
Chapter IV: The Inter-State Commission and the Regulation of Trade and Commerce under the Australian Constitution

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This article explores the rise and demise of the Inter-State Commission against the backdrop of “New Protection”, an economic and social policy which involved protecting Australian industry by criminalising monopolisation and contracts or combinations in restraint of trade. Ch IV of the Constitution provides for the existence of the Inter-State Commission and, as enacted, envisages a Commission with powers to adjudicate and administer the constitutional guarantee of the freedom of inter-state trade and commerce. The Inter-State Commission Act 1912 (Cth) conferred such jurisdiction on the Commission, which it exercised in its first (and only) adjudication. It held that the Wheat Acquisition Act 1914 (NSW) was invalid and its administration unconstitutional. On appeal, the High Court found that the provisions conferring jurisdiction on the Commission were contrary to Ch III of the Constitution. This decision left the Commission only with powers of investigation and report. By 1920 it had no members and in 1950 the Inter-State Commission Act was repealed. While the outcome in the Wheat Case is understandable given the broad powers conferred on the Commission, it was not inevitable.

INTRODUCTION

In *The Spirit of the Laws*, Baron de Montesquieu famously described the unwritten constitution of England in the middle of the 18th century as having three principal structural components: a legislature, an executive and a judicature. That structure first described by Montesquieu came later in that century to be reflected in the structure of the written Constitution of the United States. Article I provided that legislative power “shall be” vested in a Congress. Article II provided that executive power “shall be” vested in a President. Article III provided that judicial power “shall be” vested in one Supreme Court and in such inferior courts as the Congress might from time to time ordain and establish.

Montesquieu, as Professor Bruce Ackerman of Yale Law School has put it, looked at the components of the system of governance that existed in practice in mid-18th century England, and counted to three. The Trinitarian structure described by Montesquieu inspired the framers of the Constitution of the United States, but also limited their imagination.¹

The framers of the Australian Constitution a century later were not quite so lofty in their aspiration and were not quite so limited in their imagination. They looked to the components of systems of governance that they saw operating in practice in the late 19th century, including in England and in the United States, and counted to four. They imagined a constitutional system in which an independent economic regulator would constitute a fourth arm of national government. They structured the Australian Constitution so as to provide for the creation of just such a fourth arm of the national government of the Commonwealth of Australia. They called it the Inter-State Commission.

The subject of this Bannerman Competition Lecture is the fate of the fourth arm of the national government of the Commonwealth of Australia. The rise and demise of the Inter-State Commission is a story most of which is set in the decade and a half immediately following the enactment of the

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¹ Bruce Ackerman, “The New Separation of Powers” (2000) 113 *Harvard Law Review* 633.

Australian Constitution in 1900 by the Imperial Parliament.² That period was at the dawn of our national political and constitutional experience. It was also at the dawn of legislative development of competition policy, post-dating by a decade the enactment by the United States Congress in 1890 of the *Sherman Act*³ and concluding roughly contemporaneously with the enactment by the United States Congress in 1914 of the *Clayton Act*⁴ and the *Federal Trade Commission Act*.⁵ The fate of the Inter-State Commission was intertwined with the fate during the same period of key elements of national legislation embodying an integrated economic and social policy known as “New Protection”, part of which involved the criminal prohibition of monopolisation and of contracts or combinations in restraint of trade along similar lines to the prohibitions contained in the *Sherman Act*. The story of New Protection and of the Inter-State Commission is a story of constitutional and legislative innovation, of unrealised constitutional potential and of constitutionally-thwarted legislative ambition.

THE CONSTITUTIONAL STRUCTURE

The first three chapters of the Australian Constitution follow the orthodox pattern first described by Montesquieu. They deal with the same subject matter and adopt the same order as the first three Articles of the Constitution of the United States. Chapter I commences by providing that “[t]he legislative power of the Commonwealth shall be vested in a Federal Parliament”.⁶ Chapter II commences by providing that “[t]he executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General”.⁷ Chapter III commences by providing that “[t]he judicial power of the Commonwealth shall be vested in a Federal Supreme Court to be called the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction”.⁸

The difference in tense between the “is vested” in Ch II and the “shall be vested” in Chs I and III is explicable on the basis that the executive power of the Commonwealth needed to be exercised from the moment of the establishment of the Commonwealth by proclamation on 1 January 1901, whereas the legislative and judicial powers of the Commonwealth were not able to be exercised until later. The legislative power was not able to be exercised until the convening of the first Parliament following the holding of the first general election. The first Parliament was in fact convened on 9 May 1901. The judicial power was not to be exercised until the enactment by the Parliament of legislation facilitating the establishment and operation of the High Court. The necessary legislation was not enacted until 25 August 1903,⁹ and the High Court sat for the first time on 6 November 1903.¹⁰

Chapter IV of the Australian Constitution, headed “Finance and Trade”, was a distinctly Australian addition to the standard tripartite constitutional structure. The focus on trade gave effect to principles for the creation of a federal government, embodied in a resolution adopted at the beginning of the first National Australasian Convention in 1891 on the motion of Sir Henry Parkes¹¹ and reiterated in a resolution adopted at the beginning of the second National Australasian Convention in 1897 on the motion of Edmund Barton,¹² to the effect that the exclusive power to collect duties of customs and excise was to be vested in the federal Parliament and that trade and intercourse between the federated colonies was to become and remain absolutely free. The linking of finance with trade

² *Commonwealth of Australia Constitution Act 1900* (IMP) (Australian Constitution).

³ *Sherman Act*, 15 USC §§ 1–7.

⁴ *Clayton Act*, 15 USC §§ 12–27; 29 USC §§ 52–53.

⁵ *Federal Trade Commission Act*, 15 USC §§ 41–58.

⁶ Australian Constitution, s 1.

⁷ Australian Constitution, s 61.

⁸ Australian Constitution, s 71.

⁹ *Judiciary Act 1903* (Cth); see also *High Court Procedure Act 1903* (Cth) enacted 28 August 1903.

¹⁰ *Dalgarno v Hannah* (1903) 1 CLR 1.

¹¹ John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 41.

