THE COMMONWEALTH CONSTITUTION: SECTION 92

Its History in the Federal Conventions.[1]

The long and at times bitter arguments on the form and purpose of section 92 appeared to have ended, only to be revived when the Convention came to consider the "no preference" clause. The latter had been settled at the Adelaide session, as clause 95, in the following words:—

> Preference shall not be given by any law or regulation of commerce or revenue to the ports of one State over the ports of another State, and any law or regulation made by the Commonwealth, or by any State, or by any authority constituted by the Commonwealth, or by any State, having the effect of derogating from freedom of trade or commerce between the different parts of the Commonwealth shall be null and void.

Barton evidently thought that part of this clause was now superfluous, because he moved at Melbourne to revise it completely by substituting,

> Any law or regulation of commerce or revenue made by the Commonwealth or by any State, or by any authority constituted by the Commonwealth or by any State, giving any preference to one State or any part thereof over another State or any part thereof shall be null and void.

Barton's explanation of the proposed change is best given in his own words. "The second part of the clause,"[2] he said, "making void any law or regulation made by the Commonwealth or by any State, . . . having the effect of derogating from freedom of trade or commerce between the different parts of the Commonwealth, may mean more than the Convention intends. At the instance of the Hon. Mr. Isaacs we amended clause 89[3] to make it read that 'on the imposition of uniform duties trade and commerce, whether by intercolonial carriage or ocean navigation between the States, shall be absolutely free.' The words used before were 'throughout the Commonwealth.' What we desire to protect is interstate trade, and we recognise that the internal regulation of trade must be left in the hands of the individual States. That is a principle upon which we are agreed. . . . If we had adhered to the wide words of clause 89, as to the amendment of which I agreed with Mr. Isaacs, then you might have

[1] Continued from *Annual Law Review*, Vol. 1, No. 1, pp. 97-111.
[2] i.e., as originally drafted at Adelaide.
[3] i.e., section 92 of the final draft.

taken from the States the power of dealing with matters affecting the internal regulation of trade and commerce and not involving interstate intercourse. *My desire is to systematise these clauses and to prevent them from operating in any way beyond what would be rationally a compliance with the principles of inter-state free-trade.*[4] I have therefore limited this clause to preferences given to any part of a State over any part of another State by any regulation made either by the Commonwealth or by any State. Having limited it so far, it seems to me that it is consistent with clause 89 as amended, and that it simply now brings the ordinary current of these clauses into conformity, and carries out the object we have in view."[5] Barton's argument may be thus paraphrased:—"By clause 89 we establish free-trade between the States and make the new Commonwealth one economic unit for trading purposes; now we should adopt a clause which will prevent both the Commonwealth and the States (but particularly the latter) from circumventing the free-trade provisions by means of preferences." He took umbrage at an apparently innocuous suggestion by Turner of Victoria that the new draft should be printed so that members could examine it more carefully; others had been allowed to move amendments without notice, he objected, and it was a slight upon him, as Leader of the Convention, to be treated differently. Discussion of procedure rapidly degenerated into a wrangle over the unequal effect of federation on the competitive activities of the New South Wales and Victorian railway systems; members who thought that dispute had been buried with the adoption of clause 89 now saw it resurrected in full vigour. Barton, however, refused to be sidetracked and left it to others to develop the dispute; he took no part in the debate until he thought the time had come for an adjournment. In moving that progress be reported he made a valiant attempt to induce the Convention to look at the new clause in the same perspective as himself. "Honourable members," he said, "who entertain any fears as to the omission of the second portion of the old clause 95 may perhaps find their fears very much modified if they look at the form in which clause 89 now stands. *It has been amended to apply to inter-state free-trade only,*[6] and it enacts that from the imposition of uniform duties of customs trade and intercourse between the States shall be absolutely free. In this clause[7] there is a prohibition of derogation from freedom of trade, but I take it that a law passed in derogation of freedom of trade would be void under clause 89. Therefore there is nothing to fear about leaving out the second portion of this clause. The first part is simply a prohibition of preference to the ports of one State over the ports of another State."

[4] Author's italics.
[5] Melbourne Debates, I., 1251.
[6] Author's italics.
[7] i.e., clause 95.

