

Cole v Whitfield (1988) 165 CLR 360

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Facts

- Mr David Whitfield was charged with the unlawful possession of undersized crayfish. While he lived in Tasmania, the crayfish had been purchased in South Australia and then shipped to Tasmania.
- In SA, the crayfish were of a legal size. However, they were not under Tasmanian laws.
- Mr Robert Cole, an inspector, charged Whitfield with breaching the *Sea Fisheries Regulations 1962* (Tas).
- Whitfield argued that section 92 of the Constitution protected his rights by enforcing a freedom of interstate trade.

Issues

- Did the *Sea Fisheries Regulations 1962* (Tas) infringe on the freedoms afforded to Whitfield under section 92 of the Constitution?

Held

- The Court held that "absolutely free" in Section 92 was not a guarantee of absolute freedom of restrictions.
- The Court concluded section 92's purpose was to create a free trade zone among the Australian states, and the words "absolutely free" referred to freedom in the economic sense.
- The object of section 92 in its application to trade and commerce is the elimination of protectionism.
- The means by which that is achieved is through 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 Court looked to the purpose of the Tasmanian regulations and found that their objectives were to encourage conservation. The laws applied to all crayfish and were not of a protectionist nature. Hence, the regulations were not in breach of Section 92.
- *Cole v Whitfield* was the first decision where the High Court consulted the Constitutional Convention debate transcripts.

Quotes

" The creation of a limitation where none was expressed and where no words of limitation were acceptable was a task which, having regard to the diverse and changing nature of inter-State trade, commerce and intercourse, was likely to produce a variety of propositions. And so it has. Sir Robert

Garran contemplated that a student of the first fifty years of case law on s.92 might understandably "close his notebook, sell his law books, and resolve to take up some easy study, like nuclear physics or higher mathematics." ... Some thirty years on, the student who is confronted with the heightened confusion arising from the additional case law ending with *Miller v. TCN Channel Nine* would be even more encouraged to despair of identifying the effect of the constitutional guarantee."

(Mason C.J, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ at page 392, remarking on the difficulty with which section 92 presented the Court in its interpretation)

Full Text

The full text is available here:

<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1988/18.html>

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