SECTION 92: MARKETS, PROTECTIONISM AND PROPORTIONALITY — AUSTRALIAN AND EUROPEAN PERSPECTIVES*

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Recent cases involving s 92 of the Constitution *refer to economic considerations and principles relating to competition. The application of provisions of the Treaty Establishing the European Community (the 'EC Treaty') having similar effect, by the European Court of Justice, has led to a broader consideration of the effects of state regulation on the ideal of a common market and a lessening of the relevance of domestic protection. It has tested what is permissible state regulation by the doctrine of proportionality. This paper will compare the current Australian perspective.*

I INTRODUCTION

Section 92 is familiar to constitutional law practitioners and scholars. It relevantly provides that 'trade, commerce and intercourse among the States … shall be absolutely free'.[1]

The section recognises that the prosperity of individual states within a Commonwealth is dependent upon the absence of restrictions on the movement of goods and services. Yet it took some time for economic considerations to come to the forefront in cases concerning s 92. While initially favoured, the view that the section expressed the economic doctrine of free trade[2] did not prevail over the 'individual rights' approach championed by Sir Owen Dixon, which focussed upon the attributes of trade and individual freedom from interference in commercial dealings rather than the economic effects of regulation upon trade.[3] Disputes as to the operation of s 92 continued.

Cole v Whitfield[4] settled the controversy in holding that s 92 guaranteed freedom from discriminatory burdens on interstate trade and commerce of a protectionist kind.[5] However, the High Court's interpretation of the section was approached

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1 *Constitution* s 92.

2 See *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266, 301–2 (Evatt J).

3 See, eg, *O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW)* (1935) 52 CLR 189, 204–5, 211–12.

4 (1988) 165 CLR 360.

5 Ibid 394.

largely through the perspective of the Convention Debates rather than economics.[6] Nevertheless competition principles played a part in it and in following cases. In *Cole v Whitfield*, the Court applied its test of protectionism by asking whether the legislation operated to provide the domestic Tasmanian crayfish industry with a 'competitive or market advantage' over interstate rivals.[7] In *Barley Marketing Board (NSW) v Norman*,[8] the Court affirmed that discrimination against out-of-state producers can occur not only where the commodities or services affected by the discrimination are the particular commodities or services subjected to regulation, but also where they are of the same *kind*.[9] This invites a substitutability analysis,[10] namely, the extent to which a particular product is replaceable with another, the two therefore being in competition.[11] And in *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]*,[12] it was explained that the purpose of provisions operating in combination with s 92 is to ensure that trade is not discouraged and competition not distorted.[13] But it is in *Betfair Pty Ltd v State of Western Australia*[14] ('*Betfair*') that the prohibition contained in s 92 was considered by reference to the effect of regulation upon competition within a national market.[15]

The concern of *Cole v Whitfield* was with the advantage regulations might give to traders in one state over those in another.[16] More than twenty years had passed by the time of the decision in *Betfair*. It was there pointed out that there had been some significant developments in that period.[17] Principal amongst them, for present purposes, is the emergence of what Judge Posner has called 'the new economy' in which internet businesses operate without regard to geographic boundaries.[18] Protectionism, in the sense discussed in *Cole v Whitfield*, is concerned with the 'preclusion of competition', which is 'an activity which occurs in a market for goods or services'.[19] But in a market which operates via the internet, it does not make sense to focus upon geographic state boundaries.

The other development of significance was the emergence, since 1995, of a National Competition Policy, which had as a 'guiding principle' that legislation should not restrict competition, unless it could be demonstrated that the benefits

6 See Sir Anthony Mason, 'Law and Economics' (1991) 17 *Monash University Law Review* 167, 176.

7 *Cole v Whitfield* (1988) 165 CLR 360, 409.

8 (1990) 171 CLR 182.

9 Ibid 204–5 (emphasis added).

10 See *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374, 455 (McHugh J), cited in *Betfair Pty Ltd v State of Western Australia* (2008) 234 CLR 418, 449 [4] (Gleeson CJ, Gummow, Hayne, Kirby, Crennan and Kiefel JJ).

11 Stephen G Corones, *Competition Law in Australia* (Lawbook Co, 3rd ed, 2004) 46.

12 (1993) 178 CLR 561.

13 Ibid 585 (Mason CJ, Brennan, Deane and McHugh JJ).

14 (2008) 234 CLR 418 ('*Betfair*').

15 Ibid.

16 (1988) 165 CLR 360.

17 *Betfair* (2008) 234 CLR 418, 452 [12].

