Intercolonial Free Trade: The Drafting History of Section 92 of the *Australian Constitution*

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Abstract

Section 92 of the *Australian Constitution* guarantees the free movement of goods among the states of the Commonwealth of Australia. Over twenty years ago, in the case of *Cole v Whitfield*,[1] the High Court of Australia developed a definitive test of invalidity for s 92. The test declares a law or measure invalid if it imposes a burden on interstate trade and commerce that is discriminatory in a protectionist sense.

This article argues that protectionism, as a criterion of invalidity, renders the test ahistorical. The irony is that *Cole v Whitfield* was the first decision of the Court to advert directly to the convention debates. Until then, the doctrine of the Court was that the convention debates and other material from pre-federation history were not available in the interpretation of the *Constitution*.

Despite its reference to the drafting history of the section, the Court misinterpreted s 92 in *Cole v Whitfield*. A chronological review of the convention debates reveals that a common market for Australia was the intention of the framers and, therefore, that the framers intended the federal purpose of s 92 to be the creation of a national market for regional produce free from discrimination of any kind, either protectionist or not.

I INTRODUCTION

Section 92 of the *Australian Constitution* guarantees the free movement of goods among the states (and territories) of the Commonwealth of Australia. Over twenty years ago, in the case of *Cole v Whitfield*, the High Court of Australia resolved to develop a definitive test for s 92. The test is discriminatory protectionism. It is an invalidity test. The test declares a law or measure invalid if it imposes a burden on interstate trade and commerce that is discriminatory in a *protectionist* sense.

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[1] (1988) 165 CLR 360.

In *Cole v Whitfield*, the Court made numerous assurances about the historical legitimacy of the new test of invalidity. Having studied the drafting history of s 92, including the convention debates and the movement towards federation, the Court claimed that a ban on protectionism was the intention of the framers for s 92. In truth, the drafting history of the section shows otherwise.[2] It shows that discrimination against interstate trade and commerce, not protectionism, was the concern of the framers aspiring as they were for the Commonwealth to become a national market for regional produce. In other words, the federal purpose of s 92 is the creation and preservation of a common market for Australia.[3]

This article reviews the convention debates in order to identify the federal purpose of s 92. What this review reveals is that the framers aspired to build a national market for regional produce. It is argued, with reference to the drafting history of the section, that the framers considered this aspiration to be best realised through a ban on discrimination of any kind against interstate trade and commerce. The argument, therefore, is that discrimination was the concern of the framers, not protectionism.

A *The Federal Purpose of Section 92*

In *Cole v Whitfield*, and later in *Castlemaine Tooheys Ltd v South Australia*[4] and, most recently, in *Betfair Pty Ltd v Western Australia*,[5] the Court deduced that discriminatory protectionism was the 'lion in the path' that the framers sought to remove from intercolonial trade and commerce.[6] The Court was able to make this deduction from its foray into the drafting history of s 92.

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[2] For a critique of the *Cole v Whitfield* test of invalidity for s 92, see G Villalta Puig, 'Free Movement of Goods: The European Experience in the Australian Context' (2001) 75(10) *Australian Law Journal* 639; G Villalta Puig, 'A European Saving Test for Section 92 of the *Australian Constitution*' (2008) 13(1) *Deakin Law Review* 99; G Villalta Puig, 'Section 92 since *Betfair Pty Ltd v Western Australia*' (2009) 11(4) *Constitutional Law and Policy Review* 152; G Villalta Puig, 'The Significance of the Free Trade Jurisprudence of the Court of Justice of the European Union to the Constitutional Development of the Australian Single Market' (2009) 16(1 and 2) *Irish Journal of European Law* 131; and, in particular, G Villalta Puig, *The High Court of Australia and Section 92 of the Australian Constitution* (Lawbook Co, 2008).

[3] The reference here to pre-federation history does not propose to find an originalist meaning to the phrase 'absolutely free' in the intention of the framers but rather to inform the federal purpose of s 92. See S Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' [2009] *Bar News: Journal of the New South Wales Bar Association* 30, 32.

[4] (1990) 169 CLR 436.

[5] (2008) 234 CLR 418.

[6] James Service, a Premier of Victoria in the 1880s, described intercolonial tariffs as the 'lion in the path' of federation. Incidentally, Victoria and, especially, Western Australia were very happily protectionist.

Until *Cole v Whitfield*, recourse to pre-federation history through the convention debates had not been an avenue of judicial inquiry open to the Court.[7] In fact, until then, the Court had been notorious for its persistent refusal to allow reference to constitutional 'travaux préparatoires'.[8] For example, in *Attorney-General (Vic); Ex rel Black v Commonwealth*, Barwick CJ recognised that it had become the 'the settled doctrine of the Court that [the convention debates] are not available in the construction of the Constitution'.[9]

By 1988, the Court concluded that, over the decades, its paramount concern with doctrine had relegated the intention of the framers for s 92:

> [J]udicially s 92 has been 'interpreted' from time to time to mean freedom from State … law and action; freedom only from a law directed against … or … having the object of interference with interstate trade; freedom as at … the point of entry into a State; freedom for a particular trader; not just for the general flow of interstate trade … freedom by reference to the criterion of operation of a challenged law (that is, whether the law itself operates on interstate trade, or on an essential attribute of this trade, and so on), freedom by reference to the direct effect of the law … freedom by reference to what the law does in the circumstances in which it is intended to operate or by reference to the practical effect of the law.[10]

Hence, almost as a last way out of the conundrum of s 92, it decided to admit the convention debates as primary evidence of the intention of the framers.[11] Nonetheless, the Court prefaced its unprecedented inquiry into the drafting history of s 92 with a carefully worded statement of what it considered were the appropriate terms of reference:

> Reference to the history of s 92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that

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[7] See C McCamish, 'The Use of Historical Materials in Interpreting the Commonwealth *Constitution'* (1996) 70 *Australian Law Journal* 638; H Irving, 'Its First and Highest Function: The Framers' Vision of the High Court as Interpreter of the *Constitution'* in P Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis, 2004).

