Ibid 16.

[41] Ibid 17.

fence purpose of the movement of troops, munitions manufacture or war supplies. This seems to suggest he did not view the freedom in s 92 as absolute in nature, that a legislature might be able to restrict the freedom, for precise and justified reasons, where the regulation clearly related to those reasons.[42] McTiernan J agreed the provisions were invalid, being directed at interstate trade.[43]

If we pause the consideration of cases at this point, it seems as if those challenging the current border restrictions would have a strong case based on s 92. This is for a range of possible reasons:

- Because, according to Isaacs J in Smithers and Starke J in *Gratwick v Johnson*, the right to interstate intercourse is absolute in nature, admitting of no exceptions;
- Because, according to Higgins J in *Smithers* and Latham CJ, Starke, Dixon and McTiernan JJ in *Gratwick v Johnson*, the measures are 'pointed at' or 'directed at' interstate trade;
- Because, according to Latham CJ in Gratwick v Johnson, the provision prohibits, rather than regulates, interstate intercourse; and
- Because, according to Rich J in *Gratwick v Johnson*, the provision impacts interstate intercourse 'directly and immediately'.

Clearly, s 4 of the Western Australian regulations, forbidding a person from entering Western Australia unless they are exempt, would fall foul of these arguments. Argument (a) needs no elaboration. In terms of argument (b), s 4 is clearly pointed at or directed at interstate trade. In terms of argument (c), if Latham CJ concluded that the regulations in *Gratwick* amounted to a prohibition as opposed to regulation on the facts there (a prohibition unless the person had a government-issued permit), no doubt he would conclude the same regarding the current Western Australian regulations. And in terms of (d), the regulations impact interstate intercourse directly and immediately.

[42] Ibid 19.

[43] Ibid 21.

This conclusion is subject to two qualifications. The first is that, particularly in the earlier case, there is evidence of a clearly non-absolutist interpretation of the section. Griffith CJ and Barton J, Higgins J reserving his judgment on this aspect, clearly stated in dicta that a law might survive s 92 challenge to the extent it could be shown to have been passed based on 'necessity'. The Western Australian Government might rely on this exception, arguing that their aim was to prevent spread of a highly infectious, deadly disease, so that their measures were 'necessary'. I will return to this argument below.

The second qualification is that the law on s 92 was substantially reformed in 1988 when the High Court rendered its decision in *Cole v Whitfield*. This means that great care must be taken with any precedent on s 92 decided prior to *Cole*. It does not mean that the pre-Cole cases contain nothing of value in terms of the law today; however, at the very least, great care must be taken with precedents decided prior to *Cole*, since their reasoning may well have been substantially undercut by the High Court's 1988 decision.

Specifically, all members of the High Court in *Cole* rejected the so-called 'criterion of operation' test for determining whether or not a law was vulnerable to s 92 challenge. According to this test, the question of constitutional validity turns upon a close consideration of what particular thing is targeted by the legislation. So, for instance, a law that targets the 'interstatedness' of intercourse (or trade and commerce) would fail the test, and be liable to be held invalid due to s 92. An example of this reasoning appears in *Grannall v Marrickville Margarine Pty Ltd*:

> If some fact or event or thing which itself forms part of trade, commerce or intercourse or forms an essential attribute of that conception (essential in the sense that without it you cannot bring into being that particular example of trade, commerce or intercourse among the States) is made the subject of the operation of a law which by reference to it or in consequence of it imposes some restriction or burden or liability it does not matter how circuitously it is done or

> how deviously or covertly. It will be considered sufficiently direct or immediate in its operation or application to inter-State trade, commerce and intercourse. Provided the prejudice is real or the impediment to inter-State transactions is appreciable, it will infringe upon s92. But generally speaking it will be quite otherwise if the thing with reference to or in consequence of which the law operates or which it restricts or burdens is not part of inter-State trade or commerce and in itself supplies no element or attribute essential to the conception.[44]

If this approach were applied, the Western Australian provision would likely be held invalid because the law operates by virtue of the very fact of the interstate intercourse. In this sense, the extract above is really another way of conveying the same ideas found in the judgments in *Smithers* and *Gratwick*, considering whether the provisions are 'pointed at' or 'directed at' interstate intercourse, have a 'direct and immediate' impact upon them etc.

However, in *Cole v Whitfield* all members of the High Court rejected this approach to s 92.[45] The effect of this is that, at the very least, of the four arguments made above as a result of *Smithers* and *Gratwick*, two of them (arguments (b) and (d)) are no longer tenable. This is according to the actual decision in *Cole*. However, the position is slightly more complicated than this, because subsequent decisions appear to backtrack from some of what was said in *Cole*, as we will see shortly.

While *Cole v Whitfield* was primarily focussed on the 'trade and commerce' aspect of s 92, and the actual factual scenario presented in that case concerned that aspect, the High Court made obiter dicta remarks about the intercourse aspect of s 92. These remarks effectively mean that argument (a) above is no longer tenable. The High Court stated that the intercourse aspect of the section was not absolute. It gave an example:

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[44] (1955) 93 CLR 55, 78 (Dixon CJ McTiernan Webb and Kitto JJ).

[45] Ibid 400-402.