Barton's attempt at conciliation failed. The railways argument had started a new trail which many members of the Convention were determined to follow. For the next four days proceedings almost got out of hand. Amendments were adopted, then altered, recommitted, rescinded, or further revised in bewildering confusion. Protagonists of one view made personal attacks on the champions of the opposite side; apologies were demanded, and offered at times with manifest reluctance. Eventually peace was restored through compromise. The Convention agreed to make provision, in the Constitution itself, for the establishment of an Inter-State Commission to which would be entrusted the task of supervising "the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder."[8] The particular clause which had caused all the trouble was at last adopted in a truncated form which prohibits only the Commonwealth from giving preferences; but this did not mean that the States would be free to do so. The Convention was slowly but surely guided by Barton into accepting his view that clause 89 (section 92) would debar the States from giving preferences; but since it was uncertain whether that clause would apply with like effect to the Commonwealth, the new clause 95 *ex abundanti cautela* expressly prohibits the latter from granting preferences through laws relating to trade, commerce, or revenue.

The relevance of the railways debate to section 92 is this. Speaker after speaker, from every colony, admitted that differential freight rates could be used to nullify the constitutional protection of

[8] Sec. 101, which states in mandatory terms that "There *shall* be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance etc." Sec. 103 provides that the members of the Commission are to be appointed for seven years and are to be removable only on addresses from both Houses during the same session, and that their remuneration cannot be reduced during their continuance in office. Not until 1912 was provision made for the establishment of such a Commission; the Inter-State Commission Act of that year created a Commission of three members (who were appointed on 11th August 1913 in strict conformity with sec. 103 of the Constitution) and defined their powers of "adjudication and administration." But the activities of the Commission were soon hamstrung by the decision of the High Court in *New South Wales v. The Commonwealth*, (1916) 20 C.L.R. 54, where the majority (Barton being one of the two dissentients) held (1) that "powers of adjudication" are not synonymous with judicial power; (2) that judicial power can only be conferred, by reason of sec. 72 of the Constitution, on federal tribunals whose members are appointed for life; (3) that the issue of an injunction is an exercise of judicial power; and (4) that the Inter-State Commission could not issue an injunction to prevent the enforcement of State legislation which it found to be in conflict with sec. 92. This decision whittled down the powers of the Commission to such an extent that one member soon afterwards resigned and was not replaced, and that no new appointments were made when the seven-year terms of the other two came to an end. Despite sec. 101 of the Constitution and the Act of 1912 there has not since been an Inter-State Commission. See the author's article on *"The Exercise of Judicial Power in the Commonwealth of Australia"* in 27 Can. Bar Rev. 686.

inter-state "free-trade,"[9] and constantly used the terms "freedom of trade" and "free-trade" as synonyms. Thus Gordon of South Australia:—

> "Without some provision to prevent preferential railway rates free-trade would be a farce. The benefits of free-trade could be done away with by erecting a barrier of railway rates."[10]

Higgins (later to become a justice of the High Court) of Victoria:—

> "What will be the use of talking about free-trade between the States, and diminishing the friction upon the borders, if we do not provide against a war of railway rates? The President was very expressive when, in Adelaide, he asked—'What is the good of transferring your war from the Custom-houses to the railway stations?' A railway rates war could be made much more detrimental to the freedom of commerce than intercolonial customs duties, and, in achieving the glorious result of absolute freedom of commerce between the colonies, I hope that, as a corollary, we shall provide that there shall be no competition between the rival railway systems to bring about the loss of railway revenue and to injure the development of Australia."[11]

O'Connor (afterwards one of the first three justices of the High Court) of New South Wales:—

> "Coming to the second portion of the clause, it simply declares that there shall be no derogation from freedom of trade or commerce. Now, what does that mean? I must confess that it is one of those dangerous generalities which we ought to be very much afraid of putting into this Constitution. We ought not to have anything in this Constitution without its reason, and, unless there is some special reason for putting in these general words, I do not think they ought to be in the Constitution. But, *if they refer simply to the imposition of customs duties or charges of any kind that will interfere with the freedom of trade, that is already provided for in clause 89,* and if they mean anything else, that something else ought to be stated more definitely."[12]

Holder of South Australia:—

> "What is the good of saying—'We must ensure absolute freedom of trade and commerce between all parts of the Commonwealth so that there shall be no custom-house barriers to this freedom of trade, and that it shall flow freely in every

[9] In the reports of the 1897-98 Debates, as in 1891, the words are almost invariably hyphenated.
[10] Melbourne Debates, I. 1258.
[11] Melbourne Debates, II. 1268.
[12] Melbourne Debates, I. 1304; author's italics.

direction, and so that every man shall do his business just as he pleases'—what is the good of saying this concerning all other things if we leave the railways, the most important factor in dealing with all matters of trade, to be so managed and to have their tariffs so arranged that this freedom of trade is absolutely destroyed?"[13]