[8] J Stone, 'A Government of Laws and Yet of Men – Being a Survey of Half a Century of the Australian Commerce Power' (1948-1950) 1 *University of Western Australia Annual Law Review* 461, 465.

[9] (1981) 146 CLR 559, 577.

[10] P H Lane, 'The Present Test for Invalidity Under Section 92 of the Constitution' (1988) 62 *Australian Law Journal* 604. See also G Carney, 'The Re-Interpretation of Section 92: The Decline of Free Enterprise and the Rise of Free Trade' (1991) 3 *Bond Law Review* 149, 150–151; M Coper, 'Constitutional Obstacles to Organised Marketing in Australia' (1978) 46 *Review of Marketing and Agricultural Economics* 71, 89–92.

[11] For a study of the convention debates, see F R Beasley, 'The Commonwealth Constitution: Section 92 – Its History in the Federal Conventions' (1948–1950) 1 *University of Western Australia Annual Law Review* 97, 98.

> language was directed and the nature and objectives of the movement towards federation from which the compact of the *Constitution* finally emerged.[12]

By its own admission, therefore, the Court resolved to refer to the drafting history of s 92 for no other reason than to assist it to uncover the federal purpose of the section.[13]

> Section 92 requires that trade, commerce and intercourse between the States shall be 'absolutely free'. But it does not itself answer the question, 'Free from what?' … it surely makes more sense to give freedom only from burdens that are incompatible with the federal purposes of s 92.[14]

The rationale put forward by the Court was so sensible that much of the academic community welcomed it.[15]

The Court concluded that the drafting history of s 92 supported a free trade interpretation of the section. First, the Court considered community attitudes to the question of intercolonial free trade in the period prior to federation:

> As the 1891 *Report of the South Australian Royal Commission on Intercolonial Free Trade shows*…, 'intercolonial free trade, on the basis of a uniform tariff', was a commonly accepted ideal. Subsequently, the first report of a Victorian Board of Inquiry in 1894 expressed the belief 'that the people of Victoria are practically unanimously in favour of free-trade between the colonies' … Notwithstanding this popular support, concrete proposals for the implementation of free trade between the separate Australian colonies languished outside the growing movement towards federation.[16]

Secondly, the Court examined the movement towards federation in that period:

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

[13] A year later, the Court formulated its criterion of inquiry into the convention debates in constitutional cases generally – that is, cases outside the ambit of s 92. Thus, in *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1990) 168 CLR 340, 376, the Court declared that '[i]t is legitimate to have regard to the Convention Debates for the purpose of identifying the subject to which a provision of the Constitution was addressed.' However, only a year after this decision, Deane J expressed his disapproval of the increasing tendency of his peers to refer to the convention debates for guidance. In *New South Wales v Commonwealth* (1990) 169 CLR 482, 511, his Honour said that 'it is not permissible to constrict the effect of the words which were adopted by the people as the compact of a nation by reference to the intentions or understanding of those who participated in or observed the Convention Debates'.

[14] D Rose, 'Federal Principles for the Interpretation of Section 92 of the Constitution' (1972) 46 *Australian Law Journal* 371, 374.

[15] For a critique of *Cole v Whitfield*, see G Villalta Puig, *The High Court of Australia and Section 92 of the Australian Constitution*, above n 2.

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

> In that [federation] movement, the problem of intercolonial free trade … was, from the outset, a central question and problem: the 'lion in the path', as Mr James Service (a former Premier of Victoria) described it in 1890, which federalists must either slay or be slain by … s 92 [was] the provision which was to slay the lion …[17]

With the benefit of those two enquiries into pre-federation history, the Court researched the convention debates and the various drafts of s 92:

> That history [of the convention debates] demonstrates that the principal goals of the movement towards the federation of the Australian colonies included the elimination of intercolonial border duties and discriminatory burdens and preferences in intercolonial trade and the achievement of intercolonial free trade. As we have seen, apart from ss 99 and 102, that goal was enshrined in the various draft clauses which preceded s 92 and ultimately in the section itself.[18]

From its historical investigations, the Court concluded that a free trade interpretation of s 92 was legitimate:

> The purpose of the section is clear enough: to create a free trade area throughout the Commonwealth and to deny to Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries.[19]

Thus, on the scope and effect of 'free trade', the Court said:

> The expression 'free trade' commonly signified in the nineteenth century, as it does today, an absence of protectionism, ie, the protection of domestic industries against foreign competition. Such protection may be achieved by a variety of different measures — eg, tariffs that increase the price of foreign goods, non-tariff barriers such as quotas on imports, differential railway rates, subsidies on goods produced and discriminatory burdens on dealings with imports — which, alone or in combination, make importing and dealings with imports difficult or impossible.[20]

For the Court, s 92 is 'an intended guarantee of freedom from discriminatory protectionism'.[21] The *Cole v Whitfield* test of invalidity under s 92, therefore, imposes a ban on discriminatory burdens of the protectionist kind.[22] For a law or measure to contravene s 92, it must impose a burden on interstate (as distinct from intrastate) trade *and* such a

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[17] Ibid 386–387.
[18] Ibid 392.
[19] Ibid 391. The Court stated at 407, 'Departing now from the [individual rights] doctrine which has failed to retain general acceptance, we adopt the [free trade] interpretation which, as we have shown, is favoured by history and context.'
[20] Ibid 392–393.
[21] Ibid 317.
[22] See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 467 (Mason CJ, Brennan, Deane, Dawson, and Toohey JJ) and *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 452 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan, and Kiefel JJ).

burden must be discriminatory in a protectionist sense.[23] In other words, a burden is discriminatory in a protectionist sense if it confers a comparative competitive advantage on intrastate traders over interstate traders, or removes a comparative competitive disadvantage from intrastate traders in respect of either similar goods or similar consumers.[24] In summary, no law or measure will fail the *Cole v Whitfield* test of invalidity under s 92 as long as the relevant law or measure is neither discriminatory in a *protectionist* sense nor *protectionist* in a discriminatory sense.

