AN AUSTRALIAN TEST FOR ARTICLE 301 OF THE INDIAN CONSTITUTION

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I Introduction

Comparative studies[1] between Australia and India have a long tradition, given that the framers of the Constitution of India (1950) relied on the Australian constitutional model, particularly in relation to the principle of federalism. The Honourable Justice Michael Kirby AC CMG of the High Court of Australia has been an enthusiastic and learned contributor to this tradition in recent years.[2]

Indeed, several provisions of the Indian Constitution and Australian Constitution (1900) are very similar if not the same. Article 301 of the Indian Constitution is one example. It provides that 'trade, commerce and intercourse throughout the territory of India shall be free'.[3] In *Atiabari Tea Co Ltd v State of Assam & Others*, the Supreme Court of India interpreted Art 301 as giving rise to a freedom that is impaired only if the law under challenge *directly* and *immediately* restricts interstate

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1 For a recent reference on the methodology of comparative constitutional law, see Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law', (2005) 53 *American Journal of Comparative Law* 125.

2 Michael Kirby, 'A Neglected Transnational Legal Relationship: A Plan of Action for Australia' 1997 *Australian International Law Journal* 17.

3 Article 302 of the Constitution of India confers almost absolute power on the Union parliament to impose any restriction, even taxes, on the freedom of trade and commerce in the public interest. States can also impose any restriction subject to the requirement of reasonableness ad prior sanction of the Union government. However, the imposition of State taxes (discriminatory and compensatory alike) in violation of the freedom of trade and commerce is more problematic (see Art 304(a)).

trade and commerce, as distinct from regulating it.[4] Restrictions obstruct the freedom; regulations facilitate it.[5]

This test of invalidity is neither clear in meaning nor certain in operation.[6] It is neither clear nor certain because Art 301 and its interpretation by the Supreme Court are based on s 92 of the Australian Constitution and the series of wrongly decided cases predating the definitive decision of the High Court of Australia in *Cole v Whitfield*.[7]

During the first half of the twentieth century, Sir Owen Dixon led the High Court to develop the doctrine that, unless the law under challenge *directly* and *immediately* restricted an activity of interstate trade and commerce, s 92 would not be breached.[8] The Dixon doctrine set precedent in *Commonwealth v Bank of New South Wales*, best known as the *Bank Nationalisation* case.[9] Held in 1949, the decision continues to trouble the interpretation of Art 301 by the Supreme Court.[10]

The *Bank Nationalisation* case is now recognised by the High Court as having been wrongly decided.[11] This article deems regrettable what it considers to be a failure on the part of the Supreme Court to take notice

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4 *Atiabari Tea Co Ltd v State of Assam & Others* (1961) 1 SCR 809, 860 (Gajendragadkar J). See too *Automobile Transport (Rajasthan) Ltd v State of Rajasthan & Others* (1963) 1 SCR 491; *Andhra Sugars Ltd v State of AP* AIR 1968 SC 599; *State of Madras v Nataraja Mudaliar* AIR 1969 SC 147; *Video Electronics Pvt Ltd v State of Punjab* AIR 1990 SC 820; *Amrit Banaspati Co Ltd v Union of India* AIR 1995 SC 1340.

5 *Automobile Transport (Rajasthan) Ltd v State of Rajasthan & Others* (1963) 1 SCR 491, 549.

6 This was recognised of Art 301 in *Atiabari Tea Co Ltd v State of Assam & Others* (1961) 1 SCR 809, 852 and 868.

7 *Cole v Whitfield* (1988) 165 CLR 360. See too HR Khanna, *The Making of India's Constitution* (1981) and Durga Das Basu, *Comparative Federalism* (1987) 433, 438.

8 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29; *Commonwealth v Bank of New South Wales* [1950] AC 235; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55.

9 *Commonwealth v Bank of New South Wales* [1950] AC 235 ('*Bank Nationalisation*'). Please note that this case should not be confused with a case decided years later by the Supreme Court of India, which is known by the same abbreviated name (*Cooper v Union of India* AIR 1970 SC 564 ('*Bank Nationalisation*')) but which bears no relation to Art 301.

