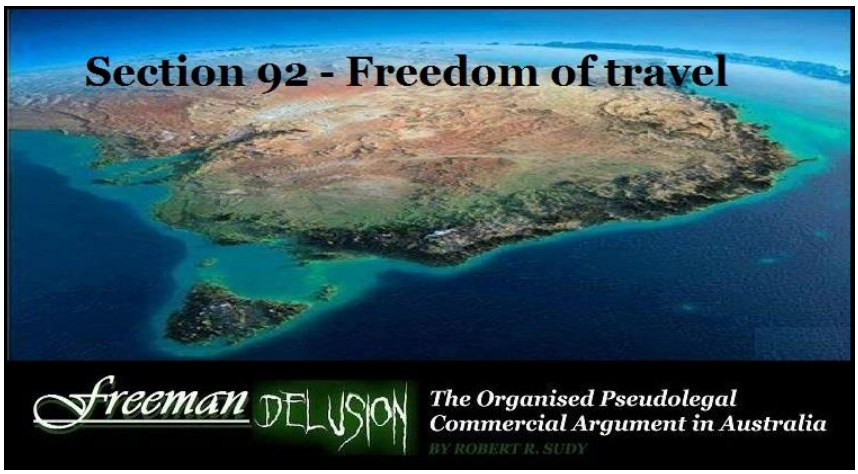
# Section 92 - Freedom of travel




Section 92 of the *Commonwealth Constitution* actually has nothing to do with freedom of travel between the states, or some constitutional right to drive unregistered and unlicensed, as Australian OPCA adherents like to imply, but rather, the concept of FREE TRADE between the States.

Section 92 of the *Constitution* provides:

> *"Trade within the Commonwealth to be free: 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. But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation."*

The chapter in the *Constitution* that this provision appears in is under Chapter IV "*Finance and Trade*", and it specifically states "*TRADE within the Commonwealth to be free".*

In the case of ***Cole v Whitfield [1988] HCA 18***, in a unanimous decision, the High Court identified the full extent of section 92:

> *"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.*
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> *The expression "free trade" commonly signified in the nineteenth century, as it does today, an absence of protectionism, that is, the protection of domestic industries against foreign competition. Accordingly, s. 92 prohibits the Commonwealth and the States from imposing burdens on interstate trade and commerce which: 1. discriminate against it by conferring an advantage on intrastate trade or commerce of the same kind, and 2. are protectionist in character."*

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A great summary of the preceding decisions regarding section 92 can be found in ***Nationwide News Pty Ltd v Wills (1992) HCA 46*** (from 33):

> *"Cases prior to Cole v. Whitfield admitted the validity of laws for the protection of a State against the introduction into the State of animal: Ex parte Nelson (No.1) (1928) 42 CLR 209, at pp 218-219) and plant: Tasmania v. Victoria (1935) 52 CLR 157, at pp 168-169) diseases, noxious drugs: The Commonwealth v. Bank of N.S.W. (1949) 79 CLR 497, at p 641; (1950) AC 235, at pp 311-312), gambling materials and pornography: R. v. Connare; Ex parte Wawn (1939) 61 CLR 596, at pp 620, 628; see also Mansell v. Beck (1956) 95 CLR 550).*
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> *The Privy Council said that permissible regulation of trade might take the form "of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens": The Commonwealth v. Bank of N.S.W.(1949) 79 CLR 497, at p 641; (1950) AC, at p 312. See also Fergusson v. Stevenson (1951) 84 CLR 421, at pp 434-435, and the views of Inglis Clark in Studies in Australian Constitutional Law, (1901), p 146 and of Harrison Moore in The Constitution of the Commonwealth of Australia, 2nd ed. (1910), p 571, and cf. Quick and Garran, op cit, pp 850-853).*
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> *Where the true character of a law, ascertained by reference to the "grounds and design of the legislation, and the primary matter dealt with, (and) its object and scope": Ex parte Nelson (No.1) (1928) 42 CLR , at p 218), is to protect the State or its residents from injury, a law which expressly prohibits or impedes movement of the apprehended source of injury across the border into the State may yet be valid: Chapman v. Suttie (1963) 110 CLR 321, at p 341. However, the severity of and need for the prohibitory measure are relevant considerations: Tasmania v. Victoria (1935) 52 CLR , at pp 168-169).*
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> *After Cole v. Whitfield, these cases need not be seen as exceptions to a general invalidation of laws impairing the guaranteed freedom of interstate trade and commerce, but the reasoning in these cases is material to the scope of the guaranteed freedom of interstate intercourse. Although State borders are not to be regarded "as in themselves possible barriers to intercourse between Australians", they do mark the territorial end of one area of legislative competence and the territorial beginning of another. Since State legislative competence is maintained by ss.106 and 107 of the Constitution, s.92 cannot transform a mere change in legal regime applicable to a person, thing or intangible that is moved across a State boundary into an impermissible burden on that movement. The change in the legal regime on one side of the border may impose a burden that is not imposed on the other, but that is not enough in itself to amount to an impermissible burden.*
>
> *Nor does s.92 purport to place interstate intercourse in a position where it is immune from the operation of laws of general application which are not aimed at interstate intercourse. The object of s.92 is to preclude the crossing of the border from attracting a burden which the transaction would not otherwise have to bear; its object is not to remove a burden which the transaction would otherwise have to bear if there were no border crossing. Section 92 does not invalidate laws that do not select a movement across a State border as a criterion of the imposition of the burden but do have the effect of burdening interstate intercourse provided (1) the law is enacted chiefly for a purpose other than preventing or impeding a crossing of a State border, (2) the*