The Court justified the historical legitimacy of discriminatory protectionism as the only possible true test for s 92. It claimed:

> The history of s 92 points to the elimination of protection as the object of s 92 in its application to trade and commerce. The means by which that object is achieved is the prohibition of measures which burden interstate trade and commerce and which also have the effect of conferring protection on intrastate trade and commerce of the same kind. The general hallmark of measures which contravene s 92 in this way is their effect as discriminatory against interstate trade and commerce in that protectionist sense.[25]

The fact that the Court studied the drafting history of s 92 is not the problem. Nor is the fact that the Court identified the federal purpose of s 92 from its drafting history. The problem is that the test of invalidity that the Court developed in *Cole v Whitfield*, and later refined in *Castlemaine Tooheys Ltd v South Australia* and re-stated in *Betfair Pty Ltd v Western Australia*, relates to the narrower anti-protectionist application of the free trade theory of interpretation. It does not relate to the broader common market application that enshrines the federal purpose of s 92.

In *Cole v Whitfield*, the Court studied the convention debates and concluded that 'the principal goals of the movement towards the federation of the Australian colonies included … the achievement of intercolonial free trade'[26] and that '[t]he purpose of the section is clear enough: to create a free trade area throughout the Commonwealth.'[27] The Court was here thinking of a common market – that is, a trade area free from discrimination of any kind. After all, discrimination, according to the joint judgment, is the natural enemy of free trade.[28] The Court was

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[23] See J G Starke, 'The *Cole v Whitfield* Test for Section 92 Explained and Applied: The Demise of the Theory of 'Individual Rights'' (1991) 65 *Australian Law Journal* 123.
[24] T Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 1225.
[25] *Cole v Whitfield* (1988) 165 CLR 360, 394.
[26] Ibid 392.
[27] Ibid 391.
[28] Ibid 391.

indeed thinking of a common market as the federal purpose of s 92, but failed to articulate its thoughts into the test of invalidity that it eventually developed.

Perhaps understandably, the dogmatic slogans, which the framers repeatedly expressed in their campaign for free trade, concerned as they were to silence their protectionist opposition, weighed more heavily on the Court than the vision of a common market free from discrimination which the framers saw in s 92. Hence, the Court formulated a test seeking to balance discrimination and protectionism.[29] The Court opted for a compromise that it thought to be in agreement with the free trade doctrine of the framers. This test, their Honours declared, was historically legitimate.

While clearly hinting at the federal purpose of s 92 as a ban on discrimination against interstate trade and commerce, the Court did not appreciate that a common market is more than a trade area free of discriminatory protectionism. Rather, it is a trade area free from discrimination of any kind. A common market cannot fully develop its economic potential amidst the persistence of discriminatory practices hampering the course of interstate trade and commerce. Once created, a common market has to be freed from the confines of discrimination, irrespective of purpose or effect – protectionist or otherwise. Discriminatory protectionism mistakes the federal purpose of s 92 as the achievement of free trade generally. By limiting the prohibition on discrimination to instances of protectionism, the test does not project the common market vision of free trade, which the framers saw in s 92. For that reason, it is argued that the test of invalidity formulated by the Court as the new law on s 92 is historically illegitimate as it fails to articulate the federal purpose of s 92. It is argued, therefore, that the Court made a mistake in its inquiry into the convention debates and, more generally, the drafting history of s 92.

The *Cole v Whitfield* test of invalidity under s 92, then, distorts the vision that the framers had of Australia as a national market for local produce. An anti-protectionist norm compromises the common market because it permits laws and measures *that discriminate* against interstate trade *if they are not protectionist*, that is, laws and measures that may not necessarily advantage local traders but that, nonetheless, unreasonably close off or restrict their 'part of the national market to trade from other States'.[30]

Discriminatory protectionism risks the partial closure of the market:

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[29] Ibid 392–393.

[30] Ibid. See also C Staker, 'Free Movement of Goods in the EEC and Australia: A Comparative Study' (1990) 10 *Yearbook of European Law* 209, 235.

> Suppose, for instance, that State X adopts a law of general application which has the practical effect of halving the imports into that State of a particular product from other States. The impact of the law on the economies of the other States, and on the national economy as a whole, will be the same whether or not the law also has the effect of halving the sales of domestic producers of the same product, or whether or not the same product is manufactured in State X. In either case, the free flow of trade in the product between the other States and State X is unilaterally restricted by State X, to the detriment of the other States and the national economy as a whole.[31]

Another example of a non-protectionist but, nonetheless, discriminatory law would be 'a general law fixing the price of commodities which, in fact, are produced in only one other State, the price operating so as to destroy all trade in such commodities between the States.'[32] Under the *Cole v Whitfield* test of invalidity, if the law or measure in question is not protectionist, then the Court deems it to conform to s 92. According to this anti-protectionist interpretation of the section, traders in interstate imports have no other option than to take the local market as they find it irrespective of any unreasonably discriminatory burdens that they may face.[33]

Such a rationale offends the federal purpose of s 92. Quite simply, it does not make sense in the broader context of a common market. Discrimination may or may not be protectionist in kind. Regardless of kind, discrimination only pursues unequal access to and participation in both the common market and the free interstate movement of goods that the latter guarantees.