10 Basu, above n 7, 433.

11 *Cole v Whitfield* (1988) 165 CLR 360, 401-4.

of this re-interpretation. Further, this article argues, on doctrinal as opposed to political or socio-economic terms, that the Supreme Court would give clarity of meaning and certainty of operation to Art 301 if it were to apply the *Cole v Whitfield* test of invalidity for s 92 advanced by Mason CJ. On the application of that test, a law breaches s 92 only if it imposes a restriction on interstate trade and commerce and that restriction is *discriminatory in a protectionist sense*.[12]

II A Test for Article 301

A *Commonwealth v Bank of New South Wales*

Article 301 is based on s 92 of the Australian Constitution.[13] That section provides that 'trade, commerce, and intercourse among the States … shall be absolutely free'. Indeed, the very interpretation made by the Supreme Court of the freedom as being impaired only if the law under challenge *directly* and *immediately* restricts interstate trade and commerce is based on the Dixon doctrine of s 92.[14]

According to the Supreme Court:

> Restrictions, the freedom from which is guaranteed by Art 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. On the other hand, restrictions having impact which is indirect or remote on the free flow or movement of trade would be permissible within the purview of Art 301.[15]

Thus, the test of invalidity has been formulated in the following terms: 'Does the impugned restriction operate directly or immediately on trade and commerce?'[16]

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12 Ibid 394.

13 *Atiabari Tea Co Ltd v State of Assam & Others* (1961) 1 SCR 809. See too Basu, above n 7, 436. See generally HK Saharay, *The Constitution of India: An Analytical Approach* (3rd ed, 2002).

14 Ibid; *GK Krishnan v State of Tamil Nadu and Another* (1975) 2 SCR 715. See too Basu, above n 7, 438.

15 Jaswant Singh, Deepak Arora and Vinay Kumar Gupta, *The Constitution of India* (1999) vol 3, LVII.

16 Ibid 838. See too *Prag Ice and Oil Mills v Union of India* (1978) 3 SCR 293.

Despite the application of this test, Art 301 has been described as 'very wide and in a sense vague and indefinite'[17] and as 'a constitutional provision which is none too clear or lucid'.[18] Equally unclear and uncertain was the test of invalidity formulated by the High Court from its Dixonian interpretation of s 92.[19] In the *Bank Nationalisation* case,[20] the High Court held that s 92 would be breached only where the law under challenge restricted trade and commerce *directly* and *immediately*. Where the restriction was indirect or remote, the freedom provided by s 92 would not be impaired. Thus, the test of invalidity was formulated in the following terms: Does the law under challenge directly and immediately, as opposed to incidentally, restrict the trade and commerce in which the individual was engaged? This test was confirmed by the Privy Council:

> s 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote.[21]

B *Cole v Whitfield*

Forty years later, in *Cole v Whitfield*, the High Court clarified and settled the obscure meaning and uncertain operation of s 92 and, in so doing, rejected the Dixon doctrine. In *Cole v Whitfield*, the High Court deduced that discriminatory protectionism was the plague that the founders sought s 92 to eradicate from intercolonial trade and commerce. It was able to make this deduction from its foray into the drafting history of s 92.

Until this case, recourse to history had not been an avenue of judicial inquiry open to the High Court. In fact, until then, the High Court had been notorious for its persistent refusal to allow reference to

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17 *Atiabari Tea Co Ltd v State of Assam & Others* (1961) 1 SCR 809, 852.

18 Ibid 868.

19 I Temby, '"In this Labyrinth There is No Golden Thread": Section 92 and the Impressionistic Approach' (1984) 58 *Australian Law Journal* 86. See too Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006).

20 *Commonwealth v Bank of New South Wales* [1950] AC 235.