Before making his contribution to this debate Downer of South Australia warned his fellow delegates not to pay too much heed to apparently analogous provisions in the Constitution of the United States or to what the Supreme Court of that country had said about them. He thought it dangerous to copy anything from the United States Constitution in the naive belief that federal courts in Australia would automatically follow American judicial precedents. He did not want to leave gaps in the Australian constitution and then to trust to the good sense of judges to fill them appropriately; nor did he want to say more than was necessary—while judges would have to interpret the Constitution, they should be given no opportunity or excuse to misinterpret it. "Why," he asked, "should we leave the greater part of the Constitution to be framed by judges, who might be influenced by utterly different principles, and discard the experience of the past which ought to have told us what we are to provide for, simply assuming that the judgments given in the future will be similar to those that have been given in the past in a country with which we have no relations at all?"[14] His opinion was that clause 89 needed no elaboration; "as far as the Constitution stands at the present time," he said, " . . . *the general cardinal provision that trade should be free would give the Supreme Court power to prevent any tariffs being made in derogation of that principle.*"[15] Later he returned to the subject by saying, "The view I take is that, according to clause 89, it is quite clear that as soon as uniform duties have been imposed there shall be absolute free-trade between the colonies."[16] Downer's plea that the Constitution should be so clearly expressed as to leave the minimum area for "interpretation" was supported, though on somewhat different grounds, by Isaacs of Victoria and Gordon of South Australia. The former thought[17] that "the judges should not be asked to decide matters which extend far into the political arena, and which might land them in very awkward entanglements, and make the Supreme Court a centre of terrible political conflicts and controversies that might go to the very existence of the States." Gordon was not so much concerned with keeping the judges out of politics as with maintaining the supremacy of Parliament. "I think we ought to remember," he said,[18] "that after all, the High Court, important as its functions are, is the creature

[13] Melbourne Debates, II. 1308-1309.
[14] Melbourne Debates, II. 1315.
[15] Author's italics.
[16] Melbourne Debates, II. 1344.
[17] Melbourne Debates, II. 1377.
[18] Melbourne Debates, II. 1381.

of the Constitution, and that the Constitution is not to be the creature of the High Court. Why are the services of the High Courts so often called into requisition in America? Simply because of the uncertainties of the Constitution. And if, by stating plainly what we intend, we can avoid the necessity of calling into use the services of the High Court here, why should we not do so? I should prefer to see as much left to parliamentary sovereignty as possible, consistent with the proper adjustment of the Constitution, rather than that we should delegate the duties of Parliament to the High Court, as, owing to the uncertainties of the American Constitution, has too often been the case there. It is a common saying that the Constitution of America is not to be found in the Federal Constitution Act itself, but in the decisions of the Supreme Court, and if we can avoid a similar state of things here, I think we ought to do so."

Other speakers concentrated on the specific issue then before the Convention. Howe of South Australia was most emphatic; "the producers of South Australia," he said,[19] "expect this Convention to give them free-trade throughout the length and breadth of federated Australia. Now, it seems to me that, while we have for the last day or two given free-trade through the abolition of custom-houses and intercolonial imposts, we are now seeking to hamper the producers of Australia by transferring this power to the Railway Departments of the various colonies. Cut-throat rates on railways are quite as great an obstacle to freedom of commerce as custom-houses on our borders." Howe was strongly supported by Trenwith of Victoria, who criticised some of the clauses relating to railways, and members' speeches on that subject, as being unfederal in purpose and character. "I would point out," he said,[20] "that we have in this Constitution prescribed a pattern for trade and intercourse. We have declared that after the imposition of a uniform tariff, trade and commerce between the States shall be absolutely free. Now, we have discovered in our experience two expedients that have been used for the purpose of derogating from absolute freedom of trade. One of them is customs duties. We have decided that that derogation from freedom of trade shall be abolished, and we have declared that after the abolition of Border Duties there shall be absolute freedom of commerce between the colonies. Really, then, we must remove the other influence that derogates from absolute freedom of trade." What was that other influence? His later remarks make it plain that he had railway competition in mind. "It is because I am anxious to see the fighting (between the State railways) removed," he said,[21] "because I am anxious to see between the colonies a condition of absolute free-trade—that I am supporting this proposal. Although I am a protectionist of the protectionists, I admit, and have always admitted, that the slight advantages of inter-colonial duties would be immensely outweighed by the greater advantage of absolute freedom of

[19] Melbourne Debates, II. 1368.
[20] Melbourne Debates, II. 1392.
[21] *ibid.*, II. 1395.

intercourse between the colonies, with reasonable protection on the coast." Later he added,[22] "If we are going to have federation, we cannot have it on the lines that ought to exist without wiping away absolutely anything in the nature of fighting or struggling between the colonies. If we can abolish such fighting we certainly ought to do so, and we cannot have federation on the basis it (*sic*) should prevail unless we do."