The Court confused the shadow of free trade hanging over the framers with their vision of a common market for the Commonwealth. The latter is the federal purpose of s 92. The former was nothing more than its inspiration. Accordingly, this article reprises the study of the convention debates undertaken by the Court in *Cole v Whitfield*. From their reassessment, the article argues that the federal purpose envisioned by the framers for s 92 was the creation and preservation of a common market.

II THE DRAFTING HISTORY OF SECTION 92

In *Cole v Whitfield*, and later in *Castlemaine Tooheys Ltd v South Australia*, the Court, in its attempt to solve the puzzle of s 92, set out to construe the federal purpose of s 92 from the drafting history of the

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[31] Staker, above n 30, 342–343.
[32] *R v Vizzard; Ex parte Hill* (1933) 50 CLR 30, 93 (Evatt J).
[33] D Rose, '*Cole v Whitfield*: "Absolutely Free" Trade?' in H P Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 335, 346.

section. The Court concluded that the federal purpose of s 92 was the achievement of intercolonial free trade. While the convention debates indicate that the inspiration for the federal purpose of s 92 was indeed the achievement of intercolonial free trade, the drafting history of the section demonstrates that the framers rather more precisely articulated the federal purpose as the creation and preservation of a common market.[34]

A *Australasian Federation Conference (February 1890, Melbourne)*

In February 1890, a year before the National Australasian Convention, Henry Parkes, then Premier of New South Wales, convened the Australasian Federation Conference in Melbourne. This was a preparatory meeting with leading federationists from the various colonies, including New Zealand. Earning his title as the 'Father of Federation', Parkes submitted a draft of the resolutions he believed delegates ought to put before the Convention. His first resolution, 'which by taking pride of place shows the importance which he attached to making Australia one 'free-trade' unit',[35] read:

> That the trade and intercourse between the Federated Colonies, whether by means of land carriage or coastal navigation, shall be free … from all restrictions whatsoever, except such regulations as may be necessary for the conduct of business.[36]

This resolution clearly projects the vision of a trade area free from all restrictions. As the earliest recorded expression of the federal purpose of s 92, this resolution is powerful evidence of the intention of the framers to create and preserve a common market. The evidence is even more powerful if one takes into consideration the fact that Parkes made it in the knowledge that, only a few years earlier, the Supreme Court of the United States of America had made an important ruling on the 'dormant' Commerce Clause in that country's constitution. The ruling was in terms of a common market (almost akin to those later employed by Parkes).

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[34] No discussion of the chronology of the drafting history of the Australian Constitution is complete without reference to J Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005).

[35] Beasley, 'The Commonwealth Constitution', above n 11, 98.

[36] H Parkes, *Fifty Years in the Making of Australian History* (Longmans and Green, 1892) vol 2, 359. The recognition that this resolution makes of the need for genuine regulation of intrastate and interstate trade and commerce contradicts the opinion of Sawer, who once observed that 'Parkes admired *laissez-faire* as much as he did free trade': G Sawer, 'Constitutional Law' in G W Paton (ed), *The Commonwealth of Australia: The Development of its Laws and Constitution* (Stevens, 1952) 76. However, the reality is that 'most of the Framers were also devotees of "free trade" in the more extensive sense of minimum regulation for commercial activities': M Coper, *Encounters with the Australian Constitution* (CCH, 1987) 273–274.

In *Guy v Baltimore*, Harland J of the Supreme Court questioned the validity of a Maryland law that charged wharfage fees on vessels laden with goods destined for States other than Maryland, and said that:

> Although denominated wharfage dues, cannot be regarded, in the sense of our former decisions, as compensation merely for the use of the city's property, but as a mere expedient or device to accomplish, by indirection, what the State could not accomplish by a direct tax, viz, build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States.[37]

Harland J continued:

> Municipal corporations, owning wharves upon the public navigable waters of the United States, and quasi public corporations transporting the products of the country, cannot be permitted by discriminations of that character to impede commercial intercourse and traffic among the several States and with foreign nations.[38]

In a statement analogous to the federal purpose of s 92, Harland J resolved:

> In view of these and other decisions of this Court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, 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.[39]

Years later, in *Brown v Houston*, the Supreme Court affirmed its decision in *Guy v Baltimore* and stated that '[n]o State has power to make any law or regulation which will affect the free and unrestricted intercourse and trade between the States.'[40]

Thus, inspired by *Guy v Baltimore*,[41] Parkes stated on 10 February 1890 at the Australasian Federation Conference:

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[37] 100 US 434 (1879), 443.
[38] Ibid.
[39] Ibid.
[40] 114 US 622 (1885), 630. See also H Heuzenroeder, 'Section 92: The Constitutional Project to Build a Federation (Part I)' (2001) 23(1) *Law Society of South Australia Bulletin* 29, 30.
[41] Since *Cole v Whitfield*, the Court has consistently relied on the pre-1900 Commerce Clause authorities: *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 and *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418. Note, however, that the modern interpretation of the Commerce Clause by the Supreme Court of the United States approximates the *Cole v Whitfield* test: *Minnesota v Clover Leaf Creamery Co* 449 US 456 (1981); *Maine v Taylor* 477 US 131 (1986). This subsequent development in the United States confirms that the attempt by the Court to deduce an originalist interpretation to s 92 from its drafting history failed: the Mason Court did not translate the federal purpose of s

> The case seems to set 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 custom 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 this doctrine of the great republic, a doctrine supported in the most convincing manner by the case to which I have alluded.[42]

B *National Australasian Convention (March – April 1891, Sydney)*

The National Australasian Convention eventually met in Sydney in March, 1891. As the President of the Convention 'at liberty to take part in [the] debates and … free to vote',[43] Parkes moved 'four fundamental resolutions … as a basis on which the drafting of a Constitution could be begun'.[44]