21 Ibid 310 (Lord Porter).

constitutional *travaux préparatoires* such as the convention debates.[22] 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'.[23]

By 1988, the High Court felt that, over the decades, this very refusal had forced it to give a scope and effect to s 92 that was never in the minds of the founders. Hence, almost like 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 founders.[24] Nonetheless, the High 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 [back then, there were no founding mothers] subjectively intended the section to have, but *for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation* from which the compact of the Constitution finally emerged.[25]

By its own admission, therefore, the High 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 s 92.[26] The rationale put forward by the High Court

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

23 *Attorney General (Vic); ex rel Black v Commonwealth* (1981) 146 CLR 559, 557 (Barwick CJ).

24 F R Beasley, 'The Commonwealth Constitution: Section 92 – Its History in the Federal Conventions' (1948-50) 1 *University of Western Australia Annual Law Review* 97, 98.

25 *Cole v Whitfield* (1988) 165 CLR 360, 385 (emphasis added).

26 Incidentally, only a year later, the High Court formulated its criterion of inquiry into the convention debates in constitutional cases generally, that is, cases falling outside of the ambit of s 92. Thus, in *Port MacDonnell Professional Fishermen's Assoc Inc v South Australia*, the High 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 so sensible that academic commentators everywhere universally applauded it:

> Section 92 requires that trade, commerce, and intercourse between the State 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*.[27]

Cole v Whitfield was the first significant decision where the High Court, expressly and thoroughly, relied on originalism as an interpretative technique. Accordingly, led by Mason CJ, the High Court explained that the criterion of operation formula, which Dixon J had developed in the *Bank Nationalisation* case, was, first, far too artificial an application:

> The interpretation which came closest to achieving a [significant] degree of acceptance was that embodying the criterion of operation formula … That formula appeared to have the advantage of certainty, but that advantage proved to be illusory. *Its disadvantage was that it was concerned only with the formal structure of an impugned law and ignored its real or substantive effect* …[28]
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> [I]n the ultimate analysis, the doctrine [embodying the criterion of operation formula] failed to command the acceptance of the Court for reasons which we shall state shortly …
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> *The doctrine is highly artificial.* It depends on the *formal and obscure distinction* between the essential attributes of trade and commerce and those facts, events, or things which are inessential, incidental, or, indeed, antecedent or preparatory

was addressed'. See *Port MacDonnell Professional Fishermen's Assoc Inc v South Australia* (1990) 168 CLR 340, 376. However, only a year after this decision, Deane J expressed some disapproval about the growing tendency of his peers to refer to the convention debates for guidance. In *New South Wales v Commonwealth*, his Honour stated 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'. See *New South Wales v Commonwealth* (1990) 169 CLR 482, 511 (Deane J).

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

28 *Cole v Whitfield* (1988) 165 CLR 360, 384 (emphasis added).

> to that trade and commerce. This distinction mirrors another distinction, equally unsatisfactory, between burdens which are direct and immediate (proscribed) and those that are indirect, consequential, and remote (not proscribed). What is more, the first limb of the doctrine … looks to the legal operation of the law rather than to its practical operation or its economic consequences. The emphasis on the legal operation of the law gave rise to a concern that the way was open to circumvention by means of legislative device. To counter this possibility the doctrine was expressed to extend to circuitous devices, but this extension of the doctrine seems itself to have turned on the legal operation of the law. At any rate, no law has been held not to apply to interstate trade on the ground that it burdened the trade by means of a circuitous device …
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> With the advantage of hindsight, it is now obvious that such an artificial formula would create problems in the attempt to apply it to a variety of legislative situations … [T]he doctrine was seen as supporting a constitutional guarantee of the right of the individual to engage in interstate trade …
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> In truth, the history of the doctrine is an indication of the hazards of seeking certainty of operation of a constitutional guarantee through the medium of an artificial formula. Either the formula is consistently applied and subverts the substance of the guarantee; or an attempt is made to achieve uniformly satisfactory outcomes, and the formula becomes uncertain in its application. What we have said explains some of the reasons why the criterion of operation ceased to command the acceptance of members of the Court, with the consequence that we do not see ourselves as constrained by authority to accept it.[29]

Secondly, the High Court explained that the Dixon doctrine allowed interstate traders to escape the operation of laws regulating intrastate trade and commerce:

> There are other features of the doctrine which compel its rejection as an acceptable interpretation of s 92. First, in some respects *the protection which it offers to interstate trade is too wide*. Instead of placing interstate trade on an equal footing with intrastate trade, *the doctrine keeps*

[29] Ibid 400-2 (emphasis added).