> Although personal movement across a border cannot, generally speaking, be impeded, it is legitimate to restrict a pedestrian's use of a highway for the purpose of his crossing or to authorize the arrest of a fugitive offender from one state at the moment of his departure into another state.[46]

Unfortunately, the High Court left the discussion there. It gave an example. It did not provide a principle, of which the example was merely an illustration. It did not provide a test. These (admittedly obiter comments) are inconsistent with any notion that the freedom of interstate intercourse is absolute in nature, so argument (a) above is no longer tenable. And since arrest of a fugitive seeking to leave the state would amount to a 'prohibition', not merely a 'restriction', on interstate trade, it is likely that argument (c) above is no longer tenable either. This effectively means that the precedent cases of *Smithers* and *Gratwick* are effectively useless in supporting a constitutional challenge to the Western Australian border restrictions, unless they are resurrected (which is not beyond the realms of possibility). But as the law currently stands, if the challenge is to succeed, it must be based on other precedents, or other arguments.

Though most of the case was concerned with the 'trade and commerce' aspect of s 92, and the new test for determining constitutionality under those limbs, the High Court in *Cole* made limited comments on the intercourse aspect of s 92. It made it clear that the new tests for the trade and commerce aspect of s 92 could not be applied to the intercourse aspect of s 92. The High Court was correct, with respect, to do so. It would simply not make sense to test restrictions on interstate intercourse based on whether they were discriminatory against interstate commerce and protectionist. The High Court suggested that the protection to be accorded interstate intercourse, as opposed to trade and commerce, might be stronger, though it was not an absolute right.[47] However, the Court did not indicate which test should be used

[46] Ibid 393.

[47] Ibid 393-394. That freedom of intercourse was stronger in nature than freedom of trade and commerce was confirmed in *Cunliffe v Commonwealth* (1994) 182 CLR 272, 395 (McHugh J).

to determine whether a law impacting interstate intercourse was valid or not. Given that the factual context of the case was elsewhere, this is understandable, if not entirely satisfactory.

Of course, as was subsequently pointed out, a differential test for the trade and commerce aspect of s 92, on the one hand, and the intercourse aspect, on the other, is also problematic. It is axiomatic in constitutional law that legislation can be characterised in more than one way, and it is quite possible that legislation might be characterised as both relating to trade and commerce, and intercourse.[48] If different tests are being applied to the 'trade and commerce' aspect of the section compared with the 'intercourse' aspect, this raises the spectre of a different answer depending on which of the aspects is applied. Thus the answer to a constitutional challenge might turn very sharply on which limb is argued to apply, or which limb the High Court places more focus on in determining the outcome, when on particular facts, both might reasonably be argued. This is problematic when the text of the *Constitution* does not reflect a difference in how the aspects are to be applied. This is an unhappy consequence of the High Court's decision in *Cole*, but at the end of this article, I suggest a possible way out.

Subsequently, members of the High Court accepted that laws of general application with an incidental, indirect impact on freedom of interstate trade, commerce or intercourse were consistent with s 92. This appears in *Nationwide News Pty Ltd v Wills*,[49] *Australian Capital Television Pty Ltd v Commonwealth*,[50] and *Cunliffe v Commonwealth*.[51]

[48] *APLA Limited and Others v Legal Services Commissioner of New South Wales and Another* (2005) 224 CLR 322, 457 (Hayne J).

[49] (1992) 177 CLR 106, 194-195.

[50] Ibid 58-59, where Brennan J stated that s 92 did not make interstate intercourse immune from laws of general application which were not aimed at interstate intercourse. Brennan J concluded that laws enacted 'for the purpose of burdening interstate intercourse' breached s 92, but a law passed for another purpose, provided it was reasonably appropriate and adapted for that purpose, the fact it incidentally impacted interstate intercourse did not mean it infringed s 92: at 57. He referred to the apparently discredited 'criterion of the imposition of the burden' (59) as determinative of liability. In a case where a multitude of purposes existed, Brennan J believed that the 'chief' purpose would be critical: at 59.

[51] (1994) 182 CLR 272.

There the court appeared (once again) to distinguish between direct and indirect burdens on interstate intercourse. Mason CJ said:

> A law which in terms applies to movement across a border and imposes a burden or restriction is invalid. But a law which imposes an incidental burden or restriction on interstate intercourse in the course of regulating a subject matter other than interstate intercourse would not fail if the burden or restriction was reasonably necessary for the purpose of preserving an ordered society under a system of representative government and democracy and the burden or restriction was not disproportionate.[52]

This was somewhat perplexing, with respect, for at least two reasons. Firstly, there is the suggestion, replicated in other judgments in the case,[53] that in applying the s 92 prohibition, a distinction should be drawn between measures that 'directly', and measures that 'indirectly' burden interstate trade. Judges like Mason CJ and Deane J (with whom Gaudron J agreed) use the word 'incidentally'. There is a clear strong link between a burden that is indirect and a burden that is incidental. This is problematic, because the joint reasons in *Cole v Whitfield* had rejected the past distinctions between direct and indirect burdens as being too formalist. Yet, just a few short years later, some version of the reasoning was apparently being resurrected. Different terms were utilised, to be sure, but essentially the same concept.

Secondly, the test espoused by Mason CJ seems to be based on whether the impugned measure was 'necessary for the purpose of preserving an ordered society'. Other justices suggested similar tests. Deane J, with whom Gaudron J agreed,[54] focussed on whether the measure was 'necessary or appropriate and adapted for the preser-

[52] Ibid 307-308 McHugh J agreed that a law which incidentally impacted freedom of intercourse, rather than directly, would be easier to justify. He applied a test considering whether the law was 'reasonably necessary for the government of a free society regulated by the rule of law': at 396.