Further support for Howe came from two delegates from his own colony, Downer and Symon, both of whom thought that the Convention was wasting time, converting molehills into mountains, and magnifying out of all proportion difficulties that were unlikely to arise if a commonsense interpretation were given to clause 89. Downer referred to what had already been said by O'Connor;[23] "my honourable friend explained with great clearness," he remarked,[24] "in a most able speech, that the trade and commerce clause, coupled with the provision for intercolonial free-trade, would do all that was required, because *the provision relating to intercolonial free-trade would give the High Court jurisdiction to prevent anything that was contrary to free-trade between the States,*[25] while the provisions of the trade and commerce clause would give the Federal Parliament jurisdiction to legislate on the whole question, and the Federal Parliament could pass legislation to insure what was right and just to all the colonies, and to prevent any of the provisions of the Constitution being evaded." Symon was of the like opinion; "I do not really understand," he said,[26] "what the object of our having inserted clause 89 is, unless it is to prohibit, not only a barrier to free interchange by means of customs duties, but a barrier by means of high railway tariffs." Forrest of Western Australia made one of his rare contributions to the discussion, taking to task the Victorian and New South Wales members (the chief participants in the railways argument), whom he did not hesitate to charge with "localism and parochialism which had largely come to the front, especially in one or two matters, during our sittings in Melbourne." "We all understood," he said,[27] "and I think we have all expressed, that after Australia was federated trade would be allowed to go free and untrammelled—that the barriers of Custom-houses would be removed, and that trade would go in the direction that it thought best—that is, in the direction that was most beneficial, without being trammelled by Tariffs and barriers of Custom-houses. . . . it occurs to me that, with all the provisions in this Bill, and all the statements

[22] *ibid.*, II. 1398.
[23] See note 12 (*supra*).
[24] Melbourne Debates, II. 1437.
[25] Author's italics.
[26] Melbourne Debates, II. 1454.
[27] Melbourne Debates, II. 1481, 1483. Forrest could afford to take a detached view of the railways argument because his colony then had no rail connection with any other. It was not until 1917 that the Trans-Continental Line linked the Western Australian and South Australian railway systems (see *Official Year-Book of the Commonwealth of Australia*, No. 11, 662-666).

in our speeches in regard to trade and intercourse throughout the Commonwealth being free, we should be careful not to allow barriers just as severe to be erected in regard to our railways; because, if we allowed the railways to remain altogether in the hands of the States without any control by the Commonwealth, it seems to me that our boast of free trade and intercourse between all parts of the Commonwealth would be merely idle words."

To sum up. Close study of the debates of 1891 and of 1897-1898 leads to certain conclusions which seem to the writer to be irresistible:—

(1) The delegates to the National Australasian Convention of 1891 were unanimous that complete "free-trade" between the colonies would be a *sine qua non* of federation.

(2) To give effect to that principle the 1891 delegates put two clauses into their draft constitution—

  (i) the Commonwealth was to have full legislative power over inter-State trade and commerce;

  (ii) there was to be absolute freedom of trade between the colonies once the Commonwealth had come into being and had imposed uniform duties of customs and excise.

(3) When the 1891 delegates adopted the clause providing for absolute freedom of trade between the colonies, what they had in mind was to provide a constitutional guarantee of "free-trade" as opposed to "protection" inside Australia.

(4) The delegates to the Australasian Federal Convention of 1897-1898 were in complete sympathy with the objective of the 1891 Convention, deliberately adopted the language used by that Convention, and gave to it the same interpretation.

(5) At the Adelaide session of 1897 the general opinion was that clause 89 (now section 92) was a prohibition or warning addressed to the States alone; that it was unnecessary to issue a like prohibition or warning to the coming Commonwealth because

  (i) the Constitution gave to the Commonwealth the *exclusive* power to impose customs and excise duties and required it to make those duties *uniform* throughout Australia;

  (ii) if there existed in the Commonwealth a power to build a tariff wall *between* States, it must—because of the requirement of uniformity—build the wall between all the States and make it of the same height throughout; but the constitutional requirement of uniformity would make the erection of an inter-State tariff wall of any height self-frustrating and absurd;

(iii) the Constitution deliberately vested in the Commonwealth a wide power over inter-State trade so as to enable it to frustrate any attempt by the States to evade the prohibitions of clause 89; no court would concede to the Commonwealth a power to do something which the Commonwealth itself could annul if done by the States.