¹² Williams, n 11, 477.

reflected the fact that duties of customs and excise were the principal source of revenue in the federating colonies in the 1890s. Duties of customs and excise were in fact to become and remain the sole source of revenue for the Commonwealth until the enactment of a Commonwealth land tax in 1910.¹³ The tax base was widened further with the enactment of a Commonwealth income tax in 1915.¹⁴ The vertical fiscal imbalance anticipated to result from the federating colonies losing their principal source of revenue on becoming States was addressed on a transitional basis in the so-called “Braddon clause”,¹⁵ providing that for the first 10 years after the establishment of the Commonwealth not more than a quarter of the “net revenue” of the Commonwealth from duties of customs and excise was to be applied annually to the Commonwealth and its expenditure, and that the balance was to be paid to the States or applied towards the payment of interest on debts of the States taken over by the Commonwealth.

On the central topic of trade, provisions of Ch IV adopted a logical and chronological order. They provided that “[o]n the establishment of the Commonwealth, the collection and control of duties of customs and of excise ... shall pass to the Executive Government of the Commonwealth”,¹⁶ that “[u]niform duties of customs shall be imposed within two years after the establishment of the Commonwealth”;¹⁷ that “[o]n the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise ... shall become exclusive”,¹⁸ and, in the only provision in the entire Constitution to be expressed as a guarantee, that “[o]n the imposition of uniform duties of customs, trade, commerce, and intercourse amongst the States ... shall be absolutely free”.¹⁹ The first Parliament in fact imposed uniform duties of customs by legislation which commenced on 16 September 1902,²⁰ bringing the constitutional guarantee into force on and from that date.

Within the context of Ch IV, the Constitution provided, and continues to provide:²¹

There shall be an Inter-Sate 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.

It provided, and continues to provide, that members of the Inter-State Commission “shall be appointed by the Governor-General”, “shall hold office for seven years” and are otherwise to have the same security of tenure as Justices of the High Court and of other courts created by the Parliament have under Ch III: they are not to be removed except by the Governor-General in Council on an address from both Houses of the Parliament praying for removal on the ground of proved misbehaviour or incapacity, and they are to receive remuneration fixed by the Parliament that is not to be diminished during their continuation in office.²²

Chapter IV’s reference to the Inter-State Commission having “such powers of adjudication and administration as the Parliament deems necessary” ties to a provision in Ch III which defines the appellate jurisdiction of the High Court. As well as being given jurisdiction “to hear and determine appeals from all judgments, decrees, orders, and sentences ... of any justice or justices exercising the original jurisdiction of the High Court ... of any other federal court, or court exercising federal

¹³ *Land Tax Act 1910* (Cth); *Land Tax Assessment Act 1910* (Cth).

¹⁴ *Income Tax Act 1915* (Cth); *Income Tax Assessment Act 1915* (Cth).

¹⁵ Australian Constitution, s 87.

¹⁶ Australian Constitution, s 86.

¹⁷ Australian Constitution, s 88.

¹⁸ Australian Constitution, s 90.

¹⁹ Australian Constitution, s 92.

²⁰ *Customs Tariff 1902* (Cth).

²¹ Australian Constitution, s 101.

²² Australian Constitution, s 103; cf s 72.

jurisdiction; or the Supreme Court of any State”, the High Court is specifically given jurisdiction “to hear and determine appeals from all judgments, decrees, orders, and sentences ... of the Inter-State Commission, but as to questions of law only”.²³

To the extent that there were in 1900 precedents for the establishment of a body along the lines of the Inter-State Commission, those precedents were to be found in the United States Inter-State Commerce Commission and in the English Railway and Canal Commission.²⁴ Each provided only a partial analogy and neither had any formal constitutional status. The Inter-State Commerce Commission had been created in 1887 by an Act of Congress²⁵ which prohibited common carriers involved in inter-state transportation from engaging in unjust discrimination or from giving undue preference. The powers of the Inter-State Commerce Commission were limited to investigating and reporting on compliance with that Act. The Inter-State Commerce Commission could give notice to a carrier to cease and desist from any violation it found. But the carrier’s obedience to such a notice was capable of being enforced only in proceedings in a federal circuit court in which it fell to that Court conclusively to determine all issues of fact and law. The Railway and Canal Commission had been created by an Act of the United Kingdom Parliament in 1888.²⁶ Unlike the Inter-State Commerce Commission, the Railway and Canal Commission was itself constituted as a court of record from which an appeal limited to a question of law lay to the English Court of Appeal. Subject to any such appeal, the Railway and Canal Commission had full jurisdiction to determine all questions of law and fact, to award damages and enforce its own orders in any dispute between a complainant and a railway or canal company concerning the legality of a rate or charge.

The idea of establishing the Inter-State Commission as a structural component of the Australian Constitution was first raised in a report of the Finance Committee to the Adelaide Session of the second National Australasian Convention in 1897.²⁷ As taken up in the draft of the Constitution which emerged from that Session, the Inter-State Commission was initially conceived as a body which the Commonwealth Parliament might, but need not, establish to perform the specific and limited function of executing and maintaining provisions of the Constitution relating to trade and commerce on railways and on rivers.²⁸ The draft was amended in the course of debate in the Melbourne Session of the second National Australasian Convention in 1898 to make the establishment of the Inter-State Commission mandatory and to expand its functions.²⁹ One of the main proponents of that expansion of function was Edmund Barton. One of the main detractors was Isaac Isaacs who saw the Inter-State Commission as having the potential to usurp the functions both of the Parliament and of the courts.

By allowing for the Inter-State Commission when established to have such powers of adjudication and administration as the Parliament might deem necessary for the execution and maintenance of the provisions of the Constitution relating to trade and commerce, the Constitution as enacted plainly contemplated that the powers of the Commission might at the option of the Parliament extend to encompass adjudication and administration of the Constitution’s guarantee of the absolute freedom of inter-state trade and commerce. By further allowing for the Inter-State Commission when established to have such powers of adjudication and administration as the Parliament might deem necessary for the execution and maintenance of the laws made by the Parliament under provisions of the Constitution relating to trade and commerce, the Constitution as enacted also plainly makes the powers of the Inter-State Commission capable of extending to encompass the adjudication and

²³ Australian Constitution, s 73.

