SECTION 92 IN THE FEDERAL CONVENTIONS: A FRESH APPRAISAL

By R. L. SHARWOOD*

It is, in some ways, a curious paradox that the difficulty of the historian's task usually increases in direct ratio to the availability of his materials; in all but the simplest of circumstances, an abundance of evidence only serves to disclose the complexities and to render simple, clearcut conclusions impossible. The background of the Australian Commonwealth Constitution could hardly be more fully documented, and yet it is still possible to argue over what these documents reveal.

These reflections result from a recent re-reading[1] of portions of the 1897-1898 Convention Debates, from which emerged the Commonwealth Constitution, and in connection therewith a study of the article by Professor Beasley entitled 'The Commonwealth Constitution: Section 92—Its History in the Federal Conventions', which appeared in volume 1 of the *University of Western Australia Annual Law Review*.[2] The high regard which Professor Beasley's analysis of difficult material has won[3] has caused me to hesitate before offering criticisms; but I would suggest that the conclusions offered by Professor Beasley, in so far as they relate to the effect attributed to section 92 upon the power of the Commonwealth, may not be an accurate reflection of the thought of the Convention.

The word 'may' is used advisedly. Certainty generally is illusion, as Holmes has said.[4] It is not possible to emerge from a reading of these Debates with any precise understanding of what the Founding Fathers intended in this field; 'the thought of the Convention' is really a hollow phrase; one is obliged to draw implications from

* B.A., LL.B. (Melb.), LL.M. (University of California); Peter Brooks Saltonstall Scholar, Harvard University.

1 This comment has been written in the United States in the course of research work which has involved some study of the historical background to the 'commerce clauses' of the Australian Commonwealth Constitution. I have not made an exhaustive study of the Convention Debates from cover to cover; this was not central to my principal purpose, and considerations of time made it quite impossible; more treasure may lie yet unmined. It is because of these circumstances that I have written what follows in the form of a comment; I trust that the adoption of this form will also excuse the use of the first person.

2 (1948-1950) 1 *University of Western Australia Annual Law Review*, 97, 273, 433.

3 Stone: A Government of Laws and Yet of Men being a Survey of Half a Century of the Australian Commerce Power' (1948-1950) 1 *University of Western Australia Annual Law Review*, 461, 471-472. Phillips in *Essays on the Australian Constitution* (1952) 242-243.

4 From his address 'The Path of the Law' (1897); Lerner, *The Mind and Faith of Justice Holmes* (1954) 71, 80: 'certainty generally is illusion, and repose is not the destiny of man'.

scattered references and occasional scraps of debate, and rarely are the remarks of any but a handful of the acknowledged leaders of the Convention instructive. The purpose of this comment, then, is to suggest no more than that a somewhat different interpretation of the evidence to that advanced by Professor Beasley is at least tenable.

I should like first to examine the conclusion which Professor Beasley numbered (5):

> At the Adelaide session of 1897 the general opinion was that clause 89 (now section 92) was a prohibition or warning addressed to the States alone; that it was unnecessary to issue a like prohibition to the coming Commonwealth because
>
> (i) the Constitution gave to the Commonwealth the *exclusive* power to impose customs and excise duties and required it to make those duties *uniform* throughout Australia;
>
> (ii) if there existed in the Commonwealth a power to build a tariff wall *between* States, it must – because of the requirement of uniformity – build the wall between all the States and make it of the same height throughout; but the constitutional requirement of uniformity would make the erection of an inter-State tariff wall of any height self-frustrating and absurd;
>
> (iii) the Constitution deliberately vested in the Commonwealth a wide power over inter-State trade so as to enable it to frustrate any attempt by the States to evade the prohibitions of clause 89; no court would concede to the Commonwealth a power to do something which the Commonwealth itself could annul if done by the States.[5]

I am not at all sure that it is proper to state that 'the general opinion was that clause 89 (now section 92) was a prohibition or warning addressed to the States alone' when in fact the question of its operation upon the Commonwealth was not specifically debated, but in any case I question whether such a 'general opinion' emerges even by implication.

Clause 89, numbered as clause 86 at the Adelaide session, read:

> So soon as uniform duties of Customs have been imposed, trade and intercourse throughout the Commonwealth, whether by means of internal carriage or ocean navigation, shall be absolutely free.[6]

Initial discussion of it, on 19 April 1897,[7] centred around Deakin's proposal to add the words – 'But nothing in this Constitution shall prevent any State from prohibiting the importation of any article or thing, the sale of which within the State has first been prohibited by the State'. The suggested amendment sprang from American experience with State 'prohibition' legislation; in the case of *Leisy v. Hardin*[8] the Supreme Court had held that, in the absence of federal enabling

[5] Beasley, *op. cit.* (n. 2) 280-281.

[6] *Official Report of the National Australasian Convention Debates: Adelaide, March 22 to May 5, 1897* (1897); 875; cited hereafter as *Debates* (Adelaide).

[7] *Debates (Adelaide)*, 875-877.