> *interstate trade on a privileged or preferred footing, immune from burdens to which other trade is subject … The doctrine created protectionism in reverse.* Both Mason J and Deane J have noted that s 92 had become in some circumstances a source of privileged and preferential treatment for that trade to the detriment of the local trade …[30]

Thirdly, the High Court explained that the Dixon doctrine did not allow the genuine regulation of intrastate and interstate trade and commerce in the public interest:

> *The second major reason for rejecting the doctrine as an acceptable interpretation of s 92 is that it fails to make any accommodation for the need for laws genuinely regulating intrastate and interstate trade.* The history of the movement for abolition of colonial protection and for the achievement of intercolonial free trade does not indicate that it was intended to prohibit *genuine non-protective regulation of intercolonial or interstate trade*. The criterion of operation makes no concession to this aspect of the section's history. In the result there has been a continuing tension between the general application of the formula and the validity of *laws which are purely regulatory in character*. Judged by reference to the doctrine, the validity of a regulatory law hinged on whether it imposed a burden on an essential attribute or on a mere incident of trade or commerce. To say the least of it, this was not an appropriate criterion of validity of a regulatory law divorced, as it is, from considerations of the protectionist purpose or effect of the impugned law. It is not surprising that the Court found it necessary to develop a concept of a permissible 'burden' which was associated with a somewhat ill-defined notion of what is legitimate regulation in an ordered society … The problems which have arisen in this area … are the inevitable consequence of any interpretation of s 92 which offers protection to interstate trade going beyond immunity from discriminatory burdens having a protectionist purpose or effect.[31]

Thus, the High Court referred to the convention debates held in the years before federation in an attempt to discover the ambitions that the founders of the Commonwealth had for s 92. The High Court 'gave detailed and careful consideration to section 92's drafting history

[30] Ibid 402-3 (emphasis added).
[31] Ibid 403-4 (emphasis added).

as a means of making some sense of the provision's sparse text'.[32] It proceeded to a careful study of the arguments put forward by the convention delegates about the various drafts of the provision that eventually became s 92. The High Court concluded that the collective tone of the convention debates as well as other key historical materials supported a free trade interpretation of s 92.

To begin with, the High Court reflected on community attitudes to the question of intercolonial free trade in the years leading up 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.[33]

This discussion served by way of background to the extensive inquiry conducted by the High Court into the movement towards federation:

> 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* …[34]

More particularly, it researched the convention debates and the various drafts of the provision that, eventually, became 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

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32 A Simpson, 'Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone' (2005) 33 *Federal Law Review* 445, 463.

33 *Cole v Whitfield* (1988) 165 CLR 360, 386 (emphasis added)

34 Ibid 386-7 (emphasis added).

> 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*.[35]

The indications were obvious. From its historical investigations, the High Court concluded that, at least as regards trade and commerce, a free trade interpretation of s 92 was both legitimate and warranted:

> *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.[36]

The conclusion reached by the High Court did away with the Dixon doctrine. Rather unceremoniously, it stated: 'Departing now from the [Dixon] 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*.'[37]

This conclusion prompted the High Court in *Cole v Whitfield* to formulate the definitive test of invalidity from its re-interpretation of s 92. Two questions underpin the High Court's approach to s 92. First, does the State law under challenge impose a discriminatory restriction on interstate trade and commerce in a protectionist sense? Secondly, if so, is that infringing law saved by the fact that it was passed in pursuit of a non-protectionist objective as a reasonable and appropriate means adapted to the achievement of that objective?

