

THE COMMONWEALTH CONSTITUTION: SECTION 92

Its History in the Federal Conventions.¹

It is, at least to the writer, an irresistible inference from the Convention Debates that the implied prohibitions of section 92 were, in the minds of its authors, aimed at all laws which were specifically directed towards or would have the necessary effect of destroying partly or wholly the economic unity of Australia which it was one of the principal objects of federation to create; and that the prohibitions are *not* aimed at laws lacking in that object or result. It seems to be an historical fact that few are likely to challenge, that one of the major obstacles in the path of Australian political and economic unity was the existence of those barriers to *free-trade*² set up by customs duties, differential excise duties, bounties and the like; hence the purpose of section 92 was to guarantee the demolition of those barriers *at a stated moment* and to prevent them from being re-erected either openly or in a skilfully disguised form. If this be the true reading of history, the apparent conflict between section 51 (i)—and other powers—and section 92 disappears; for there are then two tests and two tests only of the validity of federal laws in relation to trade and commerce, namely:

- (1) Does this law grant a preference within the meaning of section 99? If it does, it is unconstitutional.
- (2) Does this legislation, though not granting a forbidden preference, necessarily impede the flow of trade in the widest possible sense of the term, or the free movement of persons from one State to another, with the object or certain effect of creating a breach in the economic unity of Australia? If it does, it is unconstitutional.³

¹ Continued from page 288, *supra*.

² As opposed to protectionism. The traditional meaning of the words, after suffering an eclipse for some twenty years, suddenly re-appears momentarily in the judgment of Evatt, J., in *Elliott v. Commonwealth*, (1935) 54 C.L.R. 657 at 701, when he said that "The plaintiff . . . maintains that the Commonwealth, like everybody else, is bound by the general rule of inter-State free trade or "inter-Colonial free trade" (as it was always called before Federation) evidenced by sec. 92 of the Constitution." The point was not developed because the High Court, in 1935, still adhered to the view that sec. 92 does not bind the Commonwealth.

³ Needless to say the second test is equally applicable to State laws. Incidentally it is probable that federal laws declared invalid after the application of this test would probably be invalid under the first; i.e., the express provision of section 99 would strike down the law without calling in aid the ambiguities of section 92. See also later, at page 438.

It may be argued that the second test would be very difficult to apply; the answer is that it should be capable of much more precise definition and application than "a logical distinction between the restrictions and burdens which may not be imposed upon interstate commerce and the directions which may be given for the orderly and proper conduct of commerce."⁴ The working out of a distinction between the permissible and the prohibited (which, with respect, cannot be a "logical" distinction but must always be empirical) is a task for which the legislature is as well equipped as the judiciary.

This interpretation finds further support in the following considerations:—

(I) Section 92 is one of the few sections in the Constitution in which restraint of power is not expressed in clear and unambiguous terms. If it was deliberately expressed in vague words, so vague as to defy acceptable delimitation of their scope, in order that by the very generality of its terms it might be held to control every section of the Constitution which relates, however exiguously, to "trade, commerce, and intercourse among the States," it would be natural to expect the section itself to be accorded a dominating position in the Constitution. Far from it; it is obscurely embedded in a group of sections of which many are ancillary, some are machinery clauses, and others have a temporary operation only; it is not even given primacy among those sections.⁵ The particular group in which it is found, viz., sections 81-105 under the heading of Chapter IV.—FINANCE AND TRADE,⁶ provide

(a) for the transfer of control over customs, excise, and bounties from States to Commonwealth immediately upon the establishment of the latter (section 86);

⁴ Per Dixon, J., in *Bank of New South Wales v. Commonwealth*, (1948) 76 C.L.R. 1, at 389. It would seem that their Lordships of the Judicial Committee do not share the optimistic belief of the learned judge that this "logical distinction" exists somewhere *in gremio iudicum*, since they say that "the problem to be solved will often not be so much legal as political, social, or economic" (*Commonwealth v. Bank of New South Wales*, [1949] 2 All E.R. 755, at 772). Political, social, and economic factors do not lend themselves easily to the processes of formal logic.