18 Richard A Posner, 'Antitrust in the New Economy' (2001) 68 *Antitrust Law Journal* 925, cited in ibid 452 [14].

19 *Betfair* (2008) 234 CLR 418, 452 [15].

of the restrictions as a whole outweighed the costs of, and could be achieved only by, restricting competition.[20] This reflects notions of proportionality. In argument, counsel for Betfair placed emphasis on the fact that the greater the degree of implementation of the National Competition Policy, the less need there would be for recourse to s 92.[21]

II BETFAIR

Betfair operated a 'betting exchange' in Tasmania. Without attempting a detailed description, a betting exchange differs from other forms of gambling in that it allows one to bet on opposing outcomes of an event (an event either happening or not happening) viz both a win and a loss. The betting exchange operator acts as an intermediary, linking customers with opposing bets. The operator takes a commission on winnings, but not the usual risks.[22] Customers of Betfair living throughout Australia could place bets by telephone or over the internet. One such customer was Mr Erceg, who lived in Western Australia and placed bets online.[23]

The legislation passed in Western Australia had two effects for Betfair: it made it an offence to bet through the use of a betting exchange; and it prohibited the publishing of a race list in a Western Australian race field, which facilitated online betting, without approval. Betfair was unable to obtain that approval.

The joint reasons place emphasis upon the description of the market and the persons in it rather than a distinction between 'local' or domestic trade and interstate trade.[24] It was said that in the new economy of internet services and instantaneous communication, such trade and commerce may be indistinguishable.[25] It was therefore preferable to move away from the traditional analyses of protectionism and instead to refer to the protection of 'those persons who from time to time are placed upon the supply side or the demand side of commerce and who are present in a given State at any particular time'.[26]

The Court found that the evidence demonstrated that there was a 'developed market throughout Australia for the provision by means of the telephone and the internet of wagering services on racing and sporting events'.[27] Betfair was in competition with other betting operators in Western Australia, because their products were substitutable. Indeed the concerns of the respondent, Racing and Wagering Western Australia, as to the effect of betting exchanges upon the revenue streams of the TAB and licensed bookmakers, were taken as indicative of cross-elasticity of demand and thus of close substitutability between the various methods of

20 Ibid 452–3 [16].
21 Ibid 453 [16].
22 Ibid 450 [8].
23 Ibid 448 [2].
24 Ibid 453 [18], 476 [97].
25 Ibid 453 [18].
26 Ibid.
27 Ibid 480 [114].

wagering.[28] The necessary interstate element was present because the market was national and Betfair was competing in it from across a state boundary. The joint reasons concluded that the Western Australian legislation had effect beyond its borders and that effect was to restrict the operation of competition in the national market which had been identified. Section 92 was therefore engaged.[29]

Now the importance of the effect of the legislative measure on trade in a broader market is well known to the Court of the European Community, the European Court of Justice ('ECJ'). What its jurisprudence suggests to follow from that approach is a necessary shift away from protectionism as a criterion of invalidity. It may be viewed as unnecessary to the economic theory of competition.[30]

III THE EC TREATY PROVISIONS

The *Treaty Establishing the European Community* ('the EC Treaty') contains provisions with similar objectives to those of s 92.[31] It identifies the fundamental aim of the European Union as the creation of a 'common market',[32] being an area 'without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.[33] Together these aims are known as the 'four freedoms'.

The ECJ has taken a broad economic approach to the question of whether legislative or other measures taken by a Member State are inconsistent with the provisions implementing these Treaty objectives. Unlike in Australia, where political union was achieved quickly, the European Union involved the unification of already well-established countries with disparate laws. It has been suggested that this may explain the larger role assumed by the ECJ from an early point in its history.[34] It looked to the effect of a measure as a barrier to trade within the Union and was less concerned with protectionism as a standard of infringement.

There are four articles in the EC Treaty which are directly relevant to the free movement of goods. Articles 23 and 25 provide that customs duties on imports

28 Ibid 480 [115]. See also at 481 [121].

29 Ibid 480 [116].

30 Some would say inconsistent: see Gonzalo Villalta Puig, *The High Court of Australia and Section 92 of the Australian Constitution: A Critique of the Cole v Whitfield Test* (Thomson Lawbook, 2008) 187.

31 The European Economic Community, as it was then known, was established in 1957 under the *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958) (also known as the '*Treaty of Rome*'). It was amended in 1986 by the *Single European Act*, opened for signature 17 February 1986, OJ L 169/27 (entered into force 1 July 1987) and in 1992 by the *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993) (also known as the *Treaty of Maastricht*). The latter treaty renamed the EEC Treaty as the *Treaty Establishing the European Community* (the 'EC Treaty'). It is this treaty, as subsequently amended, with which we are concerned.

32 *Treaty Establishing the European Community*, opened for signature 7 February 1992, [1992] OJ C 224/6 (entered into force 1 November 1993), art 2 ('EC Treaty') [cited as amended]. See also the activities of the European Communities outlined in arts 3(1)(a), (c).