[8] (1890) 135 U.S. 100.

legislation, a State could not interfere with the importation of liquor from a sister State or its sale by the importer; to remedy this situation Congress passed such enabling legislation, the Wilson Act of 1890[9] (quoted in the footnote), and State action under this Act was upheld in *In re Rahrer*.[10] Deakin seems to have believed that such legislation *could* be enacted by the Commonwealth Parliament,[11] but preferred that it be embedded in the Constitution itself. The debate was cut short by a vote to postpone further discussion until 'the substantial financial clauses' were reached.[12]

Upon the resumption of the debate three days later,[13] Deakin continued his argument for an amendment, which he had now reworded so as to limit its application to opium and alcohol.[14] Isaacs made a strong attack on the breadth of clause 86, as drafted; 'it is not only unnecessary, but it is very dangerous. It goes much further than it is intended'.[15] He did not on this occasion expressly charge that it would bind the Commonwealth, but it seems clear that this was his view. Apparently his reason for holding the clause 'unnecessary' was, in part, the existence of subsection 2 of clause 50 (now section 51), which listed Commonwealth powers; subsection 1 read 'The regulation of trade and commerce with other countries and among the several States', and subsection 2, 'Customs and excise, and bounties, but so that duties of customs and excise, and bounties shall be uniform throughout the Commonwealth; *and that no tax or duty shall be imposed on any goods exported from one State to another*'.[16] This, argued Isaacs, prevented the Commonwealth Parliament from levying interstate border duties; he quoted from clause 105, which prohibited *State* duties after the imposition of federal duties, and concluded:

> The States are prevented from levying any impost on imports or exports, and the Federal Parliament is prevented.
>
> Mr O'Connor: Where, except in clause 86?
>
> Mr Isaacs: There is a distinct prohibition that no tax or duty shall be imposed on goods imported or exported from one State to another, and how then can you assert the power of the Federal Parliament to impose duties.
>
> Mr Barton: Will you refer to the second part of clause 92?
>
> Mr Isaacs: That strengthens my view. . . .[17]

Clause 92 prohibited preferences (it emerged as section 99), and the second part read:

[9] 26 Stat. 313; it provided 'That all . . . intoxicating liquors . . . transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise'. [10] (1891) 140 U.S. 545.
[11] *Debates (Adelaide)*, 877. [12] *Ibid.* [13] *Ibid.*, 1140-1148. [14] *Ibid.*, 1140.
[15] *Ibid.*, 1141. [16] *Ibid.*, 1143; emphasis added. [17] *Ibid.*

> . . . and any law or regulation made by the Commonwealth, or by any State, or by any authority constituted by the Commonwealth, or by any State, having the effect of derogating from freedom of trade or commerce between the different parts of the Commonwealth shall be null and void.[18]

Isaacs' argument, then, was that the existence of clauses 50(2), 105 and 92 made clause 86 unnecessary, and that for this reason it ought to be omitted.

Is it not a clear implication from all this that Isaacs believed that clause 86 (although in his opinion, and for this very reason, superfluous) would *itself* prevent the federal Parliament levying interstate border duties? And did not O'Connor's interjection indicate the same view of its operation? Barton seems to have disagreed here with Isaacs' view that clause 50(2) prevented the Commonwealth from imposing duties at State borders, although he had argued the reverse in the earlier discussion of clause 50(2);[19] it is not clear from the debate whether he thought clause 86 would affect the position, but his interjection suggests that he thought that clause 92 might do so.[20]

O'Connor followed Isaacs with a strong speech clearly directed in the first place against Isaacs' view that the clause was unnecessary and only towards its end against Deakin's proposed amendment. 'I do not think there is a more necessary provision in the whole Constitution than this', he declared.[21] But, in view of his earlier interjection, his speech does contain one very curious sentence: 'It [clause 86] amounts to nothing more than a declaration, without which it would be impossible to say that the Commonwealth itself could put on border duties between the several States'.[22] Has something gone astray here? It is hard to see how clause 86 could posssibly be read as a *declaration* in favour of Commonwealth power to levy interstate border duties; it is hardly an enabling clause. It is true that clause 82[23] directed the Commonwealth Parliament to impose uniform duties of customs within two years, that clause 85[24] preserved State powers in this field until such uniform duties were imposed, and that therefore the reference to those uniform duties in the 'freedom of interstate trade' clause[25] might seem to indicate that federal duties *would* exist on interstate as well as external borders. It is, however, equally proper to conclude that this reference to the uniform federal duties was inserted merely to indicate that clause 86 would come into operation contemporaneously with the cessation of all State power to levy duties, which, by clause 85, had been made to depend upon the adoption of federal duties and that the Constitution deliberately delayed the 'new order' in this field until the happening of one

[18] *Ibid.*, 1070. [19] *Ibid.*, 766-767. [20] *Ibid.*, 1143. [21] *Ibid.*, 1144.
[22] *Ibid.*, 1144-1145. [23] *Ibid.*, 835; now s. 88. [24] *Ibid.*, 872; now s. 90.
[25] Drafted, at the time, in terms of freedom 'throughout the Commonwealth'.

event – the imposition of uniform duties by the federal authority in accordance with clause 82. Also it was proper, consistent with the pattern and conducive to the workability of the transfer of power that clause 86 be given the same delayed action, so that its opening words were no more than a timing mechanism.[26] This second interpretation is, it is submitted, the more satisfactory, as it avoids the questions of inconsistency with clause 50(2) and, perhaps, clause 92 which the first raises.