The second resolution dealt with trade and intercourse. It read '[t]hat the trade and intercourse between the federated colonies, whether by means of land carriage or coastal navigation, shall be absolutely free.' Interestingly, Parkes had deleted the words 'from all restrictions whatsoever'[45] from the draft that he had submitted to delegates in the Australasian Federation Conference. The omission of the words reveals that Parkes 'was now thinking of an even wider freedom' – that is, an even stronger common market.[46]

Clearly, in 1891, the phrase 'absolutely free' was absolutely free of criticism.[47] That is, in the days of the convention debates, free trade 'had

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92, identifiable from the convention debates, into a consistent test of invalidity. See further D T Coenen, *Constitutional Law: The Commerce Clause* (Foundation Press, 2004) and B I Bittker and B P Benning, *Bittker on the Regulation of Interstate Commerce and Foreign Commerce* (Wolters Kluwer Law and Business,1999).

[42] *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 10 February 1890, 46 (Henry Parkes).

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

[44] K H Bailey, 'Fifty Years of the Australian Constitution' (1951) 25 *Australian Law Journal* 314, 328.

[45] Parkes, above n 36, 367.

[46] Contrast Beasley, 'The Commonwealth Constitution', above n 11, 99.

[47] J A La Nauze, 'A Little Bit of Lawyers' Language: The History of "Absolutely Free" 1890–1900' in A W Martin (ed), *Essays in Australian Federation* (Melbourne University Press, 1969) 70.

clear and usually uncomplicated motivations'.[48] Importantly, speaking to his second resolution, Parkes declared:

> I seek to define what seems to me an absolutely necessary condition of anything like perfect federation, that is, that Australia, as Australia, shall be free – free on the borders, free everywhere – in its trade and intercourse between its own people; that there shall be no impediment of any kind – that there shall be no barrier of any kind between one section of the Australian people and another; but, that the trade and the general communication of these people shall flow on from one end of the continent to the other, with no one to stay in its progress or to call it to account … It is, indeed, quite apparent that time, and thought, and philosophy, and the knowledge of what other nations have done, have settled this question in that great country to which we must constantly look, the United States of America. The United States of America have a territory considerably larger than all Australasia – considerably larger, not immensely larger … There is absolute freedom of trade throughout the extent of the American union … Now, our country is fashioned by nature in a remarkable manner – in a manner which distinguishes it from all other countries in the wide world for unification of family life – if I may use that term in a national sense. We are separated from the rest of the world by many leagues of sea – from all the old countries, and from the greatest of the new countries; but we are separated from all countries by a wide expanse of sea, which leaves us with an immense territory, a fruitful territory – a territory capable of sustaining its countless millions – leaves us compact with ourselves. So that if a perfectly free people can arise anywhere, it surely may arise in this favoured land of Australia. And with the example to which I have alluded, of the free intercourse of America … I do not see how any of us can hesitate in seeking to find here absolute freedom of intercourse among us.[49]

Parkes intended these words as 'a declaration of policy to guide the draftsmen'[50] but, '[a]s a political generalisation it was admirable, and it crystallised sentiment in a memorable phrase'.[51]

In this regard, Parkes intended the second resolution to convey a 'principal object of federation … the establishment of intercolonial free trade'.[52] The vision of a common market had thus been set in the minds of all those present at the Convention. Not surprisingly, the Drafting Committee incorporated the text of the second resolution moved by

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[48] G Sawer, 'The Record of Judicial Review' in G Sawer (ed), *Federalism: An Australian Jubilee Study* (FW Chesire, 1952) 228.
[49] *Official Report of the National Australasian Convention Debates*, Sydney, 2 March 1891–9 April 1891, 24–25 (Henry Parkes, President). See also La Nauze, above n 47, 70.
[50] Sawer, 'Constitutional Law', above n 36, 71.
[51] Bailey, above n 44, 328.
[52] La Nauze, above n 47, 37.

Parkes, with slight changes in wording, in cl 8 of Ch IV (Finance and Trade) of the draft *Constitution*. The clause read:

> So soon as the Parliament of the Commonwealth has imposed uniform duties of customs, trade and intercourse throughout the Commonwealth, whether by means of internal carriage or ocean navigation, shall be absolutely free.

Representing Queensland, Samuel Griffith who, years afterwards, would oppose the phrasing, here agreed to it. In the words of William Holman: '[o]f this Committee Sir Samuel Griffith was the leading member, and, without attributing to him its authorship, there is evidence that it then had his full approval'.[53] Again, this is further powerful evidence of the strength of the consensus among delegates on the question of free trade.

The clause, as so drafted, came before the Convention, which approved it by a very large majority. However, the colonial legislatures did not pass the 1891 Bill. Indeed, it was not until six years later that a second federal convention was summoned when, in early 1897, *Enabling Acts* were passed in each participating colony for the election of delegates to the Australasian Federal Convention.

Nonetheless, the vision of a common market had been vividly conjured by Parkes and his supporters. Every delegate was aware that, 'difficult as it might be for their existing systems of free trade or protection, a constitution must somehow impose intercolonial free trade, even if transitional arrangements might be necessary'.[54] For example, in the interval, Griffith, as President of the University Extension Council in Queensland, delivered an address in June 1896 on 'Some Conditions of Australian Federation'. He said that 'at a shorter or longer period after the establishment of a Federal Government – and the shorter the better – trade and intercourse throughout the Federation, whether by land or water will be absolutely free'.[55]

This vision of a common market for the Australian colonies was so clear that it could even be seen from the imperial metropolis. Robert Palgrave, a sometime editor of *The Economist*, had followed the proceedings and debates of the inaugural constitutional convention with interest. Published in London in 1896, his *Dictionary of Political Economy* cited the Australian movement towards federation in support of his claim that the idea of one market is inseparable from the idea of one polity:

> All known precedents lead us to associate the idea of commercial federation with that of political federation. In the existing federal systems

[53] W A Holman, 'Section 92: Should it Be Retained?' (1933 – 1934) 7 *Australian Law Journal* 140, 142.
[54] La Nauze, above n 47, 21.
[55] Ibid 74–75: Thus, 'the one absolutely constant element remained absolutely constant'.