⁵ B. R. Wise, in *The Making of the Constitution* (published in 1913), asserts (at 248) that "(the financial clauses), it may be remarked, were the only ones not framed by lawyers." The author, himself a member of the 1897-98 Convention, persistently uses the expression "inter-Colonial Free Trade" as descriptive of the object of the Finance and Trade sections (e.g., at 250, 253); in an Appendix on "The Struggle in Tasmania", contributed by Mr. Justice Nicholls of that State, the same expression appears (at 352) and is varied later (at 356) to "Australian Free Trade." This is to be expected, for both authors wrote at a time when only one case directly involving section 92 had come before the High Court, namely, *Fox v. Robbins* (page 286 *supra*, note 43); and in that case "interstate free trade" is directly contrasted with "interstate protection."

⁶ Printed in full as an Appendix to this article.

- (b) for the substitution, on condition of uniformity, of Commonwealth *power* for State power over those subjects (sections 88, 90);
- (c) for the adjustment of Commonwealth-State financial relations during a transitional period, i.e., a period during which the States must so revise their financial policies as progressively to diminish their dependence on revenue from customs and excise and discover alternative sources of income (sections 87, 89, 93, and 94), by
 - (i) giving to all States for a specified period a constitutionally guaranteed share of the net revenue from customs and excise (sections 87, 89), and
 - (ii) giving to one State (Western Australia) a constitutionally guaranteed right for a specified but shorter period to maintain its customs barrier (but at a constantly diminishing height) *against the other States* in order to compensate it for the relatively greater loss which it would incur through the surrender of the customs and excise power to the Commonwealth (section 95);
- (d) for nullifying attempts by citizens of any State to obtain a special advantage, through the operation of the low-tariff policy of their State between the dates of the establishment of the Commonwealth and of the imposition of uniform duties, which would otherwise enure to them after the imposition of uniform duties (section 92, second paragraph);⁷
- (e) for the prevention of any evasion by the States of the economic consequences of the transfer of power over customs and excise from them to the Commonwealth (section 92) or in other words, to prevent them from enjoying for ten years a claim to an irreducible share of the net revenue from customs and excise and simultaneously or thereafter augmenting their receipts or favouring their own producers and merchants by expedients which in fact though not in form re-established State customs or excise duties or the equivalent thereof.

⁷ Goods imported into one State between the dates mentioned in the text, and sent to another State *after* the second date, were to pay federal duty less any duty actually paid on first importation. In the absence of such a provision, importers in a low-tariff State might have imported heavily between the two dates and held the goods until after uniformity; then, by selling in what had been a higher-tariff State, they could either undercut the latter's merchants or make an additional profit by including in their costs the federal duty chargeable on similar goods after uniformity and then adding their usual percentage to the costs so inflated. This provision was to last for two years only, it being unlikely that it would pay importers to hold such goods for a longer period.

Section 92 is thus an integral part of the general scheme of transfer, but *from that point of view* is of no more importance than any other section of the group. If it were intended to predominate,^{7a} the natural position for its first paragraph would appear to be after section 88; for its second paragraph, as an independent section immediately before section 95.

(II) The operation of section 92 is subject to a condition and to a proviso. It is true that the force of both condition and proviso has long since been spent; but it is submitted that they cannot even now be disregarded when the meaning of the section (and not exclusively of that truncated part which is presently operative) is being sought. The section was to have no effect whatever until the imposition of uniform duties of customs by the Commonwealth Parliament; uniformity had to be introduced within two years of the establishment of the Commonwealth. For a maximum period of two years federal laws on any topic included in section 51 could not be subject to any implied restriction or prohibition based upon an inoperative section, but only to such other restraints as are contained elsewhere in the Constitution (e.g., sections 99, 100, 102, 114) and were not made dependent upon the happening of a specified event. On the imposition of uniform customs duties, would such federal laws, hitherto unassailable by reason of the strict observance of the operative restrictions, have then become subject to the risk of being declared invalid under section 92? And would such invalidity, if judicially established, have been retrospective?