33 Ibid art 14(2).

34 Damien Geradin and Raoul Stewardson, 'Trade and Environment: Some Lessons from *Castlemaine Tooheys* (Australia) and *Danish Bottles* (European Community)' (1995) 44 *International and Comparative Law Quarterly* 41, 64–5.

and exports, or charges having equivalent effect, are prohibited in the customs union. Articles 28 and 29 prohibit measures, between Member States, which impose quantitative restrictions on imports and exports, and all measures having equivalent effect.[35] The expression 'measures having equivalent effect' is interpreted broadly. In a leading case of '*Dassonville*' in 1974 it was said that:

> All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.[36]

In *Dassonville,* a Belgian law prohibited the import of goods having a designation of origin without a certificate to that effect. An importer wished to import a case of Scotch whisky into Belgium from France. The measure was held to infringe art 28 because it was more difficult for a trader re-importing a product to obtain such a certificate than the original importer who obtained it direct from the producer. The means of proof of origin acted as a hindrance to intra-Community trade.

The *Dassonville* formula is regarded as an economic approach based upon the concept of access to the market.[37] The breadth of the *Dassonville* formula led to a wide variety of measures being invalidated by the ECJ. They included: measures settling maximum or minimum prices for sale;[38] regulations or minimum contents for certain products;[39] regulations relating to the size, form, weight, composition, presentation, packaging and labelling of products;[40] and regulations relating to advertising.[41]

Two further articles in the EC Treaty assume some relevance. They concern the law of competition. That subject is dealt with by the *Trade Practices Act 1974* (Cth) in Australia. Article 81 prohibits, as incompatible with the common market,

35 The *Treaty of Amsterdam* (1999) renumbered all EC Treaty Articles: see Josephine Steiner, Lorna Woods and Christian Twigg-Flesner, *Textbook on EC Law* (Oxford University Press, 8th ed, 2003) 8. Reference to the article numbers in this paper is to articles as currently in force.

36 *Procureur du Roi v Benoît and Gustave Dassonville* (C-8/74) [1974] 2 ECR 837, 852 ('*Dassonville*').

37 David O'Keeffe and Antonio F Bavasso', 'Four Freedoms, One Market and National Competence: In Search of a Dividing Line' in O'Keeffe (ed), *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer Law International, 2000) 542, 547.; Alina Tryfonidou, 'The Outer Limits of Article 28 EC: Purely Internal Situations and the Development of the Court's Approach through the Years' in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing, 2009) 200. In *Schutzverband gegen Unlauteren Wettbewerb v TK-Heimdienst Sass GmbH* (C-254/98) [2000] 1 ECR I-151, I-171 [29], a case concerning an Austrian law which prohibited traders from selling door-to-door unless their permanent establishment was in the same district, the Court said that the law impeded access to the market and therefore intra-Community trade. See also *Torfaen Borough Council v B & Q plc* (C-145/88) [1989] 4 ECR 3851, 3876–7 [22].

38 *Riccardo Tasca* (C-65/75) [1976] 1 ECR 291, 308 [13]; *Openbaar Ministèrie of the Kingdom of the Netherlands v Jacobus Philippus van Tiggele* (C-82/77) [1978] 1 ECR 25, 40 [18]. Compare this to the outcome in *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182.

39 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (C-120/78) [1979] 1 ECR 649, 664 [15] ('*Cassis de Dijon Case*').

40 *Commission of the European Communities v Federal Republic of Germany* (C-51/94) [1995] 4 ECR I-3599, I-3612 [29]–[30].

41 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* (C-405/98) [2001] 2 ECR I-1795, I-1824 [21].

agreements or practices which may prevent, restrict or distort competition and may affect trade between Member States. Article 82 refers to abuse of market power which may affect trade between Member States. The requirement that trade between Member States be affected, present in both articles, is a 'jurisdictional test' which determines the application of EC law.[42] For present purposes its relevance is as a test of the effect upon competition which might also apply to the regulation of trade and commerce by individual Member States.

The requirement, for the purposes of art 81, that an agreement may affect trade between Member States is fulfilled if it is possible to foresee, on the basis of objective factors, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.[43] And so long as the relevant conduct is capable of creating an appreciable change in the pattern of trade between Member States, it is immaterial that the conduct in question occurs within the territorial confines of a Member State.[44] The influence of such a broad approach to what may amount to an effect on trade between Member States is evident in the formula employed in *Dassonville* in relation to the free movement of goods.

According to the *Dassonville* formula, measures which impose burdens will restrict the flow of trade in the Community and will have the prohibited effect. A protectionist purpose is not necessary for a measure to be invalid. In a later decision, in 1985, the ECJ confirmed that it does not need to be shown (for the purposes of art 28) that the domestic industry gains an advantage from restrictions on imports.[45] It is enough for invalidity that a particular measure creates barriers to inter-community trade.[46]

That the focus of the ECJ is upon the economic consequences of measures by Member States upon competition within the community market, is also evident from recent developments concerning what is called the 'internal rule'. The prohibition stated by the *Dassonville* formula was on restriction of trade *between* Member States. Because of this interstate requirement, the Treaty provisions were excluded from operation in situations which were wholly internal to a Member State.[47] (It was observed in *Betfair* that a similar doctrine was earlier developed by the Supreme Court of the United States, which left states free to regulate those aspects of commerce which were so local in character as to warrant different

42 O'Keeffe and Bavasso, above n 37, 544.

43 *Société Technique Minière v Maschinenbau Ulm GmbH* (C-56/65) [1966] ECR 235, 249.