Did O'Connor, in the sentence quoted, choose the first interpretation? It would be hardly consistent with his question to Isaacs, or with the tone of his subsequent speech, from which I quote the following:

> What we intend in making this declaration of freedom of trade throughout the Commonwealth is that inasmuch as every part of the Commonwealth is open to the trade of every member of the Commonwealth, that every member of the Commonwealth shall be absolutely free from trade restrictions of any kind.[27]

Is it possible that O'Connor was misreported, and that what he in fact said was 'it amounts to nothing more than a declaration, without which it would be *possible* to say that the Commonwealth itself could put on border duties between the several States', or, alternatively, that he inserted a 'not' between 'could' and 'put'? His statement in either of these forms would make much more sense, and would be consistent with the rest of his remarks, both here and later in the Convention.

There was further brief discussion of Deakin's amendment, followed by a longer discussion as to when the Convention should close its labours (to adopt Sir George Turner's phrase).[28] In this restless atmosphere, Deakin's amendment was defeated by a majority of one, and clause 86 was agreed to.[29]

I would submit that it is impossible to conclude from this debate that clause 86 was seen as 'a prohibition or warning addressed to the States alone'. Deakin perhaps saw it this way, though whether his mind was directed to the point when he suggested (by implication) that the Commonwealth Parliament could pass a Wilson Act is doubtful. The remarks of Barton and O'Connor were, to say the least, ambiguous. Isaacs clearly did not accept such a view, and, for what it is worth, no-one thought to meet his argument with the simple statement (if it were true) that clause 86 had no relevance to Commonwealth power. I hesitate to attribute any 'general opinion' to the Convention, but at least the only clearly articulated view does not conform to Professor Beasley's conclusion. I have not discovered

[26] See, in support of such a view, *Debates (Adelaide)*; 836-837.
[27] *Ibid.*, 1144. [28] *Ibid.*, 1146. [29] *Ibid.*, 1148.

the evidence upon which the interesting argument in the three sub-clauses of conclusion (5) is based if it is an attempt to paraphrase Isaacs' argument, as outlined above, then I submit that it involves a misconstruction.

So much for the Adelaide session; Professor Beasley's remaining conclusions relate primarily to the sessions at Sydney and Melbourne in September 1897 and January to March of 1898:[30]

> (6) At the Melbourne and Sydney sessions of 1897-1898 it was first appreciated, by a few members, that clause 89 might well be interpreted as binding the Commonwealth at least to the extent of prohibiting it from derogating from the principle of inter-State free-trade by setting up a (necessarily) uniform tariff wall between all States. . . .
>
> (7) Although the Commonwealth itself, under this interpretation of clause 89, could not rebuild an inter-State tariff wall, it might through its legislative power over 'trade and commerce . . . among the States' give one or more States advantages from which the remainder were excluded; to prevent this, a new clause (now section 99) was inserted to prevent the Commonwealth from preferring one State to another by laws relating to trade, commerce, or revenue.[31]
>
> (8) During the prolonged debates on what are now sections 51(i) and 92, there was frequent expression of a fear, not that the latter would be interpreted so as to restrict power conferred by the former, but that the substantive power conferred by section 51(i) might be construed—in the light of American precedents—to extend in many instances to intra-State trade and in particular to the State-owned railway systems. . . .
>
> (9) It was never present to the minds of the members that there was the slightest risk that section 92 might be deemed (a) to whittle down the power conferred on the Commonwealth by section 51(i), (b) to apply to all the other powers conferred on the Commonwealth if they were related, however distantly, to trade and commerce among the States, or (c) to have the effect of creating a legislative no man's land which neither Commonwealth nor States could enter.

The two principal contentions here may be summarized thus:

(i) For the first time a few members realized that what is now section 92 might prevent the Commonwealth imposing interstate border duties.

(ii) But there is no indication that section 92 was seen as a restriction upon what is now section 51(i) or any other Commonwealth power, or that it created 'a legislative no man's land'.

As to the first of these contentions, the evidence already presented shows quite clearly that this result had certainly been foreseen in Adelaide.

The truth of the second contention must again be tested by a close analysis of the record.

Clause 86 (now renumbered 89) was not reached in the Sydney

[30] Beasley, *op. cit.* (*supra*, n. 2), 281-282.

[31] A 'preferences' clause had been before the Convention in Adelaide—*ibid.*, 273.

session, but, as Professor Beasley indicates, it was discussed in other contexts.