²⁴ See generally John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901) 895–901; W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Legal Books, 2nd ed, 1910) 573–576.

²⁵ *Interstate Commerce Act*, Pub L 49-41, 24 Stat 379 (1887).

²⁶ *Railway and Canal Traffic Act 1888* (UK). See generally Butterworths & Co, *Halsbury’s Laws of England* (at 1912) Vol XXIII, 753–764.

²⁷ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 12 April 1897, 432–433.

²⁸ Williams, n 11, 520.

²⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 24 February 1898, 1513–1539.

administration of laws to be made by the Parliament in the exercise of its power to make laws for the peace, order, and good government of the Commonwealth with respect to “trade and commerce with other countries, and among the States”.³⁰ Arguably, it also makes those powers capable of extending to encompass the adjudication and administration of laws to be made by the Parliament under other heads of national legislative power including that with respect to “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”.³¹

In their well-known commentaries on the Constitution published in 1901, Dr John Quick and Robert Garran observed that, despite giving a definite direction to the Parliament that there “shall be” an Inter-State Commission, the Constitution stopped short of actually organising the Inter-State Commission. They pointed out that “[u]ntil the Parliament provides for the number of members and their salary, the Commission cannot exist at all” and that “until the Parliament determines what powers of adjudication and administration are necessary to it, it can have no powers at all”. They added that “[t]he Parliament cannot, of course, be compelled – except by its constituents – to constitute a Commission, or to give it any powers when constituted”.³²

As events occurred, the Parliament did not constitute the Inter-State Commission until 1912, when it did so as an adjunct to its attempt to implement the policy of New Protection. The life of the Inter-State Commission as the fourth arm of national government was then to be cut short barely three years later by a decision of the High Court construing Ch III with a “Montesquieuan fundamentalism”³³ which trumped and effectively emasculated the powers of adjudication capable of being conferred on the Inter-State Commission by the Parliament in accordance with Ch IV.

NEW PROTECTION

Perhaps unsurprisingly given the centrality to the constitutional design of vesting in the Commonwealth Parliament exclusive power to legislate for duties of customs and excise which was to be exercised on a uniform basis for the whole of Australia, the membership of the first Parliament (which existed between 9 May 1901 and 23 November 1903) divided according to attitudes of members towards trade policy. On one side were the so-called “Protectionists”, who formed a government led initially by Edmund Barton as Prime Minister. On the other side were the so-called “Free-Traders”, led by George Reid, who became the Leader of the Opposition. In between, there were those labelled by Reid the “Indifferentists”.³⁴ With the resignation of Barton, to become (along with Sir Samuel Griffith and Richard O’Connor) one of the first three members of the High Court, the office of Prime Minister and the leadership of the Protectionists passed to Alfred Deakin.³⁵

The rise of the Labour Party as a third political force in the second general election saw the membership of the House of Representatives during the second Parliament (which existed between 16 December 1903 and 5 November 1906) split almost evenly between the Protectionists, the Free-Traders and Labour – leading to a predicament Deakin famously described as three elevens in the field each fighting against both other teams. Following defeats on the floor of the House of governments led successively by the Protectionist Deakin, Labour’s Chris Watson and the Free-Trader Reid, stable government was eventually formed in the second half of 1905 by the Protectionist Deakin governing with the support of Labour.³⁶

Watson’s short-lived Labour Government having succeeded in procuring the enactment by the Parliament of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth), the scene was set with the return of Deakin to the office of Prime Minister in the second half of 1905 for the implementation

³⁰ Australian Constitution, s 51(i).

³¹ Australian Constitution, s 51(xx).

³² Quick and Garran, n 24, 895–896.

³³ Compare *Wainohu v New South Wales* (2011) 243 CLR 181, 202 [30].

³⁴ George Houstoun Reid, *My Reminiscences* (Cassell & Co, 1917) 205.

³⁵ See generally Geoffrey Sawer, *Australian Federal Politics and Law: 1901–1929* (Melbourne University Press, 1956) 14–33.

³⁶ See generally Sawer, n 35, 34–59.

of the policy of New Protection. The basic notion of New Protection involved the legislative protection of Australian industry from what was perceived to be unfair foreign competition on the understanding that the economic benefit to the protected industry – the monopoly rent if you like – would be shared between capital and labour. The immediate impetus for the implementation of that policy was provided by evidence adduced in 1905 before a Royal Commission into the Tariff, chaired by Sir John Quick, which the Watson Government had established in 1904. The evidence was to the effect that the Chicago-based International Harvester Co, a so-called “Octopus trust” reputedly controlled by John D Rockefeller of Standard Oil notoriety, already had 90% of the world trade in harvesting machinery and was “after the other ten”, having plans to undercut the main Australian manufacturer, H V McKay, until he was driven out of business. McKay ran the largest manufacturing business in Australia. His factory in Melbourne employed some 2,500 workers.³⁷

In rapid succession in 1906 the Parliament enacted three pieces of legislation. The first was the *Australian Industries Preservation Act 1906* (Cth). The other two were the *Customs Tariff Act 1906* (Cth) and the *Excise Tariff Act 1906* (Cth).

The *Australian Industries Preservation Act* was thought by the Free-Trader Reid to be “one of the most interesting measures on the Statute Book of the Commonwealth”.³⁸ Its operative provisions divided into two Parts, one headed “Prevention of Dumping”, the other “Repression of Monopolies”.

The Part headed “Prevention of Dumping” made provision for the Minister to refer for the investigation and determination of a Justice of the High Court a question of whether goods were being imported with intent to destroy or injure an Australian industry by their sale or disposal within the Commonwealth in unfair competition with any Australian goods and, if so, whether the importation of those goods should be prohibited. The determination of the Justice was to be published by the Minister and, if affirmative, was to have effect as a proclamation under the *Customs Act 1901* (Cth) prohibiting the importation of the goods.

