The missing constitutional cog: the omission of the Inter-State Commission

By Andrew Bell SC

Introduction

Section 101 of the Constitution provides that:

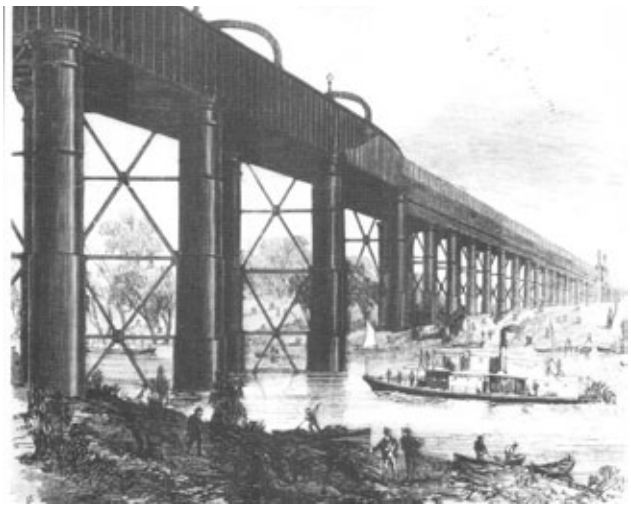
> There shall be an Inter-State Commission with such powers of adjudication and administration as the Parliament deems necessary for the execution of maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and all laws made there under.

Contrary to this constitutional injunction, there is not an Inter-State Commission and, for most of this country's federal constitutional history, there has not been such a body. One does not need to pause too long to conclude that this really is a somewhat remarkable fact, given not only the mandatory language of s 101 but also the plethora of s 92 cases that dominated the (unsatisfactory) constitutional jurisprudence in the High Court until *Cole v Whitfield* (1988) 165 CLR 360 as well as the frequently tense relations between the states in relation to the economic pie and sharing of resources (the current clash over access to the water of the great rivers for agricultural and environmental purposes to the cost of downstream states being a case in point). The origins of, and the reasons why, what was intended to be a critical piece of this country's constitutional and economic machinery does not exist present an intriguing historical tale. This is the story of the missing constitutional cog.

Constitutional origins

The constitutional origins of the Inter-State Commission, as revealed in the Federal Convention Debates of the 1890s, are cognate with those of s 92 of the Constitution, designed to prohibit the making of laws and regulations derogating from absolute freedom of trade between the states. The principle of freedom of inter-state trade was at the heart of the movement towards federation – indeed a clause strikingly similar to the ultimate s 92 was the first of Parkes's Draft Resolutions for the 1891 Sydney Assembly, over which he presided.[1] Six years later, in Adelaide, this central principle was re-iterated in a slightly modified form by Edmund Barton, appearing as the fifth of his Draft Resolutions.[2] As a statement, it effectively summarised the near universal aversion to protectionist border-tariffs – physically manifested by the Customs Houses which 'even protectionists loathed the sight of'.[3]

Customs-Houses were, however, only one exemplum of the commercial 'evil' which federation sought to overcome. The other and more insidious problem lay thinly concealed in the complex system of 'differential' and 'preferential' railway rates which were especially prevalent in New South Wales and Victoria. Examples (and criticism) of these, especially in regard to the Riverina district, were legion throughout the Convention Debates.[4] One delegate to the 1891 Sydney Convention bluntly acknowledged that 'Nothing has caused more friction than the practice of imposing differential railway rates and so filching trade from a neighbouring colony … in fact I know of no other cause of strong feeling between the people of these different communities than that which has arisen from commerce.'[5]



The bridge over the Murray River at Echuca, as etched in the *Illustrated Sydney News* of 12 January 1876. This, together with the other illustrations in this article, is taken from Michael Coper's *Encounters with the Australian Constitution*, and is reproduced with his kind permission.

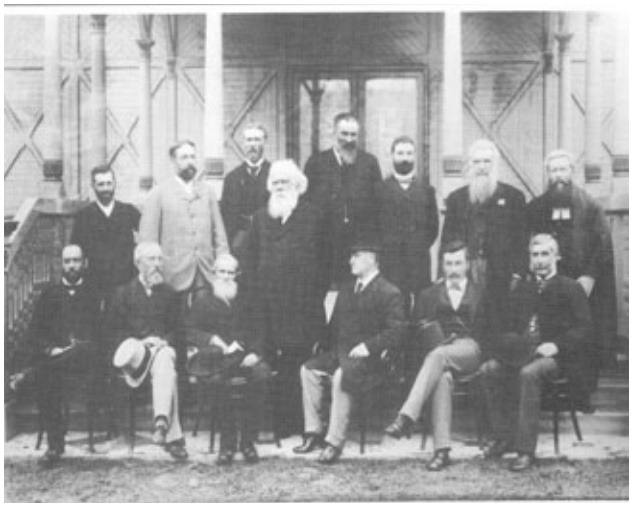
The resolution of this tension would not come easily, however, for it was underscored by provincial concerns and the powerful vested interests of those 'two mighty corporations – NSW and Victoria',[6] both of which had invested large sums in the development of their distinctive railway systems in the latter half of the nineteenth century.[7]