*imposition of the burden is appropriate and adapted to the fulfilment of the other purpose: Cf. Castlemaine Tooheys Ltd. v. South Australia (1990) 169 CLR , at pp 471-472, where a corresponding requirement in relation to freedom of interstate trade and commerce is discussed) and (3) the prevention or impediment to border crossing is an incidental and necessary consequence of the law's operation: R. v. Connare; Ex parte Wawn (1939) 61 CLR , at p 616).*

*Of course, many transactions which constitute interstate trade and commerce equally constitute interstate intercourse, but it does not follow that the protection with which s.92 clothes a single interstate movement requires the transaction to be classified exclusively as either trade and commerce or as intercourse. The protection which s.92 gives to a particular interstate movement is indirect: it invalidates a law which would otherwise apply to an interstate movement where the law imposes an impermissible burden on transactions of the kind in which the particular movement occurs.*

*This view of the operation of s.92 found some support even before Cole v. Whitfield: See North Eastern Dairy Co. Ltd. v. Dairy Industry Authority of N.S.W. (1975) 134 CLR , at pp 614-615; Clark King and Co. Pty. Ltd. v. Australian Wheat Board (1978) 140 CLR 120, per Mason and Jacobs JJ. at p 188; Australian Coarse Grains Pool Pty. Ltd. v. Barley Marketing Board (1985) 157 CLR 605, at pp 649-650; Miller v. TCN Channel Nine Pty. Ltd. (1986) 161 CLR , at pp 570-571,609-610) and, since Cole v. Whitfield, replaces the "individual rights" theory of s.92 which had prevailed at one time: Barley Marketing Board (N.S.W.) v. Norman (1990) 171 CLR 182, at p 201). In accordance with this view, the validity of a law affecting interstate trade and commerce is now tested by reference to its discriminatory and protectionist effect: See Castlemaine Tooheys Ltd. v. South Australia (1990) 169 CLR , at pp 471ff). A law which imposes a burden on interstate trade or commerce must satisfy the test propounded in Cole v. Whitfield if it is to escape invalidity; a law which imposes a burden on a category of interstate intercourse (whether or not it is also a category of interstate trade or commerce) must satisfy a test stated in the terms discussed in this judgment. If one law applies to a movement because the movement occurs in a transaction of interstate trade and commerce and another law applies to the same movement because it is an instance of interstate intercourse, it is necessary to determine the validity of each law in order to decide whether any burden legislatively imposed on the movement has been validly imposed."*

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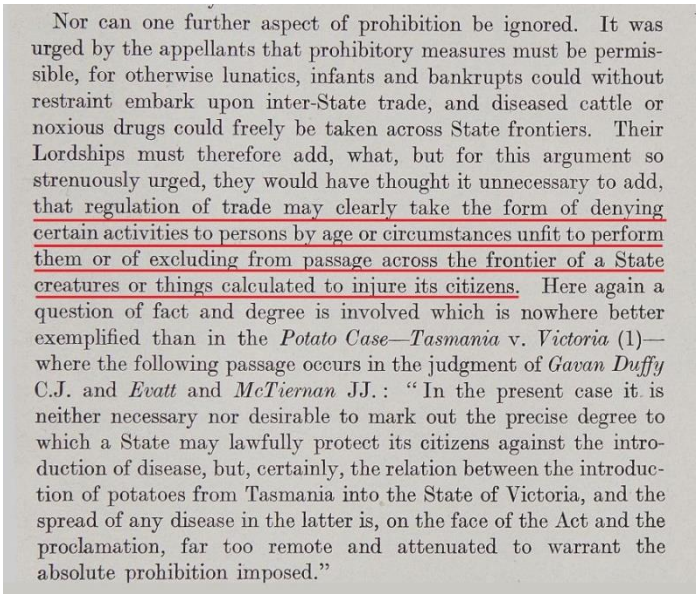
It is important to note that the provision does not imply a blanket prohibition over any laws that restrict access into a State, as seen during the COVID-19 pandemic. As stated by the Privy Council in ***Commonwealth v Bank of New South Wales [1949] UKPCHCA 1; [1949] 79 CLR 497*** (on page 461) permissible regulation of trade might take the form *"of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens":*



Nor can one further aspect of prohibition be ignored. It was urged by the appellants that prohibitory measures must be permissible, for otherwise lunatics, infants and bankrupts could without restraint embark upon inter-State trade, and diseased cattle or noxious drugs could freely be taken across State frontiers. Their Lordships must therefore add, what, but for this argument so strenuously urged, they would have thought it unnecessary to add, that regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens. Here again a question of fact and degree is involved which is nowhere better exemplified than in the *Potato Case—Tasmania* v. *Victoria* (1)—where the following passage occurs in the judgment of *Gavan Duffy* C.J. and *Evatt* and *McTiernan* JJ.: "In the present case it is neither necessary nor desirable to mark out the precise degree to which a State may lawfully protect its citizens against the introduction of disease, but, certainly, the relation between the introduction of potatoes from Tasmania into the State of Victoria, and the spread of any disease in the latter is, on the face of the Act and the proclamation, far too remote and attenuated to warrant the absolute prohibition imposed."

Hence when in ***Palmer & Anor v The State of Western Australia & Anor [2020] HCATrans 180*** the High Court was asked whether the *Quarantine (Closing the Border) Directions* (WA) and/or the authorising *Emergency Management Act 2005* (WA) were invalid because they impermissibly infringed section 92 of the *Constitution,* the court responded that on their proper construction, in their application to an emergency constituted by the occurrence of a hazard in the nature of a plague or epidemic, comply with the constitutional limitation of section 92 of the Constitution in each of its limbs.

The detailed reasons were published in ***Palmer v Western Australia [2021] HCA 5***.

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