The Part headed “Repression of Monopolies” followed the pattern of the *Sherman Act* in imposing criminal prohibitions on contracts or combinations in restraint of trade and on monopolisation. It departed slightly from the pattern of the *Sherman Act* in that each of the offences it created was expressed to involve an element of specific intent. Entering into a contract or maintenance of a combination was prohibited only if done with intent either “to restrain trade or commerce to the detriment of the public” or “to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers and consumers”.³⁹ Monopolisation was prohibited only if done with intent “to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity”.⁴⁰

The other departure from the *Sherman Act* was that, in an attempt to rely on all available heads of Commonwealth legislative power, the *Australian Industries Preservation Act* attempted to impose those prohibitions on contracts or combinations in restraint of trade and on monopolisation not merely on the conduct of persons in relation to trade or commerce with other countries or among the States⁴¹ but also more generally on any foreign corporation, or trading or financial corporation formed within the limits of the Commonwealth.⁴²

“Unfair competition” was defined for the purposes of both Parts of the *Australian Industries Preservation Act* in terms which made competition presumptively unfair in circumstances, which

³⁷ See generally Bernard R Wise, *The Commonwealth of Australia* (Pitman & Sons, 1913) 264–271; Andrew Hopkins, “Anti-Trust and the Bourgeoisie: 1906 and 1965” in E L Wheelwright and Ken Buckley, *Essays in the Political Economy of Australian Capitalism* (Australia & New Zealand Book Co, 1978) Vol 2, 87–94.

³⁸ Reid, n 34, 251.

³⁹ *Australian Industries Preservation Act 1906* (Cth) ss 4, 5.

⁴⁰ *Australian Industries Preservation Act 1906* (Cth) ss 7, 8.

⁴¹ *Australian Industries Preservation Act 1906* (Cth) ss 4, 7.

⁴² *Australian Industries Preservation Act 1906* (Cth) ss 5, 8.

included “if the competition would probably or does in fact result in an inadequate remuneration for labour in the Australian industry [or] in creating substantial disorganization in Australian industry or throwing workers out of employment”.⁴³

Whilst the *Australian Industries Preservation Act* was cast in general terms, the *Customs Tariff Act* was specifically targeted to provide McKay with a direct and immediate measure of protection from the threat perceived to be posed by the International Harvester Co. It singled out harvesting machinery imported into Australia for very high rates of customs duties. The Governor-General was authorised by proclamation to lower the rates of duties to specified levels if satisfied that the machinery was being sold in Australia above specified cash prices. The *Excise Tariff Act* was designed as McKay’s *quid pro quo* for that ongoing tariff protection. It imposed excise duties on harvesting machinery manufactured in Australia at a rate equivalent to the lower rate of the duties of customs imposed on imported harvesting machinery, subject to the proviso that no excise duty was imposed on machinery manufactured under conditions as to the remuneration of labour which, amongst other possibilities, were in accordance with an industrial award or industrial agreement under the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) or which, on application made for the purpose to the President of the Commonwealth Court of Conciliation and Arbitration, were declared by him to be fair and reasonable.

Neither the *Australian Industries Preservation Act* nor the *Excise Tariff Act* fared well in the courts.

An application to the President of the Commonwealth Court of Conciliation and Arbitration by McKay for a declaration that the wages he paid his employees were fair and reasonable resulted in 1907 in the decision of Higgins J in the celebrated *Harvester Case* that the wages being paid were insufficient to meet “the normal needs of the average employee regarded as a human being in a civilised community”.⁴⁴ But McKay refused to increase the wages of his employees. He also refused to pay duties of excise on the harvesting machinery he manufactured. His boldness was vindicated. His subsequent prosecution for non-payment of excise resulted in the decision in *R v Barger*⁴⁵ in which the High Court, whose membership had in 1906 been expanded to five with the additional appointments of Isaacs and Higgins JJ, held by majority (with the original three Justices outvoting the new two) that the *Excise Tariff Act* of 1906 was beyond the legislative power of the Parliament as an attempt through the guise of taxation to regulate manufacturing, which the majority considered to be a form of intra-state trade impliedly reserved by the Constitution to the States.

The *Australian Industries Preservation Act* ended up never being invoked against the International Harvester Co or any other foreign company. During the third Parliament (which existed between 12 December 1906 and 19 February 1910), the attention of government – initially under Deakin, and from November 1908 under Labour’s Andrew Fisher as Prime Minister – turned to the potential for its domestic application.⁴⁶ To strengthen powers of investigation, the Act was amended to insert a provision which empowered the Comptroller-General of Customs to compel the answering of questions and the production of documents in relation to alleged offences.⁴⁷ An attempt to use that new power to investigate an alleged shipping cartel resulted in the decision in *Huddart, Parker & Co Pty Ltd v Moorehead*,⁴⁸ in which the High Court held, this time by a majority of four to one (with Isaacs J as the lone dissident), that the prohibitions on contracts or combinations in restraint of trade and on monopolisation were beyond the legislative power of the Parliament insofar as they purported

⁴³ *Australian Industries Preservation Act 1906* (Cth) ss 6, 18.

⁴⁴ *Ex parte H V McKay* (1907) 2 CAR 1.

⁴⁵ *R v Barger* (1908) 6 CLR 41.

⁴⁶ See generally Sawyer, n 35, 60–72.

⁴⁷ *Australian Industries Preservation Act 1907* (Cth).

⁴⁸ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

to apply to the intra-state conduct of trading or financial corporations formed within the limits of the Commonwealth. The provisions of the Act which relied on the corporations' power thereby became dead letter. They were soon afterwards repealed.⁴⁹

During the fourth Parliament (which existed between 13 April 1910 and 23 April 1913), with Labour's Fisher as Prime Minister and William Morris Hughes as Attorney-General, the Act was again amended in November 1910 to strengthen the remaining prohibitions on contracts or combinations in restraint of trade and on monopolisation in relation to trade or commerce with other countries or among the States by removing the requirement for the prohibited conduct to be done with intent.⁵⁰ The prohibitions as prospectively amended would be breached by any contract or combination entered into or maintained in restraint of trade or by any monopolisation.