When what is now section 51(i) – the 'trade and commerce' power – reached the floor on 22 September, Deakin at once moved an amendment (suggested by the Legislative Assembly of Victoria) which would have had the effect of writing the American Wilson Act into the Constitution.[32] Isaacs supported him, arguing that the Commonwealth Parliament, unlike Congress, had no power to impose customs duties between the States, and concluding:

> If we do not put in similar words [*i.e.*, similar to those of the Wilson Act], a subsequent clause 89, saying that interstate commerce shall be absolutely free, would prevent even the Commonwealth Parliament from making such a provision as is now suggested. Therefore it is necessary, if we retain clause 89, to insert in the constitution itself some provision such as we now suggest.[33]

There followed general debate upon the merits of such a provision, in the course of which O'Connor stated:

> The only thing that prevents the federal government from dealing with the question in this way is the prohibition which may be implied from the clause relating generally to freedom of trade – clause 89;[34]

and he suggested that the better course would be to amend clause 89.[35] Professor Beasley quotes from this speech, following it with the somewhat surprising comment.

> As far as the author has been able to discover, this was the first occasion on which a delegate had realized that clause 89, because of its broad terms, might be construed as a prohibition addressed to the Commonwealth as well as to the States.[36]

I would agree that O'Connor indicated that in *his* opinion clause 89 as drafted went further than the Convention really wanted such a clause to go; Isaacs made the same criticism many times, but this is beside the point; the real issue here is the opinion of the Convention on the operation of the clause *as drafted*, because it is substantially this draft which found its way into the Constitution.

Deakin spoke at some length in favour of his own amendment. Nowhere did he state expressly that the Commonwealth Parliament would have no power to pass a Wilson Act, but in his speech there appears the following significant passage:

> The proposal to remit the whole of the liquor question to the federal legislature *while an immense improvement on the draft bill,* does demand from the several states a concession of their power which they

[32] *Official Record of the Debates of the Australasian Federal Convention, Second Session, Sydney, 2nd to 24th September 1897*, 1037; cited hereafter as *Debates (Sydney)*.
[33] *Debates (Sydney)*, 1038. [34] *Ibid.*, 1041. [35] *Ibid.*
[36] Beasley, *op. cit.* (*supra*, n. 2), 104.

are very unlikely to grant. It is certainly the next best proposition to my own, but it is not equal to it.[37]

Is it not the implication here that only by *amendment* to the draft Bill would the Commonwealth Parliament have power to pass a Wilson Act? Is it not more than likely that Deakin now held the views of his brilliant young Attorney-General, to whom he had left the initial explanation of his amendment?

The debate continued for some time, the delegates being principally occupied with the problems raised by State 'prohibition' legislation and the question of where any provision in this matter could best be included in the Constitution—whether, for example, it ought to be stated as a proviso to clause 89 itself. Glynn significantly observed at one point that 'clause 89 must be read in conjunction with the sub-clause before us'[38]—*i.e.*, what is now section 51(i). Barton stated his intention to vote against the amendment; in his opinion it was unwise to take away in this manner the power given the Commonwealth Parliament to regulate trade and commerce.[39] Isaacs interrupted him: 'There is no power in the Commonwealth Parliament to deal with this matter, though there is in the federal Parliament of the United States!'[40] Barton's reply to this is most revealing:

> There is power to regulate trade and commerce, though clause 89 stands somewhat in the way, and I propose to amend that clause so as to prevent the Commonwealth Parliament from being denuded of the powers it would otherwise have . . . *I suggest that clause 89 should be amended in some such way as will leave the Commonwealth in its proper position as the regulator of trade and commerce.*[41]

Here is a specific acknowledgement that clause 89, as it stood, gravely affected the general power of the Commonwealth Parliament over trade and commerce, granted by the clause under discussion. A little later in the debate, Isaacs briefly repeated his argument,[42] and Kingston, in a short statement supporting the amendment immediately before the vote, appears to have accepted it.[43] The amendment was passed by twenty-eight votes to eleven; it was subsequently transferred to a separate clause, and now appears as section 113.

Then, as Professor Beasley relates, Dr Cockburn proposed a further amendment, reading 'And the Parliament may provide for the prohibition of the introduction of vegetable and animal diseases from one State to another',[44] and indicated that he shared the belief that the proposed Bill bound the hands of the Commonwealth (he seems to have had in mind both clause 89 and the clause numbered 92 in Adelaide, though he specifies neither). Discussion followed on

[37] *Debates (Sydney)*, 1042; emphasis added.
[38] *Ibid.*, 1051.
[39] *Ibid.*, 1053.
[40] *Ibid.*
[41] *Ibid.*, emphasis added.
[42] *Ibid.*, 1055-1056.
[43] *Ibid.*, 1058.
[44] *Ibid.*, 1059.

whether or not this was a proper matter for federal concern. Barton pointed out that his proposed amendment to clause 89 (to make it read 'So soon as uniform duties of customs have been imposed, trade and intercourse throughout the Commonwealth is not to be restricted or interfered with by any taxes, charges or imposts')[45] would remove doubts as to constitutional power. Cockburn for this reason did not press his amendment, and sub-clause (i) was eventually agreed to.