(6) At the Melbourne and Sydney sessions of 1897-1898 it was first appreciated, by a few members, that clause 89 might well be interpreted as binding the Commonwealth at least to the extent of prohibiting it from derogating from the principle of inter-State free-trade by setting up a (necessarily) uniform tariff wall between all States; in other words, no legislature, federal or State, could rebuild the intercolonial tariff walls which it was one of the primary objects of federation to demolish.

(7) Although the Commonwealth itself, under this interpretation of clause 89, could not rebuild an inter-State tariff wall, it might through its legislative power over "trade and commerce . . . among the States" give one or more States advantages from which the remainder were excluded; to prevent this, a new clause (now sec. 99) was inserted to prevent the Commonwealth from preferring one State to another by laws relating to trade, commerce, or revenue.

(8) During the prolonged debates on what are now sections 51 (i) and 92, there was frequent expression of a fear, not that the latter would be interpreted so as to restrict the power conferred by the former, but that the substantive power conferred by sec. 51 (i) might be construed—in the light of American precedents—to extend in many instances to intra-State trade and in particular to the State-owned railway systems. If a proposal had been made at the beginning of the Convention to empower the Commonwealth to take over the State railways, it would have received virtually no support; if such a proposal had been made towards the end of the Convention it would have been approved almost unanimously but for the fear that federation itself might be jeopardised if linked up with such a controversial matter as unification of railway control.[28]

[28] Several members predicted that the logic of events would force the Commonwealth to take over the State railways (and their financial burdens) very soon after the establishment of federation. There were two grounds for this view: (1) that federal control over inter-State trade and commerce would be incomplete without full control over the railways; (2) that only the Commonwealth would have financial resources adequate to the proper maintenance and extension of railways in a large but very sparsely settled country. Hence the obvious compromises in secs. 51 (xxxii), (xxxiii) and (xxxiv), 98, 102, and 104.

(9) It was never present to the minds of members that there was the slightest risk that sec. 92 might be deemed (a) to whittle down the power conferred on the Commonwealth by sec. 51 (i), (b) to apply to all the other powers conferred on the Commonwealth if they were related, however distantly, to trade and commerce among the States, or (c) to have the effect of creating a legislative no man's land which neither Commonwealth nor States could enter.[29]

Contemporanea expositio.

Examination of the views of commentators, both before and shortly after the establishment of the Commonwealth, reveals that none of them had the slightest inkling that sec. 92 might some day be deemed to have created "a gap in the legislative field in Australia." R. R. Garran's *Coming Commonwealth* was published in 1897 and must therefore have been written before the second Convention met. But the author, a member of the Bar of New South Wales, had been present at the 1891 debates in the strangers' gallery;[30] when most of the colonies had made provision for the election of delegates to a new Convention, Garran wrote his book on the not unnatural assumption that the 1891 draft Bill would provide the basis of discussion. Referring to the taxation power, he says,[31]

> " . . . one mode of taxation—duties of customs and excise —must be given to the Federal Parliament exclusively. One of

[29] See *James v. Commonwealth*, (1936) A.C. 578, at 629, 633. In *Commonwealth v. Bank of New Wales* (the appeal to the Privy Council in the *"Banking Case,"* not yet reported), the respondent's appeal book contains the following:—

> [68] Section 92 is an overriding constitutional provision guaranteeing the freedom of trade, commerce and intercourse among the States. Sections 51 and 52 are subject to section 92, which also binds the States. Section 92 effectively withdraws from both the Commonwealth and the States power to make any law inconsistent with the freedom guaranteed.
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> [69] The Constitution thus deliberately creates a gap in the legislative field in Australia, but by section 128 it enables the Australian people to reduce or close the gap if they see fit so to do. In *James v. The Commonwealth*, (1936) A.C. 578, the existence of such a legislative gap was referred to in argument (see pp. 595 and 601), but its inconvenience was held to flow from the terms of the Constitution (see pp. 629 and 633).

That a gap exists in the legislative field in Australia is undeniable; but it has been created, not by the Constitution, but by a long series of judgments of the High Court and the Privy Council. The assertion that "the Constitution deliberately created the gap" is a palpable mis-statement of historical and verifiable fact; excusable, perhaps, in the Privy Council, whose inability to understand the nature and working of any federation is so often and so lamentably obvious (cf. 26 Can. Bar Rev.), but inexcusable in any Australian historian—or lawyer. It is true that the Constitution debars *all* legislatures from imposing customs barriers (and, by implication, any similar obstacles) between the States; but this is not "a gap in the legislative field," it is an essential condition of federation.