Some months earlier, Hughes had commenced what was to be the first and only prosecution under the Act. The prosecution was of complex cartel conduct having horizontal and vertical dimensions on the part of 17 mining companies (and 13 individual directors of those mining companies), together with four shipping companies (and their managing directors), in relation to the sale and transportation to industrial and commercial consumers in other States of coal mined in the Newcastle region. Newcastle coal, superior for industrial and commercial purposes to other coal then being produced in Australia, had a low elasticity of demand. There were significant barriers to entering into its mining and transportation. The mining defendants, members of the unincorporated association Associated Northern Collieries colloquially known as "the Vend", comprised substantially all of the coal miners in the Newcastle region. The shipping defendants between them carried substantially all of the coal carried between New South Wales and other States. The cartel conduct made the subject of the prosecution occurred between the date of the commencement of the Act in 1906 and the date of the commencement of the prosecution. Despite the amendment, the prosecution was continued in reliance on the prohibitions under the Act in its unamended form, with the consequence that intent still needed to be proved.⁵¹

The trial in what became known as the *Vend Case* took place over 75 days in 1911 before a Justice of the High Court, sitting alone as provided for in the Act, nobody appearing to have suggested that trial by jury was a constitutional necessity. In a judgment of nearly 300 pages, notable for its economic prescience and sophistication of analysis,⁵² Isaacs J in December 1911⁵³ convicted each of the defendants of having engaged or been knowingly concerned in a combination with intent to restrain inter-state trade in Newcastle coal to the detriment of the public and of having monopolised or been knowingly concerned in monopolisation of the same trade with intent to control the supply and price of Newcastle coal to the detriment of the public. Detriment to the public his Honour found in the fact that the cost of delivered coal to the industrial and domestic consumers was significantly higher and the quantity of coal delivered to those users was significantly lower than either would have been had the defendants not engaged in concerted conduct.

The mining defendants abided by the decision of Isaacs J. They paid the fines he imposed on them. The shipping defendants appealed.

In judgments notable for their lack of engagement with economic principle, for their adherence to laissez-faire philosophy and for their concern to avoid the supposed evils of the phenomenon they

⁴⁹ *Australian Industries Preservation Act 1909* (Cth).

⁵⁰ *Australian Industries Preservation Act 1910* (Cth).

⁵¹ See generally Kerrie Round, Martin P Shanahan and David K Round, "Anti-Cartel or Anti-Foreign? Australian Attitudes to Anti-Competitive Behaviour before the First World War" (2010) 56 *Australian Journal of Politics and History* 540, 546–548.

⁵² See generally D J Stalley, "Federal Control of Monopoly in Australia" (1958) *University of Queensland Law Journal* 258; Geoffrey de Q Walker, *Australian Monopoly Law* (FW Cheshire, 1967) 31–35; Alan Ransom, "Monopolization and Price Fixing – Good Cases Making Bad Law; Australian–United States Parallels and a Suggested Solution" (1981) 12 *Federal Law Review* 308, 331–343; Martin P Shanahan and David K Round, "Serious Cartel Conduct, Criminalisation and Evidentiary Standards: Lessons from the Coal Vend Case of 1911 in Australia" (2009) 51 *Business History* 875.

⁵³ *R v Associated Northern Collieries* (1911) 14 CLR 387.

variously described as “cut-throat”⁵⁴ or “ruinous”⁵⁵ competition, the Full Court of the High Court on appeal by the shipping defendants in September 1912⁵⁶ and the Privy Council on further appeal by the Attorney-General of the Commonwealth in July 1913⁵⁷ unanimously held the shipping defendants (and by implication the mining defendants) to have been wrongly convicted. An intention to act to the detriment of the public, they held, was not to be found merely in an intention to act in a concerted manner to raise prices or restrict supply. Something more was required. That something was lacking.

Writing for the Full Court of the High Court, Griffith CJ gave a hypothetical example of a restraint of trade falling outside the statutory prohibition because it would not be detrimental to the “public” properly understood as including producers as much as consumers. The example was of two neighbouring vigneron endeavours to establish the industry of wine growing in a particular district. It would not necessarily be to the detriment of the public, his Honour opined, either for them to agree between themselves to fix their prices or for them to enter into supply agreements with wine merchants and hotel-keepers in a neighbouring town on terms which provided for the maintenance of the resale prices of their wines.⁵⁸ Writing for the Privy Council, Lord Parker appeared to treat as a factor indicative of lack of intention to act to the detriment of the public that there was no basis for an inference that the defendants or any of them had “acted otherwise than with a single view to their own advantage”.⁵⁹

LEGISLATIVE RISE AND CONSTITUTIONAL FALL OF THE INTER-STATE COMMISSION

Bills to establish the Inter-State Commission had been introduced into the first Parliament by Barton in 1901 and into the third Parliament by Deakin in 1909. Both for various reasons had lapsed.⁶⁰

In December 1912, after the decision of the Full Court of the High Court in the *Vend Case* and with his appeal to the Privy Council pending, Hughes introduced into the fourth Parliament another Bill to establish the Interstate Commission, which was enacted with the support of the opposition led by Deakin.⁶¹

Establishment of the Inter-State Commission was described by Littleton Groom in the course of the second reading debate on the Bill in the House of Representatives in 1912 as “completing the structure of the Federal Constitution as contemplated by its framers”. “The theory of our Constitution is, of course, to divide the functions of Government into three distinct parts – the Legislature to make the laws, the Judiciary to interpret the laws, and the Executive to administer the law”, Groom explained, but “[i]t was realized that, in addition, there should be created a constitutional body, partly administrative, and partly judicial”. “The Inter-State Commission”, he said, was “a composite body combining functions ordinarily performed by officers under the direction of responsible Ministers, and functions of a judicial character”.⁶² Sir John Quick spoke during the same debate of the Commission having authority “to prevent anybody, or any combination of persons, resorting to methods or expedients that may amount to restraint or obstruction of trade”.⁶³ The subject matter of the *Vend Case*, for example, would fall within the scope of its authority.⁶⁴

⁵⁴ *Adelaide Steamship Co Ltd v The King* (1912) 15 CLR 65, 76.