The presently operative part of section 92 is immediately followed by the proviso which authorises, for a period of two years *after* the imposition of uniform duties, a departure from the principle of interstate free trade established by the first paragraph.⁸ The fact that section 92 might have no operation whatever for a maximum period of two years, and that a wide exception from its operation was sanctioned for two more years (and, in relation to Western Australia, for five years under section 95) casts strong doubt on the validity of the popular (and at times judicial) conception of the section as an unconditional constitutional guarantee of freedom of trade in the sense of individualism versus collectivism, but it is not inconsistent with the interpretation of the section as an ultimate guarantee of interstate "free trade" and of the economic unity of Australia.

Certain other points call for brief comment.

(A) The requirement of uniformity is specifically applied only to customs duties (section 88). Uniformity of excise duties is required

^{7a} As the substantive grant of legislative power over trade and commerce among the States is given pride of place at the very beginning of section 51.

⁸ See note 7.

indirectly, by virtue of sections 51 (ii) and 99.⁹ If there were no proviso to section 51 (ii) and no section 99, would section 92 operate to prohibit differential excise duties if the Commonwealth had sought to impose them? Section 92 comes into operation “on the imposition of uniform duties of customs,” not “on the imposition of uniform duties of customs and excise.”

(B) The requirement of uniformity of customs duties is only specifically imposed in relation to the first law passed by the Parliament in regard to such duties (section 88). Thereafter uniformity of customs duties, as of excise duties, depended not on section 88 but on sections 51 (ii) and 99.

(C) If a free-trade Parliament had been elected in 1901,¹⁰ determined to adopt a policy of “absolute freedom of trade with other countries,” i.e., to impose no customs duties whatever, could it be said that a failure to impose any such duties was equivalent to imposing uniform duties so as to comply with section 88 and to bring sections 90 and 92 into operation? Would the power of the Parliament over excise and bounties as well as over customs (section 90) have become exclusive if it had announced in legislative form, within two years of the establishment of the Commonwealth, that it did not propose to levy any customs duties whatever? Would the power of the States to impose such duties and to grant such bounties have also ceased the moment that an Act of Parliament purported to abolish all customs duties? If the answer to these questions were “Yes” (so as to bring sections 90 and 92 into full operation), it would have involved a judicial pronouncement that the words “on the imposition of uniform duties of customs” must be deemed to contain an implied addendum “or on the passing of an Act of the Parliament for the abolition of all customs duties”—an extension of meaning that would seem to require an unusual degree of judicial courage—or law-making. But if the answer were “No,” by what means could the Parliament have been compelled to impose at least some uniform duties so as to bring the section into operation?

These points have been raised because of the reference by Dixon, J.,¹¹ to “the apparently inflexible terms in which the framers of the Constitution chose to express a policy regarded, it is said, as basal to the federation.” These “apparently inflexible terms” occur in a group of sections few of which can be described as models of the draftsman’s art. Some of the defects have already been pointed out; there are others. For example, section 87 is imperative that for ten years from the establishment of the Commonwealth the latter must not use for its own purposes more than one-quarter of the net revenue from customs and excise but must refund three-quarters to

⁹ Section 51 (ii) confers a legislative power as to “Taxation; but so as not to discriminate between States or parts of States.” For section 99 see Appendix.

¹⁰ See page 100 *supra*, note 12.

¹¹ In *Bank of New South Wales v. Commonwealth*, (1948) 76 C.L.R. 1, at 386.

the States. Yet section 89 (and by implication section 93), after prescribing the appropriate bookkeeping methods, merely requires the Commonwealth to pay to the States month by month the balance (*if any*) of revenue over expenditure. Section 89 contemplates there being no such balance; but section 87 says in effect (1) that before the imposition of uniform duties, in any State where customs and excise duties were already imposed by State law, there *must* be a balance because three-quarters of the net revenue is to be refunded—it being assumed that any State which imposed such duties did not lose money thereby; and (2) that after the imposition of uniform duties by the Commonwealth there must still be a balance for refund—here the assumption being that the Commonwealth would impose duties sufficiently high to ensure that the receipts would exceed the costs of collection. Sections 87, 88, 90, 93, 94, and 95 undoubtedly assume that the Commonwealth would adopt a protectionist policy; to have made the adoption of such a policy mandatory would never have been acceptable to New South Wales. The inconsistencies between some sections, the inadequacy of others to achieve the desired result, suggest great caution in interpretation and raise grave doubts whether the “apparently inflexible terms” of section 92 do in fact justify the far-reaching interpretation put upon them by the High Court and the Judicial Committee.