At the 1897 Convention, the familiar debate regarding inter-state railway rivalry again flared but was given a new dimension by Sir John Gordon of South Australia who posed the relevant question:

> What of our river trade which has been cut off by this cut-throat system? It is a question not only between railway and railway, but between railway and river.[8]

The issue of the fair operation of inter-state free-trade under a federal system now clearly concerned three states and at least two modes of transport. Involving as it did issues of 'fairness' and what was 'just and reasonable', it would not prove easy to settle. Recognising the heat and great moment of this issue, O'Connor surely confirmed the uneasiness of many delegates by declaring that the central and crucial principle of inter-state free trade could not stand alone as a constitutional prohibition, but rather would need to be institutionally guaranteed:

> It must be evident to members that the practical working of this principle of freedom of trade throughout the Commonwealth will be a very difficult thing indeed, unless it is in the hands of some skilled body of persons.[9]



The Melbourne Conference of 1890 was the real beginning of the federal movement. Professor La Nauze observed that Parkes was 'the central figure of any conference at which he was present'.

Similarly, South Australian delegate Gordon expressed the concern of his state by arguing that 'For Federation to be of any service to South Australia, we must be absolutely secure in connection with the commercial part of the bargain.'[10]

If s 92, especially as it affected state railways and the complex system of freight rates, was to be policed, however, the question of the appropriate tribunal or body to do so remained open. For such a politically charged issue was it that it was deemed an inappropriate task for the High Court[11] and touching as it did on such a parochial and provincialised question, it was felt undesirable that the federal parliament should settle it, especially considering the Senate's role as a states' house. Something in the nature of a compromise was needed.[12] Victorian premier, Sir George Turner, took the opportunity to suggest the following provision:

> Parliament may make laws to create an Inter-State Commission to execute and maintain the provisions of this Constitution relating to trade and commerce upon railways within the Commonwealth and upon rivers flowing through, in or between two or more States.[13]

For Turner this compromise would serve (i) to dissolve the tension between the two largest states and (ii) more importantly, to defer the whole issue to a future federal parliament's discretion. For other delegates the suggestion of this body was welcomed, and if a compromise, then a valuable and useful one. Not surprisingly, South Australia's Gordon advocated that 'we must give it very wide powers and it should be viewed from a commercial standpoint.'[14] Another delegate Grant, interestingly also from a smaller state (Tasmania) hailed it, claiming that 'its decision will be based on what is just and fair rather than on abstruse legal opinions.'[15] Significantly, he located a useful role for a future Inter-State Commission as an alternative to the High Court and, in his view, a more appropriate body to determine the type of issues raised by s 92.

From Adelaide the Convention moved to Melbourne where the dispute concerning differential and preferential railway rates once again flared, developing, in La Nauze's judgment, into 'the most tedious and tangled debate of the Convention,'[16] lasting some four days.[17] What was clear to most delegates from this continued tension was that the terms providing for the establishment of an Inter-State Commission at parliament's discretion would need to be strengthened. Accordingly the weak and discretionary 'Parliament may make laws …' was altered to the seemingly mandatory 'There shall be an Inter-State Commission …'[18]

While provision for this body was criticised by some,[19] support for it was strong – so strong indeed that the Convention voted to extend its jurisdiction from control over railways and rivers to trade and commerce generally.[20] The Inter-State Commission was now a 'necessary adjunct to the Constitution'[21] and would be a vital cog in the institutional machinery of the emergent Commonwealth. Indeed its inclusion in the Constitution was a *sine qua non* for some states' decision to enter the federal compact. As the South Australia, Sir John Gordon recalled, 'Had it not been for the provision in the Constitution, I make bold to say that South Australia, at least, would not have entered the Union.'[22]