[53] Ibid 346 (Deane J)(with whom Gaudron J agreed), 366 (Dawson J) and 396 (McHugh J).

[54] Ibid 392.

vation of an ordered society or the protection or vindication of the legitimate claims of individuals in such a society'.[55] McHugh J considered whether the measures were 'reasonably necessary for the government of a free society regulated by the rule of law'.[56] In contrast, Brennan J contrasted laws of general application, and laws aimed to interstate intercourse, the latter being likely invalid due to s 92.[57] Dawson J said the test was whether the measures were 'inappropriate or disproportionate',[58] in respect of laws not directed at interstate intercourse. Similarly, Toohey J pointed out the challenged provision was a law of general application.[59]

Further clarity on this matter was obtained in the 1999 decision of *AMS v AIF*.[60] This case again directly raised the question of the 'intercourse' aspect of s 92. It involved a family law dispute. Both of the parents of a child had been living in the Northern Territory, but moved to Western Australia. After the couple separated, the mother indicated she wished to move back to the Northern Territory with the child. Relevant family law provisions imposed an obligation of joint custodianship of children, and operated with a presumption that both parents would spend significant time with a child. One issue was whether a court might be able to restrict the ability of the mother to move back to the Northern Territory with the child, which would impact the father's contact with the child, or whether such a restriction would offend the freedom of intercourse aspects of s 92.

Gleeson CJ, McHugh and Gummow JJ suggested that the family court in such matters might be able to restrict the movement of the mother where such an order could be shown to be 'reasonably required by the object of the legislation'.[61] Gaudron J applied the view taken by Deane J in *Cunliffe*, considering whether the law incidentally

55 Ibid 346.
56 Ibid 396.
57 Ibid 333.
58 Ibid 366.
59 Ibid 384.
60 (1999) 199 CLR 160.
61 Ibid 179, with whom Hayne J agreed: at 233.

impacted freedom of intercourse in pursuit of another legitimate objective and not beyond what is necessary to achieve that objective, or instead whether it was passed for the purpose of restricting interstate intercourse.[62] Kirby J took a similar position.[63] Callinan J did so as well, suggesting that McHugh J in *Cunliffe* had suggested a more restricted test of 'reasonable necessity' in terms of regulating interstate intercourse, as opposed to one of proportionality, but that either way, the regulation here was valid.[64]

The intercourse aspect of s 92 was also considered in *APLA Limited and Others v Legal Services Commissioner of New South Wales and Another*.[65] Gleeson CJ and Heydon J seemed to adopt a two-stage test in terms of the intercourse aspect of s 92.[66] They considered firstly whether the object of the legislation was to impede interstate intercourse. They determined that the legislation at issue in the case did not have such an object. Secondly, they considered whether the legislation imposed an impediment to interstate intercourse that went beyond what was reasonably required to achieve its objective. They determined that the legislation at issue did not exceed what was reasonably required. Gummow J adopted a similar approach, considering whether the object of the legislation was to impede interstate intercourse. Having determined it was not, Gummow J considered whether the legislation impacted interstate intercourse to a greater extent than was reasonably required by the object of the legislation. He also phrased this test in terms of whether the impact of the legislation on interstate intercourse was 'inappropriate and disproportionate'.[67]

Hayne J was critical of aspects of the reasoning of Mason CJ, Deane J (with whom Gaudron J agreed) and McHugh JJ in *Cunliffe*, in particular their reference to permitting the validity of legislation to be determined based on resort to concepts such as 'ordered society'. He

[62] Ibid 193.

[63] Ibid 215-216.

[64] Ibid 249-250.

[65] (2005) 224 CLR 322.

[66] Ibid 353.

[67] Ibid 393-394.

said that such a test was subjective. He preferred the position of the other justices in that case, and of the justices in *AMS*, in basing a test on more objective criteria focussed on the object of the legislation. He expressly adopted the position taken in AMS.

V SECTION 92 AND QUARANTINE CASES

Section 92 has been specifically considered in the context of quarantine. However, these cases have tended to focus on the 'trade and commerce' aspect, rather than the intercourse aspect of s 92. Further, they were all decided prior to the s 92 'revolution' announced in *Cole v Whitfield*. These present significant limitations on the utility of such cases to the present facts, but they are considered to shed some light, and therefore worthy of note.

In *Ex Parte Nelson (No1)*[68] the High Court (by statutory majority) validated New South Wales regulations permitted the Governor of the State to make an order prohibiting the importation of stock into the state where it was believed that the stock was infected with an infectious or contagious disease. Exceptions existed where it could be shown that the relevant stock had been appropriately dipped, and a relevant permit had been obtained. Knox CJ Gavan Duffy and Starke JJ stated that s 92 had not stripped states of their ability to protect their citizens from infections from elsewhere. The joint reasons determined that the relevant question was the 'true nature and character' of the challenged legislation. If its true nature and character was of a kind, for example, of prevention of disease importation, the fact that it had 'incidental' effects on interstate trade, commerce and intercourse did not make it offensive to s 92.[69] The absolutist position of Isaacs J in relation to s 92 is clearly evident in his (dissenting) decision: 'any legislative constraint whatsoever on those subjects (trade, commerce and intercourse) by the state is a derogation of the guaranteed immunity'.[70] He dismissed any suggestion of a health exception, on the basis it

[68] (1928) 42 CLR 209.

[69] Ibid 218.