⁵⁵ *Attorney-General (Cth) v Adelaide Steamship Co Ltd* (1913) 18 CLR 30, 41.

⁵⁶ *Adelaide Steamship Co Ltd v The King* (1912) 15 CLR 65.

⁵⁷ *Attorney-General (Cth) v Adelaide Steamship Co Ltd* (1913) 18 CLR 30.

⁵⁸ *Adelaide Steamship Co Ltd v The King* (1912) 15 CLR 65, 80.

⁵⁹ *Attorney-General (Cth) v Adelaide Steamship Co Ltd* (1913) 18 CLR 30, 52.

⁶⁰ See generally Andrew Bell, “The Missing Constitutional Cog: The Omission of the Inter-State Commission” [2009–2010] (Summer) *Bar News* 59, 61–63.

⁶¹ See generally Bell, n 60, 64–66.

⁶² Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 1912, 7075.

⁶³ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 December 1912, 7108.

⁶⁴ Commonwealth, n 63, 7109–7110.

The *Inter-State Commission Act 1912* (Cth) was assented to and came into force on Christmas Eve 1912. By Pt II, it provided for the establishment of an Inter-State Commission to consist of three members, one of whom was to be “of experience in the law”.⁶⁵ By Pt III, it provided for the Commission to be “charged with the duty of investigating, from time to time, all matters which in the opinion of the Commission ought in the public interest to be investigated” affecting, among other things, “the production of and trade in commodities”, “prices of commodities” and “profits of trade and manufacture”.⁶⁶ By Pt V, it provided for the Commission to have jurisdiction, on complaint or of its own motion, to hear and determine any matter as to anything done or omitted to be done by any person in contravention of “the provisions of the Constitution relating to trade or commerce or any law made thereunder”.⁶⁷ For that purpose, the Commission was constituted a court of record and given jurisdiction to determine all matters of fact and law and to grant all relief as may be just including by way of damages or injunction.⁶⁸ The orders of the Commission were to be capable of being enforced in the same manner as an order of the High Court⁶⁹ and were not to be questioned or reviewed except on appeal to the High Court on a question of law.⁷⁰

The Inter-State Commission was not to become operational until the appointment by the Governor-General on 11 August 1913, during the period of the sixth Parliament (which existed from 5 September 1914 to 26 March 1917) on the advice of the Ministers in the Liberal Government under Joseph Cook as Prime Minister, of Albert Piddington as the legal member and Chief Commissioner and of George Swinburne and Nicholas Lockyer as the other two members.⁷¹ Piddington had been appointed to the High Court in 1912 when its numbers had been increased to seven, but had resigned without sitting in controversial circumstances when it became publicly known that Hughes as Attorney-General had offered him the appointment after Piddington had indicated to Hughes in an exchange of telegrams that Piddington took an expansive view of Commonwealth legislative power.⁷² Swinburne had had a distinguished career as a businessman, as an engineer, as a member of the Victorian Legislative Assembly and as the Victorian Minister for Agriculture and Public Works.⁷³ Lockyer was a respected public servant. He had been appointed Comptroller-General of Customs in 1911 and had previously worked in the New South Wales Treasury.⁷⁴

In September 1913, the Inter-State Commission embarked at the request of Groom, as Minister for Trade and Customs, on the first of a number of investigations it was to conduct under Pt III of the *Inter-State Commission Act*. It was a very large investigation into the tariff system. Not long after the outbreak of the First World War, the Commission on the complaint of the Commonwealth embarked on what was to be the only adjudication it would ever conduct under Pt V.

In January 1915, the Commonwealth complained to the Commission that the *Wheat Acquisition Act 1914* (NSW), a wartime measure enacted by the Parliament of New South Wales, was being administered by New South Wales officials in a manner which amounted to a form of “inverted protection”,⁷⁵ by which demand for wheat in New South Wales was being met at lower prices than would have been paid to meet unmet demand in other States. Claiming that the administration

⁶⁵ *Inter-State Commission Act 1912* (Cth) s 4.

⁶⁶ *Inter-State Commission Act 1912* (Cth) s 16.

⁶⁷ *Inter-State Commission Act 1912* (Cth) ss 24–27.

⁶⁸ *Inter-State Commission Act 1912* (Cth) ss 23, 29–31, 36.

⁶⁹ *Inter-State Commission Act 1912* (Cth) s 35.

⁷⁰ *Inter-State Commission Act 1912* (Cth) ss 42, 44.

⁷¹ See generally Sawyer, n 35, 111–113, 128.

⁷² Sawyer, n 35, 105–106.

⁷³ See generally F H Sugden and F W Eggleston, *George Swinburne: A Biography* (Angus & Robertson, 1931).

⁷⁴ D I McDonald, “Lockyer, Sir Nicholas Colston (1855–1933)” in Australian National University, *Australian Dictionary of Biography* (Melbourne University Press, 1986).

⁷⁵ Sawyer, n 35, 152.

contravened the constitutional guarantee of absolute freedom of inter-state trade, the Commonwealth asked for an order commanding the State of New South Wales to cease and desist.

The Inter-State Commission overruled a preliminary objection by New South Wales to its jurisdiction in a ruling authored by Piddington.⁷⁶ The Commission then went on to hear and, in February 1915, to determine the Commonwealth's complaint. The Commission, by majority with Piddington in dissent, held that the *Wheat Acquisition Act* was invalid and that its administration was unconstitutional. The Commission commanded the State to cease and desist and ordered the State to pay the Commonwealth's costs.⁷⁷

The State lost no time appealing to the High Court. And the High Court, the membership of which had by then been increased to seven, lost no time hearing and determining the State's appeal. The High Court, constituted for the purposes of the appeal by six Justices, heard the appeal in the first two weeks of March 1915 and gave judgment barely two weeks later. By a majority of four to two (with Barton and Gavan Duffy JJ dissenting), the High Court in the *Wheat Case*⁷⁸ upheld the State's objection to the jurisdiction of the Inter-State Commission, holding that the whole of Pt V of the *Inter-State Commission Act* was invalid as an attempt to confer judicial power on a body that was not a court contrary to Ch III of the Constitution.