Section 92 restrains both Commonwealth Parliament and State Parliaments[38] by providing that trade and commerce among the States

35 Ibid 392 (emphasis added).

36 Ibid 391 (emphasis added).

37 Ibid 407 (emphasis added).

38 Ibid 400. See D Sonter, 'Intention or Effect? Commonwealth and State Legislation after *Cole v Whitfield*' (1995) 69 *Australian Law Journal* 332. As the law that the High Court had to assess in *Cole v Whitfield* was State legislation, the High Court did not need to consider the interplay between s 51(i), which bestows on the federal Parliament the power to make laws with respect to trade and commerce, and s 92. Nonetheless, the High Court did consider the challenges that federal legislation under the s51(i) trade and commerce head of power may pose to the scope of s 92. The High Court stated: 'It is … necessary for present purposes that we make some

shall be absolutely free. The expression 'trade, commerce … among the States' in s 92 means, essentially, all the commercial arrangements of which transportation (of goods, people, intangibles) is the direct and necessary result.[39]

The term following 'trade, commerce' in the wording of s 92 is 'intercourse'. It enables s 92 to guarantee personal freedom of movement among the States.[40] The freedom is 'to pass to and fro among the States without burden, hindrance or restriction'[41] that extends to 'all of the modern forms of interstate communication'.[42] As such, a law that discriminates against a person's freedom of movement will be invalid under s 92.

More importantly, for the purposes of this article, the freedom of interstate intercourse is not subject to the freedom of interstate trade and commerce. Indeed, this article focuses on the freedom of interstate trade and commerce only. The freedom of interstate intercourse has a less restrictive scope and, in any event, the High Court has affirmed that the two freedoms do not overlap:

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general reference to the relationship between s 51(i) and s 92 for the reason that the guarantee of the absolute freedom of interstate trade and commerce contained in s 92 must be read in the context of the express conferral of legislative power with respect to such trade and commerce which is contained in s 51(i). We do not accept the explanation [favoured by history and context] … that the key to the relationship between s 51(i) and s 92 is to be found in the presence of the words "with respect to" in the opening words of s 51(i). The consequence of reconciling the two constitutional provisions in that way is to treat the legislative power conferred by s 51(i) as essentially peripheral in character. In our view, any acceptable appreciation of the interrelationship between the two sections must recognise that s 51(i) is a plenary power on a topic of fundamental importance.' (*Cole v Whitfield* (1988) 165 CLR 360, 398). Thus, the application of the decision in *Cole v Whitfield* may have a different impact on whether the law under challenge is enacted by a State Parliament or the federal Parliament.

39 *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530. See too *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55; *O'Sullivan v Noarlunga Meat Ltd [No 1]* (1954) 92 CLR 565.

40 *Cunliffe v Commonwealth* (1994) 182 CLR 272.

41 *Gratwick v Johnson* (1945) 70 CLR 1, 17 (Starke J).

42 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 83 (Deane and Toohey JJ).

> The notions of absolutely free trade and commerce and absolutely free intercourse are *quite distinct* and neither the history of the clause nor the ordinary meaning of its words require that the content of the guarantee of freedom of trade and commerce be seen as governing or governed by the content of the guarantee of freedom of intercourse.[43]

Generally, the expression 'absolutely free' has been interpreted by the High Court to refer to an absolute freedom from unreasonable restrictions.[44] In the context of trade and commerce, 'discriminatory protectionism' is the forbidden act.

> 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.[45]

For a law to be found to contravene s 92, the High Court must be satisfied that it imposes a restriction on interstate (as compared to intrastate) trade and commerce and that that restriction is discriminatory in a protectionist sense.[46] That is, a restriction is discriminatory in a protectionist sense if it confers a comparative competitive advantage on intrastate traders over their interstate colleagues, or removes a comparative competitive disadvantage from local traders.[47]

The concept of 'discrimination in a protectionist sense' is not limited to laws regulating competition between goods that are the same, but also covers laws regulating competition between goods that are substitutable.[48] Nor is it limited to laws that make goods imported from

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43 *Cole v Whitfield* (1988) 165 CLR 360, 388 (emphasis added).