> with which we are familiar, such as those of the United States, Germany, Switzerland, Austria-Hungary, and Canada, freedom of internal trade has been the result, even where it has not been the fundamental condition, of political unity. In the system which has been proposed for the Australasian colonies one of the chief objects aimed at is the same freedom of internal trade. Free commercial intercourse, indeed, seems one of the most distinctive marks of national unity. It appeals directly to the masses, and gives at once a sense of mutual interest and mutual benefit.[56]

C *Australasian Federal Convention*

1 *First Session (March – May 1897, Adelaide)*

The Australasian Federal Convention of 1897 and 1898 was the next constitutional convention assembled. It first met at Adelaide from March to May 1897. Popularly elected, the delegates nominated Charles Kingston, then Premier of South Australia, as the President of the Convention.

Succeeding Parkes in his role as agitator for the cause of federation, Edmund Barton, of New South Wales, moved a series of resolutions encapsulating the principal conditions of federation, including the creation and preservation of a common market. His fifth condition was that 'the trade and intercourse between the Federated Colonies, whether by land or sea, shall become and remain absolutely free'.[57] Of this and his other resolutions, Barton remarked that 'they correspond very largely in the main with the proposals of Parkes at the Convention in 1891. They have been altered only in the direction of brevity and simplicity'.[58]

This remark was particularly true of the 'absolutely free' clause. Albeit renumbered as cl 86, the Drafting Committee phrased the clause in the same words used in the 1891 Bill. This drafting was not without debate. Representing Victoria, Isaacs complained that 'the words are very wide indeed' but, even then, emphasised his wish for a common market: 'We

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[56] R Palgrave (ed), *Dictionary of Political Economy* (Macmillan, 1912) Vol 2, 45–46. The Court quoted this extract with approval in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 455. On *Betfair Pty Ltd v Western Australia*, see A Simpson, '*Betfair Pty Ltd v Western Australia*' (2008) 19 *Public Law Review* 191; E Ball, 'Section 92 and the Regulation of E-Commerce: A Casenote on *Betfair Pty Ltd v Western Australia*' (2008) 36 *Federal Law Review* 265; B Brown, 'Bet Fair and Bet Far: A New Frontier in Freedom of Interstate Trade and Commerce' (2008) 82 *Law Institute Journal* 36; A Buckland and S Thornton, 'Freedom of Interstate Betting' (2008) 16 *Litigation Notes* 13; G Wright, 'Recent Developments: *Betfair Limited v Western Australia*' (2008) 82 *Australian Law Journal Reports* 600; Georgina Wright, 'Betfair Pty Ltd v Western Australia' (2008) 82 ALJR 600; [2008] HCA 11' (2008) *Bar News: Journal of the NSW Bar Association* 12; W Pengilley, 'Constitutional Freedom of Trade and Competition Principles' (2008) 24 *Australian and New Zealand Trade Practices Law Bulletin* 25.

[57] *Official Record of the Debates of the Australasian Federal Convention*, First Session, Adelaide, 22 March 1897–5 May 1897, 20–21 (Edmund Barton, Leader).

[58] Ibid.

certainly want to secure inter-colonial free-trade … [W]e shall have nothing that bars freedom of entry into any State of goods from any other State.'[59] To dispel any doubts about the resolute common market intention of the framers, Richard O'Connor, of New South Wales, said:

> What we intend in making this declaration of freedom of trade throughout the Commonwealth is that inasmuch as every part of the Commonwealth is open to the trade of every member of the Commonwealth, that every member of the Commonwealth shall be absolutely free from trade restrictions of any kind [protectionist or not].[60]

2 *Second Session (September 1897, Sydney)*

No amendment was made to the wording of the clause but, by the opening of the second session in Sydney in September 1897, its number had been changed from 86 to 89. The renumbered clause continued to attract criticism. O'Connor, who had earlier defended the common market purpose of s 92, stated:

> I have always thought that the words in that clause are very much too general. It was pointed out in Adelaide, and having thought the matter over since, I have come round to the view, that we should state our meaning there more definitely.[61]

John Cockburn, of South Australia, also attacked the clause but, in doing so, revealed its intended purpose – namely, the creation and preservation of a common market:

> [A]ny law made by a State … which may have the effect of derogating from the freedom of trade or commerce will be absolutely null and void. A law prohibiting the passing of cattle over the border of Queensland into New South Wales will, to a great extent, interfere with freedom of trade. A law prohibiting the introduction of vines into South Australia, where we have no phylloxera, and where we mean to keep free from that scourge, would be interfering undoubtedly with freedom of commerce.[62]

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[59] *Official Record of the Debates of the Australasian Federal Convention*, First Session, Adelaide, 22 March 1897–5 May 1897, 1142–1144 (Isaac Isaacs, Delegate).

[60] *Official Record of the Debates of the Australasian Federal Convention*, First Session, Adelaide, 22 March 1897–5 May 1897, 1144 (Richard O'Connor, Delegate).

[61] *Official Record of the Debates of the Australasian Federal Convention*, Second Session, Sydney, 2 September 1897–24 September 1897, 1041 (Richard O'Connor, Delegate).