[70] Ibid 242.

would create a slippery slope of immunity from s 92.[71] Higgins J stated that the provision was 'pointed at' the interstate movement of stock.[72] Powers J expressly agreed with Isaacs and Higgins JJ, noting the offensive provision directly affected and prevented interstate trade and commerce, and was invalid.[73]

The matter was considered again in *Tasmania v Victoria*.[74] There Victorian legislation permitted the state's Governor to prohibit the importation of any tree, plant or vegetable into the state which, in the Governor's opinion, was likely to introduce a disease into Victoria. The legislation made it an offence to import such material into the state contrary to a declaration by the Governor. The Governor declared that, in his opinion, the importation of potatoes from Tasmania was likely to introduce disease into Victoria, and prohibited it. A majority of the High Court declared that the Victorian legislation was unconstitutional, being contrary to s 92.

Gavan Duffy CJ, Evatt and McTiernan JJ noted that the Governor's discretion was quite unbounded, in contrast with that considered in *Ex Parte Nelson*. The provision here could impose a total prohibition, as opposed to a permit-type system involved in Nelson. The link, if any, between disease and the introduction of potatoes was, according to the joint reasons, 'far too remote'.[75] Rich J stated that test was whether the impact of the challenged provision was 'direct and immediate', or merely consequential. Here the regulation operated directly on importation, thus it was invalid.[76] The 'criterion' for the operation of the legislation was the source of the product.[77] This was offensive to s 92.

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[71] Ibid 236: 'If we could admit "health" to be a legitimate ground of exception from the unqualified language of s92, we could find no halting place'.

[72] Ibid 246.

[73] Ibid 253.

[74] (1934) 52 CLR 157.

[75] Ibid 169.

[76] Ibid 173. This test of whether the measure 'directly' restricted interstate trade and commerce, as opposed to 'remotely' or 'incidentally', was adopted by the Privy Council in *Commonwealth v Bank of NSW* (*Bank Nationalisation Case*)(1949) 79 CLR 497, 637 (Lord Porter, for the Council).

[77] (1934) 52 CLR 157, 173.

Dixon J, also in the majority, strongly criticised the reasoning of the statutory majority in *Ex Parte Nelson.* He took issue with the reference in that reasoning to the 'true nature and character' of challenged legislation, in determining whether or not it was valid according to s 92. There the majority characterised the legislation as relating to health and the prevention of contagion and infectious disease. The majority there found the challenged legislation was not in itself regulation of interstate trade and commerce, though it was affected by the legislation.

Dixon J expressed strong disagreement with this reasoning:

> I find myself unable to regard this mode of reasoning as relevant to s92. It assumes that, because the legislation relates to disease in cattle, it cannot relate to trade in cattle. It appears to be quite plain that the statute stopped inter-state trade in cattle as a measure of precaution against the spread of disease. When a state by legislation forbids importation from another state of an ordinary commodity, it is difficult to understand what are the further considerations which must be inquired into under the description 'grounds and design of the legislation' … if the words mean that it is always necessary to ascertain why it does (what it does), the answer is that the terms of s92 admit of no excuses or justifications for abrogating the freedom of trade in a commodity … section 92 withdraws from the parliament of the state any power to detract from the absolute freedom of trade, commerce and intercourse between the states. Whatever purpose may be disclosed by state legislation … it may not restrict this freedom … what possible doubt can there be that, when it forbids the introduction into the state of a commodity produced in another state, it does restrict freedom of trade between the states.[78]

VI PROPORTIONALITY

There has been an increase in the use of proportionality in Australian constitutional law in recent years. While it is not an unfamiliar doc-

[78] Ibid 180-181.

trine in constitutional law jurisprudence, utilised sometimes in determining whether or not a Commonwealth head of power supports particular legislation,[79] its use has become more widespread. The concept of proportionality is significantly utilised in European human rights law, and it may have originally hailed from Germany.[80] It enjoys the strong support of the current Chief Justice of the High Court of Australia.[81] Its most ubiquitous use in recent constitutional law cases in Australia has occurred in relation to the implied freedom of political communication, where five of the current members of the High Court use it in order to determine whether or not legislation is consistent with the implied freedom.[82]

In that context of proportionality, the High Court has stated that there are three components of a proportionality analysis. The court must consider whether the law is suitable, necessary and adequate in its balance. A law will be suitable if rationally connected to its purpose. It will be necessary if there is no obvious and compelling alternative reasonably practical means to achieve the same purpose in a manner less restrictive of the freedom. The question of adequacy in the balance involves a weighing of the impact of the restrictions on the affected freedom, having regard to the importance of the objective.[83]

Application of a proportionality approach to a constitutional right or freedom is in sharp contrast to an absolutist approach to a constitutional right or freedom. As discussed above, there have been occasions in earlier s 92 decisions where an absolutist approach is

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[79] For example, in the context of s51(29), see *Commonwealth v Tasmania* (1983) 158 CLR 1, 260 (Deane J); regarding s 51(6) *Polyukovich v Commonwealth* (1991) 172 CLR 501, 592 (Brennan J); and regarding the inherent nationhood power, *Davis v Commonwealth* (1988) 166 CLR 79, 99 (Mason CJ Deane and Gaudron JJ).

[80] Mosie Cohen-Elija and Iddo Porat 'Proportionality and the Culture of Justification' (2011) 59 *American Journal of Comparative Law* 463.

81 Susan Kiefel 'Proportionality: A Rule of Reason' (2012) 23(2) *Public Law Review* 85.

[82] Proportionality was accepted in *McCloy v New South Wales* (2015) 257 CLR 178, 194-195 (French CJ Kiefel Bell and Keane), and was subsequently accepted by Nettle and Edelman JJ. Gordon and Gageler JJ do not accept the proportionality approach to the implied freedom of political communication.

