

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

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Facts

- South Australia implemented a recycling scheme for bottles. The State Government passed the *Beverage Container Act 1975 (SA)* (**the Act**) which required a mandatory deposit of 5 cents per bottle.
- This would be refunded when they were returned; refillable bottles were exempt from this deposit.
- A later amendment to the Act subjected non-refillable bottles to a refund of 15 cents and refillable bottles to a refund of 4 cents.
- The refund for non-refillable bottles was to be implemented by retailers, instead of at a collection depot.
- Tooheys Brewery (**Tooheys**) used non-refillable bottles. The Act's amendment of higher deposit and refund mechanism made Tooheys' beer uncompetitive.
- Tooheys sought a declaration that the Act was invalid by being contrary to section 92 of the Constitution.
- Section 92 states that "...trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

Issues

- Did the Act contravene section 92 of the Constitution?

Held

- The High Court unanimously held that the Act was contrary to section 92.
- A law that imposes a prohibition or requirement on both interstate and intrastate trade, or upon a particular interstate trader, is not necessarily protectionist.
- If the law is designed to secure a legitimate object and a non-discriminatory method to do so exists, then it may suggest that the object of the Act is actually to discriminate.
- The burden upon interstate trade and commerce is legitimate provided that it is incidental to securing the legitimate object, or if such regulation may be necessary or appropriate and adapted for the protection or enhancement of the welfare of the community.
- The magnitude of the difference in refund between refillable and non-refillable bottles greatly exceeded the amount required to disadvantage the sale of beer in non-refillable bottles.

Test for Protectionism under Section 92

- The High Court formulated the above into a three part test to determine if a law is contrary to

section 92:

- is there a legitimate local interest in need of protection?
- are the measures necessary and appropriate, and adapted to protecting the local interest?
- is the impact on interstate trade and commerce incidental and not disproportionate to the achievement of the objective of protecting the public interest?
- This test was further developed in in *Betfair Pty Limited v Western Australia*.

Reasoning

- The magnitude of the difference in refund between refillable and non-refillable bottles greatly exceeded the amount required to disadvantage the sale of beer in non-refillable bottles.
- Alternative measures were also open to the State Government to solve the environmental issues and litter, rather than the implementation of a protectionist scheme.

Quotes

" ...whether a law is appropriate and adapted to an objective and whether any burden imposed on interstate trade is incidental and not disproportionate to the achievement of that objective, will often sufficiently reveal that the law is discriminatory in a protectionist sense. However, the essence of the legal notion of discrimination lies in the unequal treatment of equals, and, conversely, in the equal treatment of unequals. Thus, if there is no inequality or relevant difference between the subject matter of interstate trade and the subject matter of intrastate trade, a law which is appropriate and adapted to an objective and burdens interstate trade only incidentally and not disproportionately to that objective will, in our view, offend against s.92 if its practical effect is protectionist – particularly if there exist alternative means involving no or a lesser burden on interstate trade"

(Gaudron and McHugh JJ at page 480)

Full Text

The full text is available here:

<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1990/1.html>

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