[62] *Official Record of the Debates of the Australasian Federal Convention*, Second Session, Sydney, 2 September 1897–24 September 1897, 1059 (John Cockburn, Delegate). Interestingly, despite the concern of John Cockburn with the spread of phylloxera into the vineyards of South Australia, the framers were able to reconcile s 92 with s 51(ix) of the *Australian Constitution*, which gives the Parliament of Australia the power to 'make laws for the peace, order and good government of the Commonwealth with respect to quarantine.'

3 *Third Session (January – March 1898, Melbourne)*

The Australasian Federal Convention summoned its third session in Melbourne from January to March 1898. Isaacs, again, and now also Griffith, disagreed with the wording of cl 89. Nevertheless, their vision was still that of a common market. Thus, Isaacs declared: 'What we want to do is to establish free-trade between the different parts of the Commonwealth … We want to get interstate freedom of trade'.[63] Even a critic of the wording of the clause as outspoken as Isaacs could see the vision of a common market reflected in cl 89, commenting that 'the meaning of it is that the passing commerce of a State shall be absolutely free'.[64] John Quick, of Victoria, shared the same vision: '[w]hat [we] want to secure is free passage across the frontier … freedom from all preferences or obstructions'[65] – that is, freedom from discrimination and discrimination only.

While in agreement that the federal purpose of cl 89 was to create and preserve a common market, Isaacs and a few other delegates believed that the wording of the clause was ambiguous and general. However, this group of delegates was very much in the minority. Thus, for example, representing South Australia, John Downer called on the Convention not to amend the clause 'because it contains a cardinal principle of our Commonwealth of absolute free-trade within its borders … I think the fears of Mr Isaacs in the particulars he mentioned are not well founded'.[66] After much heated debate, the Convention rejected Isaacs' proposed amendment by 20 votes to 10. George Reid, then Premier of New South Wales, voiced the collective mood when, to the critics who complained that the words 'absolutely free' were 'infinite in their application',[67] he retorted:

> This clause touches the vital point for which we are federating, and although the words of the clause are certainly not the words that you meet with in Acts of Parliament as a general rule, they have this recommendation, that they strike exactly the notes which we want to strike in this Constitution. And they also have the further recommendation that no legal technicalities can be built up upon them in order to restrict

[63] *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January 1898–17 March 1898, Vol 1, 1015 (Isaac Isaacs, Delegate).
[64] La Nauze, above n 47, 82.
[65] *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January 1898–17 March 1898, Vol 2, 1017 (John Quick, Delegate).
[66] *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January 1898–17 March 1898, Vol 2, 1018 (John Downer, Delegate).
[67] *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January 1898–17 March 1898, Vol 2, 1020 (John Cockburn, Delegate).

> their operation. It is a little bit of laymen's language which comes in here very well.[68]

Disgruntled, Isaacs now departed from his original line of argument and raised scattered objections to the 'absolutely free' clause. This move only served to further unify the majority, who opposed any amendment to the wording of a clause already understood to be the perfect projection of the vision of a common market. Speaking for the majority, Barton said:

> I cannot see any particular difficulty about this matter, except so far as intercolonial free-trade may be an irritating thing. I cannot apprehend the difficulty that my honourable and learned friend seems to be suffering under. The clause provides that – So soon as uniform duties of customs have been imposed, trade and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. Do we mean that, or do we not? Do we mean that trade and intercourse is to be absolutely free, or is it to be left free *sub modo*? … I cannot understand why, at every stage, we should be told that intercolonial free-trade is a good thing so long as you let us do this, that, or the other. Is intercolonial free-trade a good, or is it a bad thing? Is it a bad thing unless you have as many obstacles in its way as you have fingers and toes? … [U]nless you have free-trade throughout the Commonwealth the Federation will not be worth a snap of the fingers.[69]

'No one objects to that', Isaacs interjected.[70] Barton replied:

> No one objects to my statement of that principle, but when it is laid down in so many words in the Constitution, it seems to cause a shrinking of the sensitive plant within honourable members. I do not know why intercolonial free-trade, if it is essential to federation, should be objected to when it is provided for in the Constitution in so many words. Why should we have all these qualifications? … [W]e have made it clear that the Commonwealth may prohibit any discrimination or preference such as would be unfair or unreasonable to any state … If these provisions have been inserted in the Constitution for the benefit of certain gentlemen, or,

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[68] *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January 1898–17 March 1898, Vol 2, 2367 (George Reid, Delegate). According to Frank Beasley, 'Sir George Reid allowed the politician to predominate over the lawyer; because he as a lawyer must have known that it is highly dangerous, if not without profit to some of us, to allow laymen's language, even a little bit of it, to find its way into a legal document': F R Beasley, 'Comment on K Bailey, "Fifty Years of the Australian Constitution"' (1951) 25 *Australian Law Journal* 314, 340. Interestingly, Barton responded to Reid by declaring: 'It is the language of three lawyers': *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January 1898–17 March 1898, Vol 2, 2367 (Edmund Barton, Leader). See also S Encel, 'The Constitution as a Social Document' in S Encel, D Horne and E Thompson (eds), *Change the Rules! Towards a Democratic Constitution* (Penguin, 1977) 48.

[69] *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January 1898–17 March 1898, Vol 2, 2369–2371 (Edmund Barton, Leader).

[70] *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January 1898–17 March 1898, Vol 2, 2369–2371 (Isaac Isaacs, Delegate).