[83] 195.

clearly evident. However, the trend seems to be away from an absolutist approach to interpretation of rights enshrined in the *Constitution*, although the particular provision might be written in absolute terms. So, for example, s 117 of the Australian *Constitution* prohibits states from discriminating on the basis of residence. Yet, the High Court has not interpreted this provision in the absolutist, literal terms in which it appears. It has allowed exceptions, where states can point to legitimate reasons for a provision that would otherwise fall foul of the prohibition.[84] One criticism of the development along these lines is that, of the seven justices in the relevant decision, *Street v Queensland Bar Association*, there are seven different articulations of precisely what the exception is.[85] This is not desirable.

The same might be said of s 99. That section appears to absolutely preclude Commonwealth laws from giving preference to states or parts of states. No exceptions appear. However, in *Permanent Trustee Australia v Commissioner of State Revenue*,[86] the joint reasons accepted that a law which had this effect could be valid if 'the differential treatment and unequal outcomes that are involved ... (were) the product of distinctions that are appropriate and adapted to a proper objective'. Thus, there are clear trends in relation to constitutional interpretation away from a literalist position of simply applying the words in the *Constitution* as written, and permitting exceptions to apparently strict rules, where they can be clearly justified by the enacting authority.

[84] *Street v Queensland Bar Association* (1989) 168 CLR 461.

[85] Mason CJ expressed it in terms of a 'compelling justification': 493 (and he specifically rejected a test based on the 'criterion of operation': at 487; Brennan J said it would be enough that the differential treatment 'has a rational and proportionate connection with a legitimate objective': at 511-512; Deane J based an exception on discrimination that flowed naturally from the nature and scope of state government responsibilities: at 529; Dawson J referred to a test based on the 'ordinary and proper administration of the state': at 548; Toohey J referred to a discrimination which was a natural consequence of legislation aimed at protecting the legitimate interests of the 'state community': at 560; Gaudron J stated that discrimination based on a relevant difference and appropriate to that difference: at 572-573; McHugh J stated the exception must relate to something arising by necessary implication from the assumptions and structure of the *Constitution*': at 584.

[86] (2004) 220 CLR 388.

Of course, this could be part of a much broader debate about constitutional interpretation, including the suggested virtues of literalism, as opposed to a flexible and/or 'living tree' approach. It is not possible to enter this debate here, but it is part of the milieu in which consideration of (implied) exceptions to apparently absolute provisions in the *Constitution* are considered.

The immediate question is the extent to which this kind of 'exception' might be applicable regarding s 92. Specifically, whether proportionality (as one kind of exception) might or should be utilised in s 92 cases, in particular those involving the intercourse aspect of the section. Once the High Court accepted that the freedoms with which s 92 was concerned were not absolute in nature, a position all members of the High Court arrived at in *Cole v Whitfield*, it became inevitable that a test would be needed to determine which measures would be valid, and which would be invalid. If some restrictions were compatible with s 92, how would a court determine which ones? The High Court had already in *Cole* rejected the past distinction between direct and indirect restrictions, although as indicated above, there has been evidence since *Cole* that this distinction might be creeping back into the analysis.

Enter the concept of proportionality. Though it was not referred to in the Cole decision, it was referred to in the decision *Castlemaine Tooheys Ltd v South Australia*.[87] It must be acknowledged that that case involved the trade and commerce, not intercourse, aspect of s 92. This means it was focussed on an application of the tests of discrimination and protectionist purpose, and it has already been indicated above that these concepts cannot easily be applied to the intercourse aspect of the section. That concession having been made, comments made there regarding proportionality are considered to be of possible relevance to any future cases involving intercourse.

The main joint reasons of Mason CJ, Brennan, Deane, Dawson and Toohey JJ stated that a law would be consistent with s 92 if it imposed a burden upon interstate trade and commerce that was incidental, or

[87] (1990) 169 CLR 436.

not disproportionate, to the attainment of the law's legitimate objective.[88] The main joint reasons denied that s 92 had the effect of extinguishing burdens on interstate trade that were 'necessary or appropriate and adapted to the protection of the people of the state from a real danger or threat to its wellbeing'.[89] The Court noted that it would be deferential to an assessment by a state government that particular measures were or were not necessary to deal with a particular problem.[90]

Members of the High Court in *Betfair Pty Ltd v Western Australia* discussed the suggestion that proportionality was relevant (again, in the context of the trade and commerce, not intercourse, aspect of the power), but seemed to prefer a test of 'reasonable necessity'.[91] It will be recalled that this was the limit on s 92 freedom accepted by Griffith CJ and Barton J in R v Smithers.

VII APPLICATION OF VARIOUS TESTS TO CURRENT WESTERN AUSTRALIAN LEGISLATION

I will now apply each of the above tests that have been discussed and applied in relation to s 92 to the current Western Australian *Quarantine (Closing the Border) Directions*.

If the absolutist approach, favoured by Isaacs J and others, were taken, the Western Australian directions would be invalid, because they clearly impose on the movement of trade, commerce and intercourse across the border dividing Western Australia from South Australia and the Northern Territory.

Some judges have considered whether the legislation is 'pointed at' or 'aimed at' or 'directed against' interstate trade and commerce. Legislation that does so is, according to Higgins J in *Smithers*, and Rich, Starke and Dixon JJ in *Gratwick*, invalid due to s 92. This came to be known as the 'criterion of operation' test. As noted above, this test

[88] Ibid 473.