44 *NV Nederlandsche-Banden-Industrie Michelin v Commission of the European Communities* (C-322/81) [1983] 4 ECR 3461, 3522 [103]. See *Commission Notice: Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty* [2004] OJ C 101/81, [77] et seq and the cases discussed therein.

45 *Cinéthèque SA v Fédération Nationale des Cinémas Français* (C-60 and 61/84) [1985] 4 ECR 2605, 2626 [21]–[22].

46 See Christopher Staker, 'Section 92 of the Constitution and the European Court of Justice' (1990) 19 *Federal Law Review* 322, 331. This approach appears to have more recently been extended to exports, dealt with under art 29: see *Criminal Proceedings against Lodewijk Gysbrechts Santurel Inter BVBA* (C-205/07) (Unreported, Court of Justice of the European Communities, 16 December 2008) [43]; Anthony Dawes, 'A Freedom Reborn? The New Yet Unclear Scope of Art 29 EC' (2009) 34 *European Law Review* 639, 641–2.

47 Tryfonidou, above n 37, 199, citing *Regina v Vera Ann Saunders* (C-175/78) [1979] 1 ECR 1129, 1135 [11].

treatment.[48]) The idea was that where there was no cross-border element, there could be no incompatibility with the provisions of the EC Treaty.[49] However, the rule was the subject of criticism for its failure to acknowledge that 'a national measure [relating] to situations that, on the face of it, do not involve an inter-state element can, nonetheless, have a substantially negative impact on inter-state trade'.[50]

The decline of the internal rule in respect of the free movement of goods may be seen in cases from 1994 onwards.[51] It has been suggested that the evolution of competition law in the EC contributed to this decline.[52] As has been noted, in competition cases there need not be a cross-border element for the Treaty to be infringed, so long as the conduct is capable of having an appreciable effect on trade. Thus, in judging the likely impact of a measure it has been said that '[i]t is the size of the fish that counts, not how much it has travelled within the pond'.[53] The current approach of the ECJ to the rule, and to the Treaty objective of freedom of movement of goods, is evident in a case handed down in 2006 involving Jersey, *Jersey Produce Marketing Organisation Ltd v Jersey* (the '*Jersey Case*').[54]

Jersey adopted the *Jersey Potato Export Marketing Scheme Act* in 2001. It prohibited producers of potatoes from exporting potatoes to the United Kingdom unless the producer was registered with a marketing board and had entered into a marketing agreement with the board.[55] Failure to comply with these obligations, and with the terms of the marketing agreement, could give rise to penalties. After two breaches a producer could be deprived of the right to enter into marketing agreements and therefore to export.[56] The board could require a contribution to be paid by producers.[57]

Jersey is not part of the United Kingdom, but is a semi-autonomous dependency of Britain. However under EC Law the United Kingdom is responsible for Jersey's external relations. The ECJ therefore treated the United Kingdom and Jersey as

48 *Betfair* (2008) 234 CLR 418, 476 [96].

49 Cyril Ritter, 'Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234' (2006) 31 *European Law Review* 690, 690; Niamh Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39 *Common Market Law Review* 731, 731; Mislav Mataija, 'Internal Situations in Community Law: An Uncertain Safeguard of Competences within the Internal Market' (Working Paper Group 2, Columbia Public Law Research, 6 February 2009).

50 Tryfonidou, above n 38, 202.

51 *René Lancry SA v Direction Générale des Douanes* (C-363/93, C-407/93, C-408/93, C-409/93, C-410/93, C-411/93) [1994] 4 ECR I-3957, I-3991 [29], cited in *Jersey Case* [2006] All ER (EC) 1126, 1146 [94] (Advocate General). See also *Criminal Proceedings against Jacques Pistre* (C-321/94, C-322/94, C-323/94, C-342/94) [1997] 3 ECR I-2343, I-2374 [44]–[45].

52 Kamiel Mortelmans, 'Towards Convergence in the Application of the Rules on Free Movement and Competition?' (2001) 38 *Common Market Law Review* 613, 630; Alina Tryfonidou, 'Case C-293/02, *Jersey Produce Marketing Organisation Ltd v States of Jersey and Jersey Potato Export Marketing Board*, Judgment of the Court (Grand Chamber) of 8 November 2005, Not Yet Reported' (2006) 43 *Common Market Law Review* 1727, 1733.

53 Mataija, above n 49.

54 [2006] All ER (EC) 1126 ('*Jersey Case*').