The final and the longest session of the 1897-1898 Convention took place in Melbourne in January, February and March of 1898, and the earliest significant reference to clause 89 which I have discovered occurred during the long, difficult and at times acrimonious debate on the problem of the rivers. There, at one point, Barton went so far as to suggest that clause 89 was really the primary 'commerce clause' of the Constitution, and 'the spring and source' of what is now section 51(i):

> . . . there is no doubt in my mind that . . . the trade and commerce clause is for the purpose of permitting the Commonwealth, by legislation, to secure those things which are secured by way of declaration in clause 89—namely, uninterrupted trade and commerce.[46]

Perhaps he had in mind the largely negative role which the 'commerce clause' of the United States Constitution had played up to that time.[46a] Cockburn doubted this interpretation,[47] and in the course of quite a long consideration of it Isaacs had this to say:

> Clause 89 is simply, as far as I read it, a declaratory clause. It is too large, I think, as I once before expressed it, in its present terms; but in its full extent it simply declares that there shall be no obstacle to trade by reason of any customs duties, or licence-fees, or anything of that kind as between the states. . . . Its real import in our Constitution, as contrasted with its absence from the United States Constitution, is that, Congress could if it chose provide for protection as between the states, could say that one state could levy duties against another. . . . The presence of clause 89 in this Bill is a prohibition on the Federal Parliament to ever make any such law whatever.[48]

If there seems any inconsistency between Barton's stand in Sydney and his argument here, it would largely disappear if Barton had in mind the crucial amendment to clause 89 which he had foreshadowed in Sydney and apparently intended to propose. I would suggest that both here and in Sydney before he was challenged, he was envisaging it as already adopted.

[45] *Ibid.*, 1064.

[46] *Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 20th January to 17th March, 1898;* (2 vols) 501; and see 538; cited hereafter as *Debates (Melbourne).*

[46a] *The Constitution of the United States of America—Analysis and Interpretation* prepared by the Legislative Reference Service, (1953), 118. Of approximately 1400 cases decided prior to 1900, most stemmed from State legislation. *Wickard v. Filburn* (1942) 317 U.S. 111 *per* Jackson J. [47] *Debates (Melbourne),* 509. [48] *Ibid.*, 525.

The debate on what is now section 112 is also instructive. This section allows the States to levy charges under inspection laws, and in the debate on 7 February the following exchange occurred:

> Dr Cockburn: We do not want to federate all our diseases, but at present . . . there is no power either on the part of the State or on the part of the Federal Parliament to take such steps as may be necessary to prevent the passage of disease . . . from one State to another . . .
>
> Mr Higgins: Clause 89 appears to be in favour of your view—all the trade and commerce shall be absolutely free.
>
> Dr Cockburn: That means that trade is to pass untrammelled.
>
> Mr Higgins: It is very hard to see how widely you can extend that clause.[49]

Cockburn then quoted Barton's proposed amendment to clause 89, and said 'I think that implies a different application'.[50] Barton promised to amend the clause under discussion (clause 106) to ensure State power in this regard,[51] and Dr Cockburn appeared satisfied. Cockburn's suggestion was, of course, almost the same as that he put forward in Sydney, but the support he received from Higgins is worthy of note.

The debate on clause 89 itself began on 16 Feburary, and centred at first around the suggested amendment substituting the words 'between the States' for 'throughout the Commonwealth'.[52] Isaacs, as Professor Beasley aptly puts it, 'again directed his fire'[53] on the clause, but he does not indicate that Isaacs once more advanced his view that the clause was a restriction upon Commonwealth power:

> The clause means that the Commonwealth is not to put a restriction upon trade in any way whatever, not merely by means of customs or excise duties, but you are to leave every person absolutely free of any limitation of his common law right of carrying on his trade.[54]

The term 'trade and intercourse', he said, includes, amongst other things, licences of all kinds.[55]

> If that construction is possible under the clause there will be no power in the local body, the State Parliament, or the federal Parliament to authorize such a charge.
>
> Mr Lyne: I quite see that.[56]

Barton shared Isaacs' further alarm that the clause, without the amendment, might extend to the *internal* trade of the States, and this aspect of the debate, in which others joined, is well summarized by Professor Beasley. The application of clause 89 to the Commonwealth was again referred to by Dr Cockburn, in a passage quoted by Professor Beasley:[57]

[49] *Ibid.*, 649. [50] *Ibid.* [51] *Ibid.*, 651
[52] *Ibid.*, 1014. [53] Beasley, *op. cit.* (*supra* n. 2), 105. [54] *Debates (Melbourne)*, 1015.
[55] *Ibid.*, 1014. [56] *Ibid.*, 1015. [57] Beasley, *op. cit.* (*supra*, n. 2), 107.