[30] He was not elected as a delegate to the 1897-1898 Convention, but was appointed secretary to its Drafting Committee.

[31] *The Coming Commonwealth*, 142. The passage is reproduced exactly as printed in 1897; "freetrade," in the last sentence, appears as one word, not as two hyphenated words.

> the great objects of federation is to throw down the border custom-houses, and allow perfect commercial freedom from one end of Australia to the other. This will make it impossible for each State to keep its separate provincial tariff against the outside world; seeing that a tariff fence, to be of any use, must be a ring-fence. Scientific protection on the Victorian sea-board would be a farce while the New South Wales ports were open and the Murray bridges free. There must, therefore, be one fiscal policy for Australia, and it must obviously be controlled by the Federal Parliament. Duties of customs and excise must be imposed and collected by the Commonwealth alone, subject, of course, to the condition that such duties shall be uniform throughout the Commonwealth, and that there shall be no internal customs barriers between the several States of the union. Exclusive federal control of the customs is necessary for the basis of a commercial union without which federation would be a mockery. Complete internal freetrade, combined with such external fiscal policy as the Federal Parliament shall determine, is the only possible basis for an effective Federation."

Garran's description of the proposed transfer of the customs and excise power to the Commonwealth, and of the limitations to be imposed thereafter upon both Commonwealth and States, is his only reference to the effect of section 92.

Henry Bourne Higgins (afterwards Higgins, J., of the High Court), though a Victorian delegate to the 1897-1898 Convention, opposed the Constitution Bill as finally drafted, mainly because he thought the referendum provisions in section 128 and the equal representation of all States in the Senate to be fundamentally undemocratic. He addressed many meetings and wrote many articles explaining the reason for his opposition, and arranged for the publication of his speeches and writings in 1900.[32] This astute lawyer-politician would assuredly have included in his arguments against federation the "gap in the legislative field"—had he been able to find it. There is not one word in his addresses or articles to suggest that he even suspected its existence.

Garran collaborated with John Quick, another Victorian delegate to the 1897-1898 Convention, in the writing of *The Annotated Constitution of the Australian Commonwealth,*[33] a monumental work which is a mine of information on the history of federation and a careful dissection of every section, almost of every word, of the Constitution. The joint authors devote thirty-four pages of comment to section 51 (i); in all those pages the only reference to section 92 is a statement of its terms, with the addition, "so that the federal Parliament, while it may assist and facilitate inter-State freetrade, is

[32] H. B. Higgins, *The Australian Commonwealth Bill* (Atlas Press, Melbourne).
[33] Published in 1901 by Angus & Robertson, Sydney.

disabled from interfering with, or impairing the rule of, inter-State commercial freedom."[34] Consistently with then current practice, the unhyphenated word "freetrade" is equated with "inter-State commercial freedom." In their extensive commentary on section 92 itself these, or analogous, expressions are again used as synonyms. "Under the Constitution of the Commonwealth," they say,[35] "there are two express guarantees for freedom of trade between the States; section 90, which provides that on the imposition of duties of customs the power of the Parliament to deal with that subject becomes exclusive; and section 92, which provides that thenceforth trade, commerce, and intercourse among the States shall be absolutely free." After a passing reference to section 113 (which in effect enables the States to control the trade in alcoholic liquor even if it has "inter-State" characteristics), they proceed to analyse section 92 itself. "Two questions," they say, "have to be considered in connection with section 92 in order to grasp its significance; first, what is absolute freedom of trade, commerce, and intercourse? and secondly, during what period of time or within what limits of space do inter-state trade and commerce operate, so as to remain protected by the shield of federal freedom? In reference to the first question, absolute freedom of trade, commerce and intercourse may be defined as *the right to introduce goods, wares, and merchandise from one State to another,*[36] the right to sell the same, and *the right to travel unburdened by State restrictions,*[36] regulations, or obstructions. Freedom of trade necessarily means the right to sell as well as the right to introduce, and the right to travel in order to sell. The right of introduction without the right of disposition would reduce freedom of trade to an empty name. The second question may conveniently be discussed under the headings, (1) when does exportation begin and (2) when is importation complete?" To find the answer to the second question they make an exhaustive examination of American cases and textbooks; but in nearly seventeen pages of comment on the section there does not appear to be one single reference back to section 51 (i); that is, they do not regard section 92 as subtracting from the power conferred by the earlier section. The sole limitation on section 51 (i) is, in their opinion, to be found in section 99, which prohibits the Commonwealth from giving preference to one State over another by laws relating to trade or commerce (or revenue). They say nothing to countenance the view (developed long after 1901) that *all* federal powers are to be read subject to section 92; nor are they aware that "a gap has been deliberately created in the legislative field."