55 Ibid 1158 [14].

56 Ibid 1158 [15]–[16].

57 Ibid 1159 [20]–[21].

a single Member State for the purposes of the application of the Treaty.[58] Jersey then argued that there was no restriction on the movement of goods *between* states and that the internal rule applied.

The ECJ did not accept this contention. It adopted two lines of reasoning. In the first place it said that the existence of a customs union necessarily implies that the free movement of goods should be ensured, not only as between Member States but, more generally, within the whole customs union.[59] Then it said that it could not be ruled out that the imposition of charges as between Jersey and the United Kingdom would have an effect upon trade in other states. It pointed to the possibility that potatoes could be re-exported from the United Kingdom to other Member States, so that the charges could be seen as affecting the trade between Jersey and other Member States.[60]

IV SOME COMPARISONS

Some comparisons may be made at this point concerning what may constitute infringement of s 92 and measures which are inconsistent with the EC Treaty.

- Both systems recognise that trade occurs within a larger national or supranational market. In *Betfair* it was said that the creation of national markets would further the plan of the *Constitution* for the creation of a new federal nation and would be expressive of national unity.[61] In the *Jersey Case* it was said that a customs union necessarily implies the free movement of goods within the union.[62]
- In Europe, and in Australia more clearly since *Betfair*, competition principles inform the approach to the interpretation of freedom of trade and commerce provisions. Attention was directed to the relationship between these principles and s 92 in *Betfair*.
- The application of such principles produces an inquiry as to the effect of legislative or other measures upon access to competition within a given market.
- In Australia this has not meant that an interstate element is lost. In *Betfair* it was explained that the necessary interstate dimension was present because Betfair's customers could be located outside Tasmania and it sought to attract customers from other states.[63] This follows from the identification of demand, as well as the supply, of goods as relevant. It may suggest that the

58 Ibid 1162 [47].
59 Ibid 1164 [64].
60 Ibid 1165 [65].
61 *Betfair* (2008) 234 CLR 418, 452 [12].
62 *Jersey Case* [2006] All ER (EC) 1126, 1164 [64].
63 *Betfair* (2008) 234 CLR 418, 448 [1].

interstate requirement may more easily be met in a market based on internet commerce.

- In any event the emphasis upon cross-border elements is lessened when regard is had to the effect of legislation upon competition in a national market.
- In Europe, and for some time, a cross-border element has not been regarded as essential for the EC Treaty to apply, as is evidenced by the decline of the internal rule.
- Importantly, the ECJ does not require that a measure be protective of domestic trade in order for it to fall foul of the EC Treaty, whereas *Cole v Whitfield* stated protectionism as a test for the infringement of s 92.[64] It was not said in *Betfair* that protectionism is no longer relevant; but the Court did point to its potential inconsistency with notions of markets in the new economy, which function regardless of geographical boundaries, and to practical difficulties which might arise from such a requirement.[65]

V PROTECTIONISM?

The approach of the ECJ may raise the question whether protectionism is a necessary part of a test of infringement under s 92 and whether a law can offend the section if it is discriminatory but not protectionist, or if it affects interstate trade adversely, without being either. It has been suggested that the current test of discriminatory protectionism is not sufficient to protect the interests of free trade within the Commonwealth.[66] The adoption of unreasonable measures by one state could have the practical effect of restricting its part of the national market to trade from other states, whether or not it receives any advantage from them. An example given of a measure discriminating against trade but without any protectionist effect is where a state halves the imports of another state of a product it does not produce.[67] This would restrict the free flow in goods and services to the detriment of the national economy, but without providing any corresponding benefit to the legislating state. *Betfair* might be seen to leave the question of retaining protectionism open, but at present the approaches of Europe and Australia may be said to be different.

To this point I have discussed matters which may establish prima facie infringement of s 92. But it has never been accepted that trade and commerce can be absolutely free of regulation. But when is regulation, which has the anti-competitive effects spoken of, permissible? What legislative aims might be acceptable? How far can the legislation intrude into the sphere of protection given by s 92 in pursuit of that objective?

64 *Cole v Whitfield* (1988) 165 CLR 360, 394, 408–9.

65 *Betfair* (2008) 234 CLR 418, 452 [14]–[15].

66 See Staker, above n 46, 340 et seq. See also Puig, above n 30, 95 et seq; P H Lane, 'The Present Test for Invalidity Under Section 92 of the Constitution' (1988) 62 *Australian Law Journal* 604, 607–8, 612.

67 See Staker, above n 46, 342–3.

VI PERMISSIBLE REGULATION

In *Castlemaine Tooheys*,[68] the Court accepted that a state might legislate for the protection of the people of the state from a danger or a threat to its well-being, at least when a burdensome discrimination was not the purpose of the Act.[69] It spoke of legislation that was directed, on its face, to social or economic problems, and identified the protection of the environment and the conservation of energy resources as the objects of the legislation in that case. Two of the matters identified by the Court as affecting the validity of the legislation were whether it was 'appropriate and adapted' to those aims and whether its impact was disproportionate to their achievement.[70] The latter reference in particular invites comparison with the principle of proportionality applied by the ECJ.