> any rate, at their instance, and if they say that they want otherwise to derogate from free-trade, are we not entitled to press the argument that this would not be a Federal Constitution if we acceded to their request? I am unable to see why principles of this kind which have been inserted in the Constitution, should be waived or whittled away, or why they should be made subject to any qualification or restriction.[71]

Isaacs sought to defend himself from what he perceived was an affront to his belief in the 'cardinal principle' of absolute free trade:

> I do not think I said a single word which justified the assertion that I quarrelled with the doctrine of intercolonial free-trade. Anything I said on that subject, I think must have assured the Convention, at least those who listened to me, that my opinion was directly the opposite. If it was not for the belief that we should get intercolonial free-trade we should not be here today trying to form a Constitution. I do not think there is anyone more loyal to the principle than I am.[72]

In trying to negotiate a compromise, Alfred Deakin, of Victoria, reiterated the federal purpose of the clause when he said: 'So far as they imply the removal of everything in the nature of an obstruction placed in the way of intercolonial trade by any state they have our hearty approval.'[73] Rallying support for the majority, Barton dismissed Deakin in a rather colourful way: 'I think somebody has got hold of a bogy here tonight.'[74]

Finally, the Convention passed the 'absolutely free' clause without amendment with the conviction that it projected the vision of a common market first pictured by Parkes in 1890. In the words of one academic commentator, 'the Convention's judgement was that the phrase must stay in the *Constitution'* because '[i]t expressed so well what the colonies were federating for' – the creation and preservation of a common market.[75] In the end, the 'absolutely free' clause took the form of cl 92 of the Bill drafted at the Melbourne session. It read as s 92 of the *Constitution* reads today (emphasis added):

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[71] *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January 1898–17 March 1898, Vol 2, 2369–2371 (Edmund Barton, Leader). See also La Nauze, above n 47, 92.

[72] *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January 1898–17 March 1898, Vol 2, 2369–2371 (Isaac Isaacs, Delegate). In the end, as a justice of the Court, Isaacs 'was always happy to adopt theories which would strengthen Commonwealth power': Sawer, 'The Record of Judicial Review', above n 48, 229. In *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, for example, Isaacs J, as a member of the majority, held that the acts and transactions of which interstate trade and commerce consist must be left *absolutely free*.

[73] *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January 1898–17 March 1898, 2373 (Alfred Deakin, Delegate).

[74] Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 20 January 1898–17 March 1898, 2374 (Edmund Barton, Leader).

[75] Bailey, above n 44, 329.

> On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be *absolutely free*.

D *Commonwealth of Australia Constitution Act 1900* (Imp)

Section 92 was born.[76] It survived unscathed until the *Commonwealth of Australia Constitution Act* received Royal Assent by Queen Victoria on 9 July 1900.[77] The Commonwealth federated on 1 January 1901. In this way, '[t]he Australian Commonwealth, therefore, set forth upon its national career with a constitution which in words, forbade any interference with interstate trade or even of "intercourse".'[78] Undeniably, from the perspective of the supporters of federation, 'the adoption of s 92 was a wise and statesmanlike step'.[79] The future of s 92 now lay with the Court: 'The lawyers who had nourished it and defended it were now absolutely free to say what it meant.'[80]

III CONCLUSION

This chronological review of the convention debates reveals that free trade was the intention of the framers, in the sense that they intended the federal purpose of s 92 to be the creation and preservation of a common market free from discrimination of any kind against interstate trade and commerce. On that premise, it is suggested that the Court should be careful not to confuse the federal purpose of s 92 with the test of invalidity for s 92.

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[76] Many years later, with the benefit of hindsight, Paddy McGuinness, the always-sceptical journalist from the National Times, once bemusedly asked: '[I]f section 92 of the Constitution is so fundamental, why was it not section 1 … ?': P P McGuinness, 'The High Court Reviewed', *National Times* (Sydney), 7 October 1978, 56. The answer to the question that McGuinness asked in the National Times is that 'the placement of s 92 … in the finance and trade part of the *Constitution* is hardly, given the immediate concerns and interests of the founding fathers, an indication of lack of importance': M J Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (Lawbook, 1985) 41. Clearly, as shown, Ch IV is exactly where Parkes would have placed the section but this fact does not limit his appreciation of its importance as a bulwark of federation. Moreover, before s 92 could have any effect, the *Constitution* had first to establish a Parliament (Chapter I), allocate legislative powers to it, including the trade and commerce power in s 51(i) (Part V), establish the executive government (Chapter II) that would execute those powers, and the judicature (Chapter III) that would enforce them, that is, it had to create the institutions through which the powers would be exercised and restrained, before any provision for restraint or limitation (such as s 92) on the exercise of these powers would make any sense.

[77] La Nauze, above n 47, 93.

[78] Holman, above n 53, 143.

[79] Holman, above n 53, 144.

[80] La Nauze, above n 47, 93. In this regard, Lord Wright of the Privy Council once asked himself whether the confusion engulfing s 92 'was not the fault of the lawyers … and not of the language itself': Lord Wright, 'Section 92 – A Problem Piece' (1954) 1 *Sydney Law Review* 145, 146.

Arguably, the test should articulate the federal purpose, not the other way around. Nor should the test embody the purpose – that is, purpose and test can be distinguishable and are, in fact, distinct. Indeed, the federal purpose of s 92, as the creation and preservation of a common market, has remained unchanged for over a century. In other words, the intention of the framers to create and preserve a common market has remained a constant aspiration of the movement towards federation from the time of the convention debates. In contrast, the academic and, particularly, judicial interpretation of that intention has fluctuated from laissez-faire and individual rights to free trade. Discriminatory protectionism is the current fad. There have been others in the past. Depending on the interpretation of the Court in *Betfair Pty Ltd v Racing New South Wales* and in *Sportsbet Pty Ltd v New South Wales*, there may be others in the future.

In conclusion, a chronological review of the convention debates reveals that free trade was the intention of the framers. In other words, the framers intended the federal purpose of s 92 to be the creation and preservation of a common market free from discrimination of any kind against interstate trade and commerce. The test of discriminatory protectionism is ahistorical because it incorporates protectionism as the primary criterion of invalidity. That is, an anti-protectionist norm compromises the common market because it risks validating laws and measures which discriminate against interstate trade and commerce if they are not protectionist.