(D) Section 99 contains an express prohibition against the grant, by Commonwealth law or regulation of trade, commerce, or revenue, of a preference to one State over another. It is just conceivable, though not very likely, that such a preference might not detract from the “inter-Colonial free trade” which the founders of the Constitution sought so earnestly to establish. But if section 92 contains such a wide restraint on federal power as has been judicially attributed to it, what need is there for section 99? The grant of a preference would be almost certain to attract the nullifying force of section 92, since a preference could hardly operate without affecting to some extent the course of trade between the preferred State and the less fortunate others. If section 99 is necessary—and its inclusion is at least evidence of the founders’ belief that it was—it is a permissible deduction from its express enactment that section 92 was not deemed adequate *per se* to prevent preferences from being given by the Parliament; in other words, that section 92 was thought to have a much more limited operation than that which its “apparently inflexible terms” have been used to support. “Apparently inflexible terms” are also used in section 88, that uniform duties of customs *shall* be imposed within two years of the establishment of the Commonwealth; but it has never been seriously argued that they incorporate a protectionist policy in the Constitution itself, to be abandoned only after constitutional amendment.

(E) It is true that all legislative powers conferred by section 51 are to be exercised “subject to this Constitution” so as to attract to the exercise any prohibitions, restraints, or *enlargements* contained elsewhere. This, it is suggested, is little more than the express

incorporation in the Constitution of the rule of interpretation that a statute must be construed as a whole—a rule of which, it is submitted, the courts have not infrequently lost sight.¹² But it is also submitted that it should be possible to incorporate all the constitutional provisions relevant to a particular topic in one comprehensive clause; if all the provisions, when so assembled, are coherent and consistent, no difficulty in their interpretation and application is likely to arise; but if this collocation of apparently cognate provisions produces inconsistency and conflict, it is then arguable that some may have been included in the composite clause by error, or at least that the apparent meaning of the inconsistent clause or clauses should be read down so as to harmonize it (or them) with the remainder. To illustrate this point it is now proposed to assemble all the constitutional provisions relating to (1) taxation and (2) trade and commerce; the contrast between the two will become immediately apparent.

Taxation.

The Parliament shall . . . have power to make laws . . . with respect to—Taxation; but so as not to discriminate between States or parts of States (section 51 (ii)); and so that no preference shall be given to one State over another (section 99); and so that no tax shall be imposed on State property (section 114); and so that proposed laws imposing taxation (a) shall not originate in the Senate (section 53), (b) shall deal with no matter other than taxation (section 55), and (c) shall deal with one subject only of taxation (section 55); and so that the proceeds of all taxation shall be paid into one Consolidated Revenue Fund (section 81); and so that the first charge on that Fund shall be the cost of collecting the taxes (section 82).

There is no inconsistency or conflict anywhere; all the clauses fit into place as parts of a coherent pattern.

*Trade and Commerce.*¹³

The Parliament shall . . . have power to make laws . . . with respect to—Trade and commerce—including navigation, shipping, and State railways (section 98)—among the States (section 51 (i)); but so that on the imposition of uniform duties of customs such trade and commerce shall be absolutely free (section 92); and so that no preference shall be given to any State (section 99); and so that the reasonable use of river water for conservation or irrigation shall not be denied to any State or its residents (section 100); and so that the Parliament may prohibit

¹² Quick & Garran, in their contemporary *Annotated Constitution*, make no special comment on the quoted words.