The EC Treaty guarantees the protection of certain non-economic values. They include matters of public policy, public security and protection of human health, animals and plants. Restrictions pursuing such aims operate as exceptions to the application of the provisions concerning the free movement of goods. Consequently, the relevant Treaty article (art 30) is construed strictly.[71] The ECJ also developed its own rule as to what regulation might be excused from the effect of the broad prohibition concerning effects upon free trade. What is described as the 'rule of reason'[72] accepts that some measures may be *necessary* in order to satisfy certain 'mandatory requirements' relating to fiscal supervision, protection of public health, fairness of commercial transactions, protection of the consumer, protection of the environment and improvement of working conditions.[73] The classes are not regarded as closed.[74]

More recently the principle of proportionality, which was first developed in German law, has been applied by the ECJ. The modern origins of the principle can be traced to the Prussian administrative courts in the late 19th century which held, in relation to police powers, that whilst measures may be necessary for public order, they did not extend to excessive measures.[75] The jurisprudential basis for the principle lays emphasis upon the result element inherent in the law.[76] It does not depend upon any 'implied legislative prohibition against the unreasonable exercise of powers', but a more fundamental relationship between

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

69 Ibid 472–3.

70 Ibid 473–4. The other matter identified at this part was whether its impact on interstate trade was incidental.

71 Lexis Nexis, *Halsbury's Laws of England*, 5th ed, (at 20 December 2010) Customs and Excise, '2 The European Basis of Customs Duty' [2.iv.19].

72 Developed in *Cassis de Dijon Case* (C-120/78) [1979] 1 ECR 649.

73 See, eg, ibid 662 [8]; Lexis Nexis, *Halsbury's Laws of England*, 5th ed, (at 20 December 2010) Customs and Excise, '2 The European Basis of Customs Duty' [2.iv.19].

74 Lexis Nexis, *Halsbury's Laws of England*, 5th ed, (at 20 December 2010) Customs and Excise, '2 The European Basis of Customs Duty' [2.iv.19].

75 Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International, 1996) 23; Jürgen Schwarze, *European Administrative Law* (Office for Official Publications of the European Communities, revised ed, 2006) 685.

76 Schwarze, above n 75, 679.

means and ends.[77] It holds that any legislative intervention must be 'limited by its effectiveness and consequently also by its proportionality in relation to the interest it seeks to defend'.[78]

The principle is said to be derived from the concept of the rule of law. It is explained that, according to German legal thinking, a distinction should be drawn between the *substantive* and *formal* aspects of the rule of law.[79] In the formal sense the rule requires all forms of state action to be measurable in the light of statute law; in the substantive sense it requires the state to be a function of the notion of justice. The ECJ considers the rule of law to be an integral part of the Community legal system.[80]

It has been explained that, in its first stage of development, the rule of proportionality required that the authorities should use the most *suitable* means available to attain the objective.[81] The courts then added a second principle, which required that 'out of several equally effective means', the one which caused the least injury had to be employed. The third requirement, which arose after the Second World War, requires that 'the intrusion into the rights of an individual must not be out of proportion to the desired end'. The three sub-principles of the principle of proportionality may therefore be stated as requiring that:

(1) The measures concerned must be *suitable* for the purpose of facilitating or achieving the pursued objective.

(2) The measure must also be *necessary*, in the sense that there is no other mechanism at the state's disposal which is less restrictive of freedom.

(3) The measure may not be *disproportionate* to its aims (proportionality in its strict sense).[82]

This last mentioned element of proportionality has been referred to as 'the most important general legal principle in the field of Community economic law'.[83]

The principle of proportionality, encompassing all three sub-principles, informs many aspects of the law dealt with by the ECJ and is evident in much of the law dealing with the free movement of goods. It should not, however, be assumed that its application accords with the approach of German courts. Being a 'general principle of law' the ECJ does not feel constrained to apply it in any pre-ordained way.[84] It applies it flexibly, with varying degrees of strictness.[85]

77 Emiliou, above n 75, 23–4.

78 Schwarze, above n 75, 679.

79 Ibid 712.

80 Ibid 714.

81 Emiliou, above n 75, 24.

82 Schwarze, above n 75, 687. See also Francis G Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999) 1.

83 Schwarze, above n 75, 865.

84 Jacobs, above n 82, 2.

85 Takis Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999) 65, 76.

The first requirement, the suitability of the measure chosen, does not appear to assume as much importance as necessity and proportionality in the strict sense.[86]

The sub-principle of *necessity* requires that measures are not to exceed what is necessary for the purpose.[87] Stated in this way, it would appear to involve the application of the third sub-principle, of strict proportionality, but it is further explained that necessity is said to require consideration of alternative available measures. A measure is permissible only if no less restrictive or onerous measure exists to achieve its objective.[88]