W. Harrison Moore's *Commonwealth of Australia* was first published in 1902.[37] The author is very critical of the language of

[34] op. cit., 517.
[35] op. cit., 845.
[36] Author's italics.
[37] By John Murray, London. The author was then Professor of Law in the University of Melbourne.

section 92. "It was commended to the Convention," he says,[38] "as a bit of layman's language on which no legal technicalities could be built. The case was an unfortunate one for the exhibition of the layman's art, for of all vague and varying words in the political vocabulary, 'free' is probably the worst.[39] Here we can do no more than indicate a few of the difficulties that beset the application of the section. The most obvious meaning is that which springs from the association of the clause with the imposition of uniform duties, and the declaration that the power of the Parliament over customs, excise, and bounties shall be exclusive. *Noscitur a sociis.* 'Absolutely free' would therefore mean that commerce among the States was to be free of all duties of customs and excise; and, as the power of the States to impose such duties has already been taken away by section 90, section 92 would operate as a restriction upon the Commonwealth Parliament alone. . . . But the section is associated with others, which, while expressly conferring power on the Commonwealth, are expressly taking away or saving the powers of the States, not in matters incidental or collateral, but in a matter vital to the Commonwealth. In such a case it is reasonable to suppose that the section must have a wider interpretation; that it operates upon the Commonwealth Parliament and the States; and that at the least the absolute freedom of trade, commerce, and intercourse is impaired by any charge (not merely of customs and excise duties), by whatever name it may be called or on whatever pretence it may be levied, which is in substance a tax (in the broad sense of the word) upon the intercourse of persons, or the commerce in goods among the States." After seeking American guidance as to whether section 92 applies to obstructions or restrictions upon commerce which are not in the nature of a tax, he continues,[40] "By a clause which binds both the Commonwealth Parliament and the States, (the constitution) provides that trade, commerce, and intercourse shall be 'absolutely free.' But if inter-State commerce is to be absolutely free from all interference or regulation, what becomes of the power confided to the Commonwealth Parliament to make laws with respect to trade and commerce among the States? It may be that section 92 expresses as to the States the doctrine of non-interference with inter-State commerce, which has been declared in the United States to arise by necessary implication as to matters of a national character. If so, it must apply unequally to State and Commonwealth; and the latter, while it may be restrained by it from taxation, prohibition, and perhaps from all regulation, *the essential and unequivocal nature of which is to impede commerce,*[41]

[38] op. cit., 201-202.

[39] It is instructive to compare the difficulties which the Supreme Court of the United States has met in endeavouring to give a rational and coherent meaning to the "freedom of speech" which is protected by the First Amendment. For a recent case on this question see *Terminiello v. Chicago,* (1948) 93 U.S. Sup. Ct. (Law. ed.), Advance Opinions, 865.

[40] op. cit., 204.

[41] Author's italics.

may for the rest operate freely upon the matter. And, of course, it is hardly a correct assumption that every regulation of commerce, even by the State, is an intrusion upon freedom of commerce, a truth which is recognised in the sufferance of the States to deal with those matters of inter-State commerce which admit of local regulation—'aids to commerce,' as they have been called."

When the second edition of Moore's work was published in 1910,[42] only one case directly and explicitly involving section 92 had come before the High Court, namely, *Fox v. Robbins*.[43] In that case the High Court had held invalid, for conflict with section 92, a State Act which required a much larger licence fee for the sale of wine produced in other States than it exacted for the sale of wine produced within the State. This was a clear-cut case, requiring little comment; hence the references to section 92 in Moore's revised edition are not substantially changed. But it is curious that he should have overlooked a significant passage in the judgment of Barton, J. (the former Leader of the 1897-1898 Convention, who was one of the first three judges appointed to the High Court), which shows clearly that the latter still regarded "freedom of trade" as synonymous with "free-trade" in the economic sense of the words. "There is no difference," said the learned judge,[44] "in substance or effect in its bearing on inter-state commerce between a burden such as this and a duty collected at the borders or the ports of one State on the products of another. In either case that commerce is restricted which the Constitution says shall be free; and in either case the disability may be made so great as to render the product unsaleable, and therefore virtually to prohibit its introduction. In a word, however the enactment may be phrased, it is inter-state protection, not inter-state free trade. And we may be allowed to recollect as a matter of history that one of the chief objects of the struggle for federation was to secure that which sec. 92 ordains, free trade among the States, although to one of them a temporary concession, long since expired, was made (see sec. 95)."