[89] Ibid 473.

[90] Ibid 473.

[91] (2008) 234 CLR 418, 477 (Gleeson CJ Gummow Kirby Hayne Crennan and Kiefel JJ).

was apparently rejected by the High Court in *Cole v Whitfield*, who dismissed its formality, technicality and narrowness.[92]

However, somewhat unexpectedly, since the sharp rejection of this approach in *Cole*, shortly thereafter members of the High Court began to distinguish circumstances where a law directly impacted interstate trade, commerce and intercourse, and where the law only incidentally did so.[93] It seems that a law of the first kind will be unconstitutional due to s 92, whereas the second may not be. Respectfully, it is somewhat confusing that the High Court apparently rejected the criterion of operation test in *Cole*, only to apparently re-assert its substance (though not by name) in subsequent cases, by considering whether the law directly impacted trade, commerce and intercourse.

Another way of expressing this sentiment is to ask whether the object of the legislation is to impede interstate trade, commerce and intercourse. This is more difficult than it sounds, because it is not entirely clear whether the fact that legislation has this effect will be sufficient. And legislation is often passed for multiple purposes.

Putting these difficulties to one side for the present, the application of these tests to the existing Western Australian directions suggest grave difficulties. The Directions clearly do directly impact, and have the object of impacting, interstate intercourse. Thus, on this approach, the legislation would be invalid. The current authorities have generally adopted a two stage approach, considering firstly whether (a) the challenged legislation has an object (or the object or predominant object[94] – it is not always clearly articulated in the judgments

[92] (1988) 165 CLR 360, 401-403.

[93] For example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 58-59 (Brennan J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 307-308 (Mason CJ) referring to the invalidity of a law 'which in terms applies to movement across a border'; Deane J(with whom Gaudron J agreed) used the concept of 'incidental' burdens: at 346, and McHugh J stated that laws which 'directly' restricted or burdened interstate trade and commerce were more likely to be invalid: at 396.

[94] One rare example of clarity on this point appears in the judgment of Brennan J in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 59 where he stated that the 'chief' purpose was the relevant one, in cases of multiple purposes.

which of these it is)[95] of impeding intercourse; and (b) if not, whether the legislation can be defended on reasonable necessity/proportionality grounds. Though it has not been specifically spelled out, it is surely a logical premise from this two-stage approach that a law which fits into category (a) is invalid, without further inquiry. In other words, the High Court adopts an essentially absolutist prohibition on laws which have the object of impeding interstate intercourse. It is only when laws are not in that category that the justifications for it are considered. This is considered to be the current state of the authorities.

On this basis, there is a strong argument that the Western Australian Directions are invalid because they have the object of impeding interstate intercourse, or have the predominant purpose of doing so.

Now, I may be wrong, and the High Court may find that the Western Australian Direction does not have the object, or the predominant object, of impeding interstate intercourse. If so, part (b) of the test becomes important. Here again, there seems to be some divergence of approach in terms of the test by which the validity of the measure will be assessed. I will apply each of the possible tests:

[95] The decision in *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 seems to sidestep this issue by apparently taking the position that a law has one purpose, which is either protectionist (seeking to protect local businesses) or non-protectionist (the state claimed an environmental rationale). Thus, the Court did not consider the resolution of a situation where a law has or may have multiple purposes. It may in such cases be necessary to consider the predominant purpose of the law. Other s 92 cases also seem to proceed on this premise – for example in *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322, 355 Gleeson CJ and Heydon J asked whether 'the object' of the legislation was to impede interstate intercourse (again, implying legislation can only have one purpose and not clarifying what happens if legislation has more than one purpose), Gummow J did acknowledge the possibility of 'objects' of legislation, but similarly did not clarify how s 92 should apply in such cases: at 393. There is of course also a healthy debate about whether it is the effect of the law, rather than its purpose, that should decide questions about its constitutionality: Gonzalo Villalta Puig 'A European Saving Test for Section 92 of the Australian *Constitution*' (2008) 13(1) *Deakin Law Review* 99, 119: the reality is that it is only the effect of the law or measure that can be empirically quantified. Unlike purpose, effect is not measured in words but in actions. Effect is palpable and tangible. Purpose is not'; Christopher Staker 'Section 92 of the *Constitution* and the European Court of Justice' (1990) 19 *Federal Law Review* 322, 340.

A *What is reasonably required to achieve the object of the legislation (Gleeson CJ, McHugh and Gummow JJ in AMS, Gleeson CJ and Heydon J in APLA)*

The object of the legislation, to try to keep Western Australians as safe as possible from COVID-19, is clear enough. The question is whether a blanket prohibition, with limited particular exceptions, is 'reasonably required', or greater than that which is reasonably required to achieve legislative object/s. It is suggested that current rates of infection, in particular community transmission, are very low in almost all States in Australia, other than Victoria. Specifically, they are very low in the two jurisdictions that share a border with Western Australia, South Australia and the Northern Territory. Given the importance of freedom of movement around Australia in terms of a constitutional value, it is concluded that the Western Australian provisions go beyond what is reasonably required. A so-called 'hard border' with Victoria, prohibiting the movement of someone from Victoria and who had recently been in that state, might be reasonably required. It is very difficult to justify imposing similar draconian restrictions on those who have not been in that state.