The requirement of *proportionality in the strict sense* is said to involve some weighing of the interests involved, but does not seek to achieve the right balance.[89] In requiring that the means used not be disproportionate to the objective, it operates negatively. Importantly, for the purposes of a later Australian comparison, it may be noted that the *relationship* between the means and the end must be a *reasonable* one.[90] The ECJ sometimes uses terms such as 'manifestly inappropriate' to describe infringing legislation but these appear to be statements of a conclusion rather than tests to be applied in reasoning to an outcome of invalidity.[91]

The sub-principles of necessity and strict proportionality therefore together require that where there is a choice available as between measures, recourse must be had to the least onerous *and* the disadvantages must not be disproportionate to the aims pursued.[92]

It has been observed that the ECJ does not always distinguish between the question of strict proportionality and the test of necessity in practice.[93] A leading case (the '*Cassis de Dijon Case*') concerned a German legislative measure which permitted that only cordial liquors having a minimum alcohol content to be sold as such.[94] The object of the legislation was consumer protection. It was concluded that consumers could be protected against confusion by a measure involving a less drastic restriction of free movement of goods. The appropriate information could have been conveyed on the product packaging.[95] It was also held that the obstacles to free trade were excessive and therefore disproportionate to their goal.[96]

86 See Schwarze, above n 75, 856.

87 Ibid 857.

88 Ibid.

89 Ibid 859–60.

90 Ibid 858.

91 *Fedesa & Ors* [1990] 5 ECR I-4023, I-4063 [14], cited in Tridimas, above n 85, 70–1. Also, a measure must not be 'patently' or 'manifestly unsuitable': see Tridimas, above n 85, 71.

92 *Fedesa & Ors* [1990] 5 ECR I-4023, I-4063 [13], cited in Tridimas, above n 85, 70–1.

93 Schwarze, above n 75, 854; Walter van Gervan, 'The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999) 37; Tridimas, above n 85, 68.

94 *Cassis de Dijon Case* [1979] 1 ECR 649.

95 Ibid 664 [13] (Decision of the Court).

96 Ibid 674 (Opinion of the Advocate General).

The boundaries of necessity and strict proportionality may not so much be crossed in practice by the ECJ, even if the word 'necessity' is deployed in both senses; rather in many cases both sub-principles are engaged. And in some cases resort to both is not necessary.

It has been suggested that the element of necessity, in the sense discussed, dominates the cases. This is especially evident in cases involving consumer protection.[97] In the *Jersey Case*, Jersey argued that the measures were not disproportionate to the objective pursued for the benefit of potato growers — transparency and fairness in the relationship between producers and marketing organisations.[98] This was not accepted. Other measures were said to have been available, measures which did not have the potential effect identified upon trade with other states.[99] The ECJ did not enter upon the question of whether the legislative measures were unreasonable and therefore disproportionate.

Another commentator has observed that, whilst the ECJ is receptive to the argument that the same objective may be attained by less restrictive means, it is not entirely consistent in its application of necessity. Where *policy measures* are involved, it turns to the test of strict proportionality.[100]

The term 'proportionality' is not unknown to Australian constitutional law.[101] Of course, it should not be assumed that it is used in the same sense as it is in Europe, as embodying all three sub-principles, nor as conveying, in particular, all that is comprehended in the concept of strict proportionality. Nevertheless, the sub-principles may, to an extent, be seen as reflected in case law concerning s 92. In particular, the cases have considered the availability of alternative measures (which may mean that the legislation in question is not necessary), as well as the extent to which the effects of the legislation are necessitated by its legitimate objects. A further feature found in Community law may also be present. The term 'necessary' may sometimes be used to refer to both requirements. The approach of the High Court, increasingly, has been to consider both.

In *Castlemaine Tooheys*, attention was directed to the necessity of the legislation, in the sense of whether alternative measures were available, at least as a relevant matter, although perhaps more so to the identification of statutory purpose. It assumed greater significance in *Betfair*, where the alternative legislative measures taken by Tasmania provided part of the answer to Western Australia's contention that the prohibitions were necessary.

97 See, eg, *Walter Rau Lebensmittelwerke v Commission of the European Communities* (C-279, 280, 285, 286/84) [1987] 2 ECR 1069, 1125–6 [34], where Danish legislation requiring margarine to be in cubic-shaped containers, to distinguish it from butter, was held to exceed its object and that consumers could be just as well-protected by measures such as labelling.

98 *Jersey Case* [2006] All ER (EC) 1126, 1167 [82] (Grand Chamber), 1133 [14] (Advocate General).