> Quite apart from the question of trade between State and State, is it not necessary that the Commonwealth itself should have some power for the restriction and the regulation of trade? The words 'absolutely free' are infinite in their application, and they seem to me to take away from the Commonwealth the power to restrict trade and regulate trade within the confines of the Commonwealth.[58]

He urged that the clause be amended in such a way as not to 'tie the hands of the Commonwealth itself'.[59]

The next speaker was again Barton; he recognized that the clause might be read as interfering with a State's right to regulate its own *internal* trade, a result which the amendment before the Convention was intended to avoid.

> It is for that reason that I thought there was so much force in the remarks of Mr Isaacs. I should not like to be taken to concur in any suggestion that it is intended that there shall be any power in the Commonwealth to restrict trade in any part of the Commonwealth. I think it should be laid down in terms which no Parliament can override that there shall be absolute unrestricted trade between all parts of the Commonwealth.[60]

Even if Barton was using the word 'Commonwealth' in what might be described as its 'geographical' as distinct from its narrower 'governmental' sense, it would seem that he was thinking in terms of a complete absence of governmental power within the confines of Australia.

The proposed amendment was then voted upon and agreed to,[61] and the Convention proceeded to discuss what now appears as the second paragraph of section 92, which has long since ceased to have application.

On 11 March the debate on the first paragraph of clause 89 was resumed,[62] with discussion upon the amendment moved by Isaacs that the words 'from taxation or restriction' be added after the word 'free'. The account of how that amendment was lost by a vote of twenty to ten,[63] and of the general course of the debate which led in the end to the adoption of clause 89 without further amendment[64] is described by Professor Beasley. His explanation for Barton's strange failure to press the similar amendment which he had long foreshadowed is perhaps the only satisfactory one – that he was antagonized by the fact that Isaacs had turned his argument into 'what to the majority appeared to be a narrow, parochial claim on behalf of the Victorian railways',[65] and persisted in it even after the defeat of his amendment. Yet a change of mind was possibly hinted at in the broad language of his last quoted speech. This reduction of the debate to the level of State rivalries, in particular the rivalry be-

[58] *Debates (Melbourne)*, 1020. [59] *Ibid.* [60] *Ibid.* [61] *Ibid.*
[62] *Ibid.*, 2365. [63] *Ibid.*, 2367. [64] *Ibid.*, 2375. [65] Beasley, *op. cit.* (*supra*, n. 2), 108.

tween New South Wales and Victoria, had the unfortunate effect of directing the attention of the Convention exclusively to the operation of clause 89 upon State power and away from its operation upon Commonwealth power; once the quarrel (for it was not much less than that) was under way, the latter aspect received no further mention; Isaacs, at an early point, seemed about to make his old comparison between the power of Congress to levy interstate border duties and the lack of such power in the Commonwealth Parliament,[66] but he did not have a chance to develop it.

However, before the debate turned in this direction, and immediately after Reid's famous defence of clause 89 as 'a little bit of laymen's language which comes in here very well' and the less well known rejoinders of Barton and Isaacs ('Mr Barton: It is the language of three lawyers. Mr Isaacs: And one of the lawyers who helped to frame the clause [Sir Samuel Griffith] now finds fault with it').[67] Mr Reid had this to say:

> The thing in view in this clause is not so much the goods that will pass one way or the other, but that the relationship between those who deal in commodities, and send them from port to port within the Commonwealth, shall not be hampered by laws or officers of the Commonwealth in the sense of interfering with absolute equality of intercourse.[68]

Reid was of course in a somewhat rhetorical mood at this stage; but whether he in fact used the phrase 'port to port' or whether he said 'part to part' (which would seem more in accord with the general tenor of his remarks), and even conceding that he was using the word 'Commonwealth' in its geographical rather than its governmental sense, his phrase 'laws or officers of the Commonwealth' must at least include (though it may not be limited to) the laws and officers of the federal Government. His statement implies a complete absence of governmental power, as did the language of Barton last discussed.

I do not propose to discuss the long and complex debate on the preference clause (now section 99), which Professor Beasley summarises,[69] except to draw attention to the fact that the original second part of the clause, which I quoted in my discussion of the Adelaide debate (where it was numbered 92), was eventually dropped, apparently upon Barton's argument that *clause 89* would render void any law in derogation of freedom of trade.[70]

Having examined the record, let us look again at Professor Beasley's conclusions, as paraphrased earlier:

'For the first time a few members realised that what is now section

[66] *Debates (Melbourne)*, 2367-2368. [67] *Ibid.*, 2367. [68] *Ibid.*
[69] Beasley, *op. cit.* (*supra*, n. 2), 273-280.
[70] *Debates (Melbourne)*, 1260-1261.

92 might prevent the Commonwealth imposing interstate border duties.'

It would, I submit, be more meaningful to say that *all clear positive evidence on the point* is in accord with the view pressed so strongly by Isaacs that section 92 would prevent the Commonwealth imposing interstate border duties (although the original point of Isaacs' argument—that the section was unnecessary because the prohibition existed elsewhere in the Constitution—was apparently lost[71]); no-one sought to contradict him. And of course this view did *not* appear for the first time in Sydney or Melbourne.