B. R. Wise's *The Making of the Australian Commonwealth*[45] makes no mention of section 92 and does not include it in the list of "Matters in Controversy" which appeared likely to imperil popular acceptance of the draft Bill of 1898. *The Legislative Powers of the Commonwealth and States of Australia*,[46] by John Quick, like the earlier work with which the author was associated, still draws heavily upon American precedents for a guide to the interpretation of the Commonwealth Constitution. His notes to section 51 (i) contain one reference only to section 92; in his notes to the latter he makes

[42] By Sweet & Maxwell Ltd., London, and Charles F. Maxwell, Melbourne.
[43] (1909) 8 C.L.R. 115.
[44] (1909) 8 C.L.R. 115, at 123.
[45] Published in 1913 by Longmans Green & Co., London. The author was one of the New South Wales delegates to the 1897-1898 Convention.
[46] Published in 1919 by Law Book Co. of Australasia Ltd., Sydney.

no independent comments but is content to quote long extracts from the judgments in *New South Wales v. The Commonwealth*,[47] *Foggitt, Jones & Co. Ltd. v. New South Wales*,[48] and *Duncan v. Queensland*.[49] None of these cases make any contribution to the theories of the meaning of section 92 which were later to develop it into the dominant provision of the Constitution in relation to federal legislative powers. Moore is the only one among the five authors mentioned to detect a possible antinomy between sections 51 (i) and 92; he resolves the antinomy by declaring, in effect, that the Constitution must be read intelligently and sensibly so as to deny that the antinomy exists.

It is not without significance that section 92 did not become one of the most controversial and most litigated provisions of the Constitution until after the first World War. It is true that even during that War[50] a few cases came before the High Court which required an examination of State legislation in the light of section 92. That Court found no difficulty in upholding the Wheat Acquisition Act 1914 (N.S.W.), which expropriated all wheat in the State not already subject to an inter-state contract: *New South Wales v. The Commonwealth*.[51] But it boggled at another Act of the same State, the Meat Supply for Imperial Uses Act 1915, which did not expropriate but merely directed the owner of stock or meat to hold it "at the disposal of the Crown"; the High Court held that until an expropriation order was actually made, section 92 preserved and protected the owner's right to sell to a purchaser in another State: *Foggitt, Jones & Co. Ltd. v. New South Wales*.[52] In the following year a Queensland Act of the same title and object was challenged; the High Court, undoubtedly influenced by extra-legal considerations (i.e., that a state of war existed, and that it was highly desirable that the supply and consumption of food should be regulated and controlled in the interests of the whole Empire), overruled *Foggitt Jones* and held the Act valid in spite of section 92: *Duncan v. Queensland*.[53] But when the war was over the High Court, no longer susceptible to factors extraneous to the Constitution, overruled *Duncan* and restored *Foggitt Jones*: *W. & A. McArthur Ltd. v. Queensland*.[54] By that time the High Court had lost all its original members;[55] there were but two survivors of Convention days, Isaacs and Higgins, JJ., of whom the former was soon to become the fore-

[47] (1916) 20 C.L.R. 54.
[48] (1916) 21 C.L.R. 357.
[49] (1917) 22 C.L.R. 556.
[50] See F. R. Beasley, *Produce Pools in Australia*, 10 J.C.L. (3rd series), 74, 259.
[51] (1916) 20 C.L.R. 54.
[52] (1916) 21 C.L.R. 357.
[53] (1917) 22 C.L.R. 556.
[54] (1920) 28 C.L.R. 530.
[55] O'Connor had died in 1912; Griffith retired in 1919; Barton died at the beginning of 1920.

most champion of the widest possible interpretation of section 92.[56] But the stage was being set for almost continuous consideration of the section. Experience during the first World War, and during the economic disorganisation which almost immediately followed it and which recurred in the early '30's, led to the passage of many Acts of a collectivist character which from their very nature modified the course of inter-state trade. Interests affected by such legislation were not slow to challenge it; and the High Court, as much dominated by conventional concepts of *laisser faire* as was the Supreme Court of the United States until Franklin D. Roosevelt's second term, has been fairly consistent in upholding the challenge and has thus converted section 92 into a bulwark of private enterprise against collectivism. The writer does not propose to take up the cudgels on behalf of either; he merely submits (1) that section 92 has been given a strained interpretation justified neither by its terms nor its history, and (2) that it is most unfortunate that the High Court, by the logic of its own reasoning, has constituted itself the protector of private enterprise and has thus entered the political arena at a time when it is increasingly important that the tradition of judicial impartiality towards economic and political issues should be strengthened.

(To be concluded.)

F. R. BEASLEY.

[56] See the first part of this article, p. 103, note 21.