¹³ For greater clarity the words "with other countries, and" in section 51 (i) have been omitted; but it is submitted that this does not subtract from the validity of the method used.

any preference or discrimination (if found by the Inter-State Commission to be undue and unreasonable, or unjust) on State railways (section 102); and so as not to interfere with the right of a State to control the use and consumption of alcoholic liquor in its own territory (section 113); and so as not to prevent a State from levying inspection charges on goods entering or leaving its territory (section 112).

The combined provisions relating to trade and commerce, unlike those relating to taxation, contain an obvious difficulty arising out of the inclusion of section 92; all the other provisions, as in regard to the taxation power, fall neatly and logically into place. It is a reasonable assumption that no draftsman would have prepared, nor the Convention approved, a clause which stated baldly in a grant of legislative power, "Trade and commerce with other countries, and among the States; provided that, on the imposition of uniform duties of customs, trade and commerce among the States shall be absolutely free."¹⁴ It is an equally reasonable assumption that although the two provisions appear separately in the Constitution, both the draftsmen and the founders were fully aware of what they were doing; and that they did not intend section 92 to withdraw entirely or even substantially the powers already conferred by section 51 (i) and other provisions. This assumption is strengthened by the fact that even section 92 does not say the last word about trade and commerce; after an interval it is followed by other clauses relating to the same subject-matter, some of which specifically enlarge it, others of which specifically restrict it, i.e., sections 98-100, 102, 112-113.

CONCLUSION.

It is perhaps too much to expect the courts to abandon their traditional habit of regarding every Act—even a constitution—as the product of legislative parthenogenesis, as parliamentary progeny without benefit of progenitors; but it is submitted that a re-examination of the Commonwealth Constitution, in all its implications, will reveal ample evidence within the four corners of the document itself of the true ambit of, and the restrictions upon, the trade and commerce power; that section 92, read correctly in its context, does no more than reinforce the conversion of six separate economic units into one and ensure the operation therein of the contemporary concept of free trade; and that its prohibition of interference with that concept extends solely to such measures, federal or State, as would necessarily or deliberately threaten that economic unity which the founders of federation in Australia had resolved to establish.

F. R. BEASLEY.

¹⁴ Such a juxtaposition of the two clauses might well have led to the interpretation that the trade and commerce power "among the States" was to determine entirely on the imposition of uniform duties of customs.

APPENDIX.

The Constitution—Chapter IV. Finance and Trade.¹⁵

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth.

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.

84. When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

85. When any department of the public service of a State is transferred to the Commonwealth—

- (i) All property of the State, of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary.
- (ii) The Commonwealth may acquire any property of the State, of any kind, used, but not exclusively used, in connexion with the depart-

¹⁵ The sections now operative are printed in heavier type.

ment; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth.

- (iii) The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament.
- (iv) The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the executive Government of the Commonwealth.

87. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

89. Until the imposition of uniform duties of customs—

- (i) The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.
- (ii) The Commonwealth shall debit to each State—
 - (a) the expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth.
 - (b) the proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth.
- (iii) The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State.

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect; but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, One thousand eight hundred and ninety-eight, and not otherwise.

91. Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

92. 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.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides:—

- (i) The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State;
- (ii) Subject to the last sub-section, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

94. After five years from the imposition of uniform duties of customs, the Parliament, may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

95. Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia, if that State be an Original State, may, during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed during the first of such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

97. Until the Parliament otherwise provides, the laws in force in any colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.

98. The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or part thereof.

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

102. The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

103. The members of the Inter-State Commission—

(i) Shall be appointed by the Governor-General in Council;

(ii) Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity;

(iii) Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office.

104. Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.¹⁶

105. The Parliament may take over from the States their public debts as existing at the establishment of the Commonwealth,¹⁷ or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

¹⁶ Secs. 101-104 are shown as inoperative because there has been no Inter-State Commission since 1920, following on the decision of the High Court in *Commonwealth v. New South Wales*, (1915) 20 C.L.R. 54; as to which see *The Exercise of "Judicial Power" in Australia*, 27 Can. Bar Rev. 686, at 696-7.

¹⁷ The words printed in italics were deleted after a referendum in 1910. A new section 105A was inserted after a referendum in 1928, but is not printed because it is not related in any way to the trade and commerce power.