'(ii) But there is no indication that section 92 was seen as a restriction upon what is now section 51(i) or any other Commonwealth power, or that it created a 'legislative no man's land'.'

There is, I would submit, a number of indications that section 92 was seen as a restriction upon the general trade and commerce power of the Commonwealth Parliament over and above the particular question of interstate border duties, and I would refer to *specific* statements by Isaacs, Barton, Cockburn and Glynn, in addition to the more general statements from which this may be drawn by implication. Neither the debate on the 'Wilson Act' clause, nor that on the 'inspection laws' clause nor that on the 'preferences' clause was confined to the context of interstate border duties. Indeed, given that by 'interstate free trade' the delegates had in mind something much broader than the mere absence of border imposts (as to which I shall have a little to say later), the application of section 92 to the Commonwealth *necessarily* involved some sort of general restriction upon its power over trade and commerce.

It is of course true that even the most discerning of the delegates, although alarmed by the breadth of the clause, did not predict with accuracy the extent of its subsequent application, and I would agree that there is no *positive* evidence that it was seen as impinging upon other Commonwealth powers. But what follows from this? When a provision is left to operate 'at large', surely no limitations can be deduced from the *silences* of the record alone; it ought not to be restricted to those circumstances actually spelt out in the record, for one of the characteristics of a constitution is applicability to situations unforeseen at its adoption. Section 92 was just such a provision.

The significance of the debates in Sydney and Melbourne is, I would suggest, this: the positive evidence (I hesitate to talk of a 'general opinion') points to the conclusion that section 92 *as drafted* imposed some sort of general restriction upon the powers of *both*

[71] Even by Isaacs himself; thus, in Melbourne, at one point, he questioned the necessity, in view of clause 89, for the concluding words of what in Adelaide was clause 50 (2), quoted earlier—*ibid.*, 1856.

Commonwealth and States. The leaders of the Convention did not pretend to know the exact boundaries of this restriction. Several of them for this very reason urged amendment or omission of the section, arguing that what the Convention really looked for was a mere prohibition of interstate border duties and similar imposts; but partly because there was much feeling in the Convention in favour of a wider clause (and it *did* express, in slogan-like fashion, one of the basic conditions of the federation), and partly because, in the end, the debate was marred by an unfortunate parochialism, no amendment to this effect was adopted. It seems to me that a 'legislative no man's land' was precisely what the most articulate of the delegates (and how far, for present purposes, do the others really matter?) envisaged, some with approval and some, it is true, with dismay; and it was the clause in the form in which it had been so interpreted which finally won the vote of the Convention.

Professor Beasley follows his conclusions with a section headed *Contemporanea expositio.*[72]

Garran, he notes, in his *Coming Commonwealth,*[73] referred to section 92 only in connection with the removal of interstate border duties. This, however, was written before the 1897-1898 Convention.

Higgins, in his collected speeches in opposition to the Commonwealth Bill,[74] did not suggest that there existed any 'gap in the legislative field'—negative evidence at the most.

The views expressed in Quick and Garran's *Annotated Constitution*[75] are inevitably of considerable importance. The authors took a fairly wide view of what was involved in interstate free trade,[76] and in several places refer in general terms (admittedly without elaboration) to the operation of section 92 on Commonwealth power—thus, 'By sec. 92, the Federal Parliament, in common with the State Parliaments, is restrained from interfering with the freedom of interstate trade and commerce, after the imposition of uniform duties of customs'.[77] The evidence in Quick and Garran does not, I would submit, provide significant support for Professor Beasley's conclusions, as he seems to suggest it does. Indeed, in view of the reading of the Convention Debates outlined here, I would suggest to the contrary.

Harrison Moore clearly saw section 92 as going beyond a prohibition of border duties, and as imposing a restriction upon the Commonwealth, although perhaps different from the restriction it imposed upon the States.[78]

[72] Beasley, *op. cit* (*supra*, n. 2), 282-287. [73] *The Coming Commonwealth* (1897).
[74] *Essays and Addresses on the Australian Commonwealth Bill* (1900).
[75] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901). [76] *Ibid.* 845.
[77] *Ibid.*, 511, 517, 945; Professor Beasley refers only to the second of these references; the first reference is quoted in the text of this comment.
[78] *The Constitution of the Commonwealth of Australia* (1902), 204.