44 *Hughes and Vale Pty Ltd v New South Wales [No 2]* (1955) 93 CLR 127; *Damjanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390; see too 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* (1969) 57.

45 *Cole v Whitfield* (1988) 165 CLR 360, 394.

46 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.

47 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 471-2.

48 Ibid.

interstate more expensive.[49] Laws that ban or make the exportation of locally produced goods more expensive may, in some circumstances, be also covered.[50]

The High Court usually decides whether or not a State law is in breach of s 92 by considering the ulterior effect of the actual terms of the legislation imposing the restriction. That is, in judging whether a law is discriminatory in a protectionist sense, the High Court has to consider not only the face or words of the law itself but also its operation on the factual situation.[51]

Even if, after the High Court applies the test, the law under challenge seems to infringe s 92, there may still be a path to validity. If the law under challenge is passed in pursuit of a non-protectionist objective, and the means which it adopts are reasonable, appropriate, and adapted to the achievement of that objective, then the law will be valid.

> It would extend the immunity conferred by s 92 beyond all reason if the Court were to hold that the section invalidated any burden on interstate trade which disadvantaged that trade in competition with intrastate trade, notwithstanding that the imposition of the burden was necessary or appropriate and adapted to the protection of the people of the State from a real danger or threat to its well-being …[52]

III Conclusion

This article argues that the Supreme Court would give clarity of meaning and certainty of operation to Art 301 if it were to apply the *Cole v Whitfield* test of invalidity for s 92. Like the High Court in *Cole v Whitfield*, the Supreme Court would be called on to discover the object of Art 301. In this regard, the Supreme Court has stated in the past that the object of Art 301 is 'to breakdown the border barriers between the States and to create one unit, i.e., economic unity with a view to encourage trade and commerce in the country and for the national economic well-being.'[53] Likewise, the High Court in *Cole v Whitfield*

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49 Ibid.

50 *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182.

51 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 471-2.

52 Ibid 472-3.

53 *Atiabari Tea Co Ltd v State of Assam & Others* (1961) 1 SCR 809. See too Singh, above n 15, LVI.

stated that the object of s 92 is 'to create a free trade area throughout the Commonwealth'.[54]

This object is best achieved by a test sensitive to discriminatory protectionism. On the application of that test of invalidity, a law would breach Art 301 only if it imposes a restriction on interstate trade and commerce and that restriction is discriminatory in a protectionist sense.

There is sufficient evidence in past discussions of the Supreme Court on Art 301 to indicate that the Supreme Court would appreciate the merit of a re-interpretation. For example, the Supreme Court has already stated, by way of *obiter*, that:

> Reading Art 301 … the mandate which emerges is that trade, commerce and intercourse throughout the territory of India must be free but subject to such restrictions imposed by Parliamentary law as may be required in the public interest. The law, however, must not give, or authorise the giving of, any preference to one State over another or discriminate, or authorise the making of any discrimination, between one State and another.[55]

Surely, the object of Art 301 is not in the aid of discriminatory protectionism, for that would disrupt the economic unity ambitioned by the framers of the Indian Constitution. Indian federalism is at the centre of an intense debate among economists, lawyers, and politicians as they attempt to solve the problems of poverty, economic underdevelopment, and income inequality that devastate the country. India is beset with all manner of self-crafted impediments to economic improvement. The antiquated interpretation of Art 301 is one. In conclusion, therefore, the Supreme Court should rely upon *Cole v Whitfeld* and the new law of s 92 if it is to interpret Art 301 with clarity of meaning and certainty of operation.

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[54] *Cole v Whitfield* (1988) 165 CLR 360, 391.

[55] Singh, above n 15, 837. See too *State of Kerala v AB Abdulkhadir & Others* (1970) 1 SCR 700.