B *Proportionality (Gummow J in APLA, Castlemaine Tooheys, Dawson J in Cunliffe), Implied Freedom of Political Communication*

It is not yet clear whether the High Court will apply a proportionality test to s 92 cases. While it suggested it might do so in *Castlemaine Tooheys*, it suggested another test in a subsequent decision in *Betfair*. If it does apply proportionality to s 92, it is similarly not clear whether it will use it as part of the same structured approach it applies to the implied freedom of political communication, considering whether the challenged measure is suitable, necessary and adequate in its balance.

On the assumption that the High Court will apply a proportionality analysis to s 92, and will apply it in the structured way that it does in relation to political communication, we must consider whether the Western Australian measures are suitable to achieving their objective,

necessary and adequate in their balance.[96] These laws may be suitable, in that they are an understandable and defensible way of achieving their objective, in terms of seeking to quarantine the state from disease being transmitted from elsewhere. However, it is less clear that they are 'necessary', in particular given the very low rates of community transmission in all states and territories, other than Victoria. Measures that are less invasive of freedom of intercourse arguably would also achieve the same objective as that sought by the legislation, including border checks, taking contact details, taking the temperature of those seeking to enter, and only imposing a hard border on those coming from Victoria.

Further, they may for similar reasons not be held to be adequate in their balance, given the importance of the right that they significantly impede, and the threat to Western Australia. They directly target and attack one of the most fundamental freedoms of all that Australians possess, a freedom the founding fathers saw fit to emphatically enshrine in the *Constitution*, when they generally eschewed express rights protection. This freedom gives effect to the whole concept of Australia, and reflects one of the main reasons for the country's establishment and existence. While of course we must remain vigilant, Western Australia has had very low levels of the virus for many months now. Its neighbouring jurisdictions are in a similar position. It is hard to justify the hard border being applied currently in Western Australia to any traveller other than one from Victoria as being adequate in its balance, having regard to the serious impact on such a fundamental freedom.

C *Reasonable Necessity (R v Smithers per Griffith CJ and Barton, Callinan J in AMS)*

It is not entirely clear the extent to which this test would lead to tangibly different results than the first two tests. Callinan J in AMS suggested this test would be more difficult to justify than some of the others. If there is a difference, it would be more difficult, if anything,

[96] *McCloy v New South Wales* (2015) 256 CLR 178, 195 (French CJ, Kiefel Bell and Keane JJ).

for Western Australia to meet this test. It is hard to strongly argue the reasonable necessity for a hard border, given the low level of case numbers in most of the Australian states and territories. Measures that are less invasive of a fundamental constitutional right are readily available.

D *Measures Necessary for the Purposes of an Ordered Society/ Protection of Legitimate Claims of a State/Consistent with a Free Society and the Rule of Law (Mason CJ, Deane, Gaudron and McHugh JJ in Cunliffe, Gaudron and Kirby JJ in AMS)*

This test would be most advantageous to Western Australia. Some version of it appeared to enjoy majority support in *Cunliffe*, though the different ways in which different judges expressed it in that case weaken its precedent value. In any event, such broad-brush uncertain expressions of an exception did not enjoy majority support in *AMS* or *APLA*,[97] and was heavily criticised by Hayne J in the latter case. It is unlikely to enjoy support on the current High Court, which tends to favour tighter tests for constitutionality. Western Australia would have an argument that the measures are necessary to avoid public panic during the pandemic, that it is a legitimate interest for a state to seek to keep out a deadly disease. The measures are set out clearly in legislation, so may be compatible with the rule of law.[98] Adoption of this test is considered to be Western Australia's greatest chance of success.

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[97] James Stellios 'The Intercourse Limb of Section 92 and the High Court's Decision in APLA Ltd v Legal Services Commissioner (NSW)(2006) 17 *Public Law Review* 10, 15.

[98] I do not pursue here an abstract argument that because the measures are seriously liberty-restricting, this aspect, per se, leads to a breach of the rule of law: see for example T R S Allan *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (1993) 21. If there were evidence the measures were being applied in an arbitrary manner, arguments about breach of the rule of law might be stronger: Anthony Gray 'The Rule of Law and Reasonable Suspicion' (2011) 16(2) *Australian Journal of Human Rights* 53, 63-66. It has generally proven difficult to get the High Court to declare legislation constitutionally invalid on the basis it is said to be contrary to the rule of law.

In conclusion, on the likely tests to be applied to a current dispute involving the intercourse aspect of s 92, the reasonably required test, the proportionality test and/or the reasonable necessity test, Western Australia may well lose a s 92 challenge to its current border restrictions, in so far as they apply to travellers coming from any part of Australia other than Victoria.

VIII IMPLICATIONS FOR THE 'TRADE AND COMMERCE' ASPECTS OF SECTION 92

While this discussion is sufficient to deal with the current issue over borders, the discussion potentially has broader implications for the interpretation of the 'trade and commerce' aspect of s 92. As explained above, one impact of the *Cole v Whitfield* was to create (or rather suggest) a disjunct to the approach taken to the 'trade and commerce' aspect of s 92, compared with the 'intercourse' aspect of s 92. Hayne J has rightly criticised this. It is problematic, partly because there is often overlap between them. It seems anomalous and intellectually unsatisfactory that the Court could arrive at different results depending on whether it focuses on the goods or services affected by a restriction (ie the trade and commerce aspect of s 92) or the relevant individual (trader, distributor) etc.