Finally, Professor Beasley mentions Wise, who did not discuss section 92 in his book *The Making of the Australian Commonwealth* (written in 1913),[79] and Quick who in his *The Legislative Powers of the Commonwealth and States of Australia*[80] discussed section 92 in a manner which is of little significance for our purposes. Wise described his book as 'the record by an eye-witness of the making of the Commonwealth during the critical period from 1889 to 1900'.[81] However, four years earlier he had published *The Commonwealth of Australia*,[82] apparently not available to Professor Beasley, where he did advert to section 92; towards the end of his section on federal powers, in which he had set out section 51 in full, he said :

> The principal expressed restrictions on the Commonwealth power are those which forbid any interference with freedom of trade and intercourse within the States, and those which are intended to prevent any alteration in the position of the States to their prejudice.[83]

This was apparently in explanation of his earlier reference to 'a residuum of power which cannot be exercised either by the Commonwealth or by the States'.[84]

I would add a reference to Inglis Clark; this author did not state his position expressly, but it is only fair to admit that the implication is that he thought section 92 not to bind the Commonwealth.[85]

Some reference to American doctrine is not without interest. At the end of the last century, when the Australian Commonwealth Constitution was in the making, one major 'commerce clause' question remained unsettled in the United States—did Congressional power to 'regulate' interstate commerce carry with it the power to *prohibit* such commerce, in whole or in part, where Congress saw fit? Was Congressional power complete or qualified? Not until 1903 were the issues discussed at any length in the Supreme Court.[86] It was possible to point to expressions of opinion favouring a very broad interpretation of the power,[87] but on the other hand there were

[79] *The Making of the Australian Commonwealth* (1913).
[80] *The Legislative Powers of the Commonwealth and the States of Australia* (1919).
[81] *The Making of the Australian Commonwealth* (1913), vii.
[82] *The Commonwealth of Australia* (1909). [83] *Ibid.*, 184-185. [84] *Ibid.*, 173.
[85] *Studies in Australian Constitutional Law* (1901) 78-79, 83.
I have refrained from referring to discussions of s. 92 in the High Court subsequent to federation; once the Constitution began to develop in the hands of the judges, who would not allow material from the debates to be cited to them (*Municipal Council of Sydney v. Commonwealth* (1904) 1 C.L.R. 208; *Tasmania v. Commonwealth* (1904) 1 C.L.R. 329), their pronouncements became risky evidence of what had been original understandings. Nevertheless it is worth remembering that until 1920 the judges seemed not to doubt that s. 92 bound the Commonwealth.
[86] *Champion v. Ames (Lottery Case)* (1903); 188 U.S. 321; in *US. v. Darby* (1941) 312 U.S. 100 the Supreme Court finally held in favour of complete Congressional power, overruling *Hammer v. Dagenhart* (1918). 247 U.S. 251.
[87] Chief Justice Marshall in *Gibbons v. Ogden* (1824) 9 Wheat. 1, 196-197; *U.S. v. The William* (1808) 28 Fed. Cas. No. 16700, 614 (involving Jefferson's embargo); *Juillard v. Greenman*, 1884) 110 U.S. 421, 447-448; *Brown v. Houston* (1885) 114 U.S. 622, 630; *In re Rapier* (1892) 143 U.S. 110, 127-129.

strong arguments against such an interpretation based on the concept of a 'federal equilibrium', and distinguishing on this ground the extent of Congressional power with respect to *foreign* commerce.[88] There appears to have been no reference to this controversy in the Australian Convention debates; but in view of the extensive reference to American experience in so many of the 'commerce clause' discussions, it is, I think, significant that the extent of Congressional power *was* unsettled, and that there was a respectable body of opinion in the United States which looked with approval on the idea of a 'gap in the legislative field', in so far as it advanced the cause of interstate 'free trade' and the 'equal partnership' theory of federalism.

In closing, I should like to make brief reference to the other principal conclusion which Professor Beasley drew from his study of the Convention debates. This is that 'what [the delegates] had in mind was to provide a constitutional guarantee of "free trade" as opposed to "protection" inside Australia'.[89] This conclusion seems to me proper,[90] providing that it is clearly understood that by 'free trade' the delegates had in mind something much more than the mere absence of border imposts in the nature of customs duties; Professor Beasley describes this broader conception as that of 'the economic unity of Australia'.[91] The exact content of this indefinite conception was never made clear, and perhaps in the nature of things *could* never have been made clear. It was almost as much a matter of sentiment as of economics. Two important points emerge from an analysis of the debates on this matter: (i) Some delegates, led by Barton (for a time, at least) and Isaacs, would have preferred to see section 92 limited to a prohibition of restrictions in the nature of taxes or duties, in which form they believed it would more accurately reflect the true intent of the Convention. But (ii) it was not so limited, and the best minds of the Convention recognized that in its broad, unamended form (in which it finally emerged) it extended much further.

HARVARD LAW SCHOOL

[88] See lengthy discussion of the issue in *The Constitution of the United States of America—Analysis and Interpretation* prepared by the Legislative Reference Service (1953) 164-168.

[89] Beasley, *op. cit.* (*supra*, n. 2), 280.

[90] I would submit, however, that Professor Beasley overlooks or insufficiently stresses much of the evidence supporting the second point set out below, to me the more crucial of the two. See *Debates (Adelaide)*, 875-877, 1142, 1144 (Turner, Glynn, Deakin, Isaacs, Barton, O'Connor); *Debates (Melbourne)*, 501, 525, 538, 649, 1014-1036 (Isaacs, Cockburn, Higgins, Quick, Barton, O'Connor, Turner, Reid).

[91] Beasley, *op. cit.* (*supra*, n. 2), 433.