99 Ibid 1167 [83].

100 Tridimas, above n 85, 77.

101 As observed by Gummow J in *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 116 ALR 54, 65 and in academic writings: see, eg, H P Lee 'Proportionality in Australian Constitutional Adjudication' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law*: *Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 126; B Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *Public Law Review* 212; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 59 et seq; Puig, above n 30, 145 et seq.

In *Cole v Whitfield*, the effects of the legislation were gauged against the statutory objective of protecting Tasmanian crayfish as a resource. It was held that the prohibitions were necessary considered in that light.[102] In *Castlemaine Tooheys*, the statutory objectives of the protection of the environment and the need to conserve energy resources were not considered to provide a justification for the differential treatment of products effected by the legislation.[103] The approach taken by the Court was to inquire whether the means adopted by the law were disproportionate to the object to be achieved, in which case the law could not be considered as appropriate to the achievement of the object.[104] That approach is to be distinguished from the question which the Court would not undertake — whether the measures taken were necessary or desirable — on the basis that the question was best left to the political process. 'Necessary' was here used in a different sense, perhaps referring to areas of pure policy choice.

The judgment of Mason J in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*[105] may be viewed as combining the second and third sub-principles of necessity and proportionality.[106] His Honour found that it had not been shown that the measure was the only practical and reasonable method of regulating the trade in milk, so as to ensure high quality and to protect public health. And, his Honour said, it had not been shown that regulation was necessary for the protection of public health. It followed that it was not a reasonable regulation.

It has been suggested that when necessity (in its ordinary sense) is combined with reasonableness, a test akin to the third test of proportionality in the strict sense is invoked.[107] And it will be recalled that that sub-principle has been regarded as requiring that the relationship between the means and the end must be a reasonable one. In *Betfair* it was said that the proportionality involved in the 'appropriate and adapted' criterion expressed in *Castlemaine Tooheys* must give significant weight to the effects of the legislation on the national market.[108] Such considerations suggested that the approach taken in *North Eastern Dairy Co* should be applied. It was described as the criterion of 'reasonable necessity'.[109] It may be observed that, as applied in *North Eastern Dairy Co*, it actually involves the two considerations.

In *Thomas v Mowbray*,[110] Gleeson CJ said that there was nothing vague about the expression 'reasonably necessary'.[111] It was an expression commonly used, for example, in restraint of trade cases and in public law concerning legislative

102 *Cole v Whitfield* (1988) 165 CLR 360, 409.

103 *Castlemaine Tooheys* (1990) 169 CLR 436, 477 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

104 Ibid 473.

105 (1975) 134 CLR 559 ('*North Eastern Dairy Co*').

106 Ibid 608, 616.

107 Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 12, although the author refers to a 'balancing of interests' rather than the use of the principle in a negative sense.

108 *Betfair* (2008) 234 CLR 418, 477 [102] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

109 Ibid.

110 (2007) 233 CLR 307.

111 Ibid 331–3 [20]–[26], cited in *Betfair* (2008) 234 CLR 418, 477 [102], n 181.

powers. In *Egan v Willis*,[112] Gaudron, Gummow and Hayne JJ referred to the established principle that the Legislative Council of New South Wales has such powers, privileges and immunities as are reasonably necessary for the proper exercise of its functions.[113] Statements about limits upon statutory powers invite comparison with the German conception of the rule of law from which, it will be recalled, proportionality is said to be derived.

Returning to *Betfair*, we may see that both the necessity for the particular method of legislation and its need in light of the statutory objectives were rejected. The principal argument advanced by Western Australia was that the prohibitions were necessary to ensure the integrity of the racing industry.[114] The Court considered that, even allowing for the presence of such a threat, there were other methods available which were effective but non-discriminatory.[115] The legislative choices made by Tasmania proved this point. It was also held that the prohibitions could not be said to be necessary for the protection of the racing industry of that state. It was not therefore proportionate to the propounded legislative object.[116]

VII CONCLUSION

Economic consequence has therefore found its place in Australia as the critical consideration in the application of s 92. This may have the consequence that the focus of debate shifts to the reasonable necessity for legislation. It may be thought that this approach bears some relationship to that undertaken by the ECJ, although I accept that it is easier to raise such questions than it is to fully answer them.

In conclusion, may I add this: questions relating to the necessity of legislation are likely — critically — to depend upon the economic effects of legislation and as such may require expert explanation. They are likely to involve questions of degree.[117] Sir Anthony Mason has said that in two of the cases following *Cole v Whitfield*, no discussion of economic writing was given in argument, despite requests from the Bench for references.[118] The use of agreed statements of fact is not likely to be sufficient in this respect and there are limits to the assumptions that the Court will be prepared to make. So much is evident from the exchanges between the Bench and Bar in *Betfair*.

112 (1998) 195 CLR 424.
113 Ibid 453–4 [48].
114 *Betfair* (2008) 234 CLR 418, 479 [109].
115 Ibid 479 [110].
116 Ibid.
117 See Zines, above n 101, 197.
118 Mason, above n 6, 176.