The thought of "a curiously anomalous body which might at once be an executive department and a Court of Law with jurisdiction to deal with cases such as the *Vend Case*"⁷⁹ and to determine that legislative or executive action was unconstitutional was too much for the majority in the *Wheat Case* to contemplate. The prescription in Ch IV of the Constitution that the Inter-State Commission was to have "such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance ... of the provisions of [the] Constitution relating to trade and commerce, and of all laws made thereunder" was explained by the majority as identifying the function of the Commission as constitutionally limited to that of "execution and maintenance" – an executive function. The powers of "adjudication and administration" which the Parliament might confer on the Commission, the majority said, were limited to powers adjectival to that function. The powers of "adjudication" which the Parliament had the option of conferring on the Commission did not extend to "judicial" powers to determine rights and liabilities such as might be conferred on a court under Ch III. They were instead limited to "quasi-judicial" powers of an administrative nature such as might be conferred on the Commissioner of Patents or the Collector of Customs.

The majority of the High Court in that way decided, as Professor Colin Howard would later put it, that the constitutional provision mandating the establishment of the Inter-State Commission "did not mean what it said".⁸⁰ In the Inter-State Commission's second annual report published in November 1915, the Commission itself (making extensive reference to the debates of the Second National Australasian Convention in 1897 and 1898) described the High Court's interpretation as furnishing "a clear instance of the purpose of the Federal Convention having miscarried".⁸¹ The Commission described the disappearance of Pt V from the *Inter-State Commission Act* as leaving it only with powers of investigation and report analogous to those of a Royal Commission or Parliamentary

⁷⁶ Commonwealth Parliament, *Second Annual Report of the Inter-State Commission* (1915) 12–16.

⁷⁷ Commonwealth, *Seizure-of-Wheat Case: Decision in the Case of the Commonwealth of Australia, Plaintiff, and the State of New South Wales and the Inspector-General of Police for the State of New South Wales, Defendants*, Parl Paper No 69 (1915).

⁷⁸ *New South Wales v Commonwealth* (1915) 20 CLR 54.

⁷⁹ *New South Wales v Commonwealth* (1915) 20 CLR 54, 109.

⁸⁰ Colin Howard, *Australia's Constitution: What It Means & How It Works* (Penguin Books, 1978) 50. See also Damien J Cremean, "The Inter-State Commission: Rethinking the Wheat Case" (2009) 83 *Australian Law Journal* 765.

⁸¹ Commonwealth Parliament, n 76, 6.

Committee and as affecting fundamentally its future utility.⁸² Swinburne would later say that “[t]he Commission with its powers depleted became merely a very expensive permanent Enquiry Board without much reason for existence”.⁸³

The Inter-State Commission continued to exercise its powers to investigate and report under Pt III of its Act, but with no great enthusiasm and to little practical effect. By 1920, Swinburne and Lockyer had resigned. Piddington was the sole surviving member. His seven-year term expired. No new members were appointed. Groom in 1920 introduced Bills into the House of Representatives to give effect to a clever scheme to overcome the effect of the *Wheat Case* by reconstituting the Commission under Ch IV of the Constitution and establish with it a Commonwealth Court of Commerce under Ch III of the Constitution. The scheme involved the Justice appointed as the President of the Court also being appointed as the Chairman of the Commission and the other two members of the Commission sitting with the Justice in the Court as “assessors”. Whether the scheme would have passed constitutional muster was never tested. The Bills were defeated in the House of Representatives on their first readings.⁸⁴ As Professor Sawyer described it, “[t]he scheme failed because a strong majority in all parties now considered that the Inter-State Commission was an expensive and useless luxury, and not worth rescuing from oblivion even if it could be given judicial power”.⁸⁵

The investigatory and reporting functions of the Inter-State Commission were for the main part taken up by the Tariff Board, which was established by the *Tariff Board Act 1921* (Cth) as an administrative body advising the Minister for Customs.

THE AFTERMATH

The *Inter-State Commission Act* remained on the Commonwealth statute book after 1920. It was not repealed until 1950.⁸⁶ But no new appointments were ever made under it. For 30 years, the Inter-State Commission was a ghostly presence – a commission without commissioners.

There was a fleeting moment in 1938 during the government led by Joseph Lyons when there was a prospect of the Inter-State Commission having new life breathed into it.⁸⁷ A Bill to give new powers to the Commission was even passed by the Senate. But it garnered no enthusiasm. Isaacs, by then in retirement, remained implacably opposed on constitutional grounds and was unable to keep his opposition private. The Bill, Isaacs was publicly reported to have said, was “as full of holes as a colander”: the proposed powers of the Commission in conflict with the Constitution.⁸⁸ The Bill was allowed to lapse in the House of Representatives and was not seen again.

In his Chifley Memorial Lecture in 1957, Gough Whitlam announced that a Labor government would recreate the Inter-State Commission.⁸⁹ True to his word, Whitlam as Prime Minister secured enactment of the *Inter-State Commission Act 1975* (Cth). But the Commission recreated by that Act was a mere shadow of the Commission that had been created in 1912. It was a body comprised of three members having powers limited to investigating and reporting on matters relating to inter-state transport referred to it by a Minister. The recreation of the Commission, even in that much diminished form, needed to wait until after the proclamation of the 1975 Act by the Governor-General. That did not occur until the Governor General proclaimed the Act on the advice of the Hawke Government in 1983.

⁸² Commonwealth Parliament, n 76, 1, 10.

⁸³ Sugden and Eggleston, n 73, 352.

⁸⁴ *Commonwealth Court of Commerce Bill 1920* (Cth); *Inter-State Commission Bill 1920* (Cth).

⁸⁵ Sawyer, n 35, 204.

⁸⁶ *Statute Law Revision Act 1950* (Cth).

⁸⁷ “Sir Isaac Isaacs on Lyons Bill”, *The Truth* (Brisbane), 3 July 1938, 22.

⁸⁸ “Sir Isaac Isaacs on Lyons Bill”, n 87.