There is a solution. The essential cause of the disjunct was the High Court's insistence that laws challenged under the trade and commerce aspect of s 92 had to be both (a) discriminatory against interstate trade and commerce; and (b) protectionist of local industry, compared with interstate industry. It is limb (b) that creates the disconnect, because it is unlikely that laws impacting interstate intercourse will be limited or even in most cases limited to those seeking to protect local trade and commerce.

As I indicated in an earlier article, the High Court's insistence that only laws with the relevant 'protectionist purpose' are invalid due to s 92 can be criticised.[99] *Cole v Whitfield* itself is internally contradictory, at times seeming to view protectionism as a separate requirement to

[99] Anthony Gray 'Section 92 of the *Constitution*: The Next Phase' (2016) 44(1) *Australian Business Law Review* 35, 44-48.

discrimination;[100] at others, to conflate them.[101] Other federations that seek to create and preserve a common market, such as the European Union and United States, do not limit their prohibitions to protectionist measures. It is enough (for invalidity) that they are discriminatory.

It is suggested that the High Court remove the requirement, in order for a law to be invalid due to the 'trade and commerce' aspect of s 92, that the measure be shown to be protectionist.[102] Rather, the test should focus on whether the impugned measure is discriminatory against interstate trade and commerce. If so, it is prima facie invalid, unless the legislation survives a proportionality analysis. In other words, although a law that discriminates against interstate trade and commerce is prima facie invalid, it will be valid if the enacting state can demonstrate that it is suitable to a legitimate objective, necessary in order to achieve that objective, and adequate in its balance, having regard to the importance of free trade and movement of goods around Australia.

This would have the effect of re-aligning the approaches to the interstate trade and commerce aspect of s 92, and the interstate intercourse aspect of the section. This is highly desirable. It would reduce the opportunity for states to erect barriers to free trade, contrary to the vision of the founding fathers. Rather than a challenger having to demonstrate that a particular law was passed for a protectionist purpose, something which has proven to be difficult to do, it would place the onus on the enacting state to demonstrate how its measures are compatible with the freedom of trade, commerce and intercourse that the Australian *Constitution* enshrines. It would not be an easy argument

[100] (1988) 165 CLR 360, 408: 'Where the law in effect ... discriminates in favour of intrastate trade, it will nevertheless offend against s92 if the discrimination is of a protectionist kind'.

[101] For example, a reference to a law whose 'effect is discriminatory in that it discriminates against interstate trade and commerce and *thereby* protects intrastate trade and commerce of the same kind': 407 (emphasis added).

[102] Anthony Gray 'Section 92 of the *Constitution*: The Next Phase' (2016) 44(1) *Australian Business Law Review* 35, 50 reached a similar conclusion: 'it is not worth the trouble to retain the requirement of a 'protectionism' finding in order to find a provision in breach of s92'.

for a state to make. Nor should it be. A state would be in a better position to have the necessary evidence to demonstrate how its measures are justified along these lines than for a challenger to try to demonstrate the existence of improper purposes.

IX CONCLUSION

The idea of freedom of trade, commerce and intercourse within the country's physical land mass was absolutely fundamental to the creation of the nation and its foundational legal document. In a document that is otherwise largely barren of express rights protection, s 92 is a standout example. The vision of a unified, connected nation is clearly evident. It must be maintained. Clearly the COVID-19 crisis has placed great strain on the nation. There are understandable attempts by governments to protect the safety of citizens, and respond to community concerns. Yet, the purpose of the *Constitution* is to place certain values above the day to day exigencies.

This article has charted developments in the High Court's interpretation of s 92. While it is by now accepted that the section does not confer absolute rights, it has proven somewhat problematic for the Court to properly articulate how a measure said to offend s 92 will be assessed. Tests such as reasonable necessity, proportionality and/or reasonable regulation to meet legitimate objectives seem to be the most likely to be applied. These tests are likely to apply quite similar principles, and lead to similar results in most cases. Applying these tests, it is considered likely that a s 92 challenge to the Western Australian Directions would be successful. The need for restrictions of that magnitude is far from clear. While some restrictions, particularly those on movement from Victoria, might well be justified, arguably the measures go well beyond that, and their impact on interstate movement is very significant. The measures are arguably disproportionate to achievement of their legitimate objective.

As important as that conclusion is, this article reaches a more important finding. The current s 92 case law is anomalous in applying a different test to the 'trade and commerce' aspect of the section com-

pared with the 'intercourse' aspect. This is unsatisfactory. In considering the 'intercourse' aspect of the section in more detail, this article has suggested that one test be used for s 92. That test would consider whether the measure in question discriminates, on its face or in effect, against interstate trade, commerce and/or intercourse. If it does, it is prima facie invalid. It would be open to the enacting government to try to save the measure, by arguing it is designed to achieve a particular policy objective, and is proportional, reasonably necessary etc to achieve that objective. In this way, congruence in the interpretation given to the two aspects of the section would return. The test for a breach of s 92 would be easier to apply, and restrictions on interstate trade, commerce and intercourse harder to defend. That is as it should be, to give effect to the vision of the founding fathers regarding how the nation would operate.

Postscript: As this article was about to the published, the High Court announced that it would dismiss, at least by majority, Mr Palmer's s92 challenge to the Western Australian border restrictions. Kiefel CJ announced that the High Court had found that the Western Australian border restrictions '(did) not raise a constitutional question': *Palmer v State of Western Australia* [2020] HCA Trans 180. While we must await the publication of the reasoning of the members of the Court to more fully understand this position, this writer must respectfully disagree with it, for the reasons stated in this article.