⁸⁹ Edward Gough Whitlam, “The Constitution versus Labor” (Speech delivered at the Chifley Memorial Lecture, The University of Melbourne, 19 July 1957).

The recreated Inter-State Commission then commenced operations on 15 March 1984. The event was hailed by Professor Michael Coper (who briefly held office as one of its three members) as the second coming of the fourth arm.⁹⁰ Its reign on earth was to be short-lived. The 1975 Act was substantially repealed in 1989 when the functions of investigating and reporting which had been conferred on the Inter-State Commission were melded with those of the Industries Assistance Commission (which had been created in 1973)⁹¹ and subsumed within the broader investigatory and reporting functions of the newly created Industry Commission.⁹²

The *Australian Industries Preservation Act* remained on the Commonwealth statute book for a very long time. But the inquest of *Huddart, Parker & Co Pty Ltd v Moorehead* and the *Vend Case* was that the *Australian Industries Preservation Act*, as Ron Bannerman described it, had become “ineffective” if not “inoperative”, having “foundered on the conservatism of the courts as to the public interest and on the apparent lack of constitutional validity except in interstate matters”.⁹³ No cases were commenced under the *Australian Industries Preservation Act* after the *Vend Case* until 1964, when a civil action for treble damages for restraint of trade was brought by a group of Australian tyre retailers against a number of Australian tyre manufacturers, apparently with the consent of Sir Garfield Barwick as Attorney-General.⁹⁴ The *Australian Industries Preservation Act* was then in the twilight of its existence. The new era of competition policy was dawning, having commenced with the introduction by Barwick in 1962 of the first version of a Bill for what would become the *Trade Practices Act 1965* (Cth), under which Ron Bannerman was to be appointed Commissioner.⁹⁵ The *Australian Industries Preservation Act* was repealed the following year.

The constitutional mindset which produced the decisions in *Barger* and in *Moorehead* was abandoned by the High Court in 1920 in the *Engineers’ Case*.⁹⁶ The “last vestigial remnants” of *Barger* were “swept away” in 1965 in *Fairfax v Federal Commissioner of Taxation*.⁹⁷ *Moorehead* was overruled in *Strickland v Rocla Concrete Pipes Pty Ltd*,⁹⁸ a case which arose in 1971 under the *Trade Practices Act 1965* (Cth). The power of the Parliament to make laws with respect to trading and financial corporations were freed from their pre-*Engineers’ Case* chains to become the mainstay of the *Trade Practices Act 1974* (Cth) and to remain so under the *Competition and Consumer Act 2010* (Cth).

The constitutional mindset which produced the decision in the *Wheat Case* was never abandoned. To the contrary, it was substantially reinforced by the decisions of the High Court and of the Privy Council in the *Boilermakers’ Case*.⁹⁹ Had Montesquieu never lived, the Privy Council was to say in

⁹⁰ Michael Coper, “The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission” (1989) 63 *Australian Law Journal* 731.

⁹¹ *Industries Assistance Commission Act 1973* (Cth).

⁹² *Industry Commission Act 1989* (Cth).

⁹³ R M Bannerman, “Development of Trade Practices Law and Administration” (1985) 18(3) *Australian Economic Review* 83, 84.

⁹⁴ See *Redfern v Dunlop Rubber Australia Ltd* (1964) 110 CLR 194, 195–200, 206.

⁹⁵ See generally David Merrett, Stephen Corones and David Round, “The Introduction of Competition Policy in Australia: The Role of Ron Bannerman” (2007) 47 *Australian Economic History Review* 178; Kerrie Round and Martin P Shanahan, “From Protection to Competition: The Politics of Trade Practices Reform in Australia and the Trade Practices Act 1965” (2012) 58 *Australian Journal of Politics and History* 497.

⁹⁶ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

⁹⁷ *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1. See *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 23.

⁹⁸ *Strickland v Rocla Concrete Pipes Pty Ltd* (1971) 124 CLR 468.

⁹⁹ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254; *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529.

that case, they doubted whether a different interpretation of the Constitution could validly have been reached.¹⁰⁰ Of course, Montesquieu did live, and the outcomes in neither the *Wheat Case* nor the *Boilermakers' Case* were inevitable.

Concern was expressed at the time of enactment of the *Inter-State Commission Act* in 1912,¹⁰¹ and has been repeated since,¹⁰² that the Inter-State Commission was launched as a ship carrying too much sail in too strong a wind. On any view of Ch IV of the Constitution, it was up to the Parliament to choose the powers of “adjudication and administration” to be conferred on the Commission which the Parliament deemed necessary and, on any view of Pt V of the *Inter-State Commission Act*, the powers which the Parliament deemed necessary to confer on the Commission were extraordinarily broad. A majority decision by the two lay members of the Commission holding State legislation enacted in a time of total war to be invalid on the complaint of the Commonwealth Executive, it must also be observed in retrospect, was an inauspicious and even provocative start to the Commission’s short-lived attempt to exercise judicial power. What might have been portrayed in another setting as a sensible pragmatic allocation to an apolitical expert body of judicial power with respect to a specialised subject matter sitting comfortably within the boundaries set by Ch IV of the Constitution became in the setting in which it arose in the *Wheat Case* an affront to the structure of the rest of the Constitution: not merely to the structure of the national government established by Chs I, II and III but also to the whole structure of federalism.

The crooked path of our constitutional history is just one of a number of routes that might have been taken. The path on which we might have been led by an Inter-State Commission empowered by the Parliament to exercise judicial power is another.

Had Pt V of the *Inter-State Commission Act* survived constitutional challenge in 1913, the subsequent history of the constitutional guarantee of freedom of inter-state trade and commerce might have been less tortured.¹⁰³ And had the Inter-State Commission not been denuded of jurisdiction to hear and determine matters arising under laws made by the Parliament relating to trade and commerce, the subsequent history of the *Australian Industries Preservation Act* might well have been more eventful in spite of the lack of judicial sympathy and understanding displayed on appeal in the *Vend Case*.

¹⁰⁰ *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 539–540.

¹⁰¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 December 1912, 7081 (William Kelly).

¹⁰² See Bell, n 60, 70.

¹⁰³ Bell, n 60, 70.