The Inter-State Commission was designed[23] to complement the High Court which, it was thought, would defer to the commission's independence and expertise[23] in areas of trade and commerce and not interfere with the policy issues with which it would inevitably be concerned.[24] The dual functions of adjudication and administration, ultimately ascribed to the commission in s 101 of the Constitution, reflect a combination of the respective roles of the English Railway and Canal Commission and the United States Inter-State Commerce Commission,[25] but unlike its two models, the scope of the Australian body's power extended beyond transport matters (and railways specifically) to the whole of Commonwealth's trade and commerce power, enumerated in s 51(i) and qualified by s 92 of the Commonwealth Constitution. This wide and general jurisdiction was largely the result of the foresight of Sir George Reid who perceived that 'if the railways are taken over (by the Commonwealth) the rivers are left, and questions may arise of public roads, trade and commerce generally, so that under any set of conceivable circumstances, the Inter-State Commission is a body that will be useful'.[26]

Quick and Garran noted that 'while in Australia the competing railway interests will be fewer and less complex [i.e. not private businesses as in the United States], nevertheless they will be correspondingly greater and will perhaps be involved with large political issues.'[27] The Inter-State Commission would have to arbitrate, therefore, not between private business companies but vast public institutions concerned not only with profit making but

also involved with major policy issues pertaining to the development of the States.[28] In short, the Inter-State Commission's envisaged role was the balancing of diverse interests in the public interest. It was to be 'free from all political prejudices and unnecessary control.'[29] Provision was made in s 103 of the Constitution for the appointment of commissioners for seven year terms; in other respects, s 103 mirrored s 72 of the Constitution in relation to the appointment of federal judges, indicative of the status that the Inter-State Commission was intended to have: in short, it was to be the fourth arm of government and, as Sir John Donaldson put it, was to 'have a function similar to the High Court but in regard to other matters.'[30]

The early parliaments

The actual birth of the Commonwealth of Australia and the accompanying sense of federal elation has been well documented.[31] Edmund Barton, who had distinguished himself as leader of the final conventions[32] was appointed acting prime minister on the first of January, 1901 by Governor-General Hopetoun and three months later the first federal elections were held.[33]

The creation of the High Court, through the Judiciary Act 1903*, would itself be strongly opposed as an unnecessary luxury*

In his policy speech, delivered in Maitland, NSW on January 17, 1901, Prime Minister Designate Barton referred to the fact that a Bill to constitute an Inter-State Commission was already being drafted by Sir William Lyne (acting minister for trade and customs) and that two of the new body's envisaged functions would be to (i) 'abolish unfair and preferential rates on the railways and in other areas' and (ii) 'to prepare the way for considering the subject of taking over the railways, but only with the States' consent.'[34] As a body 'next in importance to the High Court', Barton assured his constituency and the new Commonwealth, via the press, that together these 'two tribunals will give confidence everywhere to the people of the Commonwealth that justice will be done for them.'[35] In other words, the Inter-State Commission, as a complement to the High Court, would secure the commercial aspect of the federation bargain.

Upon formal election and confirmation in office of the acting ministers, the business of the first parliament commenced, primarily being concerned with the creation of the machinery necessary for federal government. Accordingly, in introducing the Inter-State Commission Bill on 17 July 1901, Sir William Lyne referred to the opportunity to institute a body, the necessity for which had long existed.[36] The prevalence of discriminatory costs and charges was cited,[37] as it had been throughout the debates of the 1890s, and, in short, the immediate rationale for the Inter-State Commission was the 'existence of the difficulties which the Constitution foresaw.'[38]

This sketch - 'Passing the Customs Officer at Wodonga' - appeared in the *Australian Sketcher* of 20 August 1881.

In addition to the existence of these foreseen problems, new guises of illicit state protectionism had appeared which also compelled the urgent creation of the Inter-State Commission. This body would be able to police, for example, such provisions as the Sydney Harbour Trust Regulations, cited by Sir John Quick as 'undoubtedly repugnant to the principle of inter-state free trade.'[39] Notwithstanding federation and the constitutional direction of s 92, the continuing reality which made the Inter-State Commission necessary was that 'we are all commercial rivals and anxious to get as much as we can from the trade of our neighbours.'[40]

The continued and indeed growing presence of such discriminatory preferential rates and charges seemed to recommend the smooth passage of Lyne's Bill. Despite assurances otherwise,[41] however, this Bill was abandoned and not taken up again during the life of the first parliament. The reasons for this are, in part, a result of the historical timing of the Bill and, in part, due to the existence of the same problems which thwarted the Inter-State Commission's subsequent history. Sawer[42] attributed the lapsing of the Bill to opposition chiefly on economic grounds. Certainly during the first decade of the Commonwealth, finances were tight due to the operation of the Braddon Clause,[43] the absence of revenue additional to duties of customs and excise (as a result of not levying a Commonwealth income tax) and the tight fiscal rule of the treasurer, Sir George Turner.[44] Accordingly, all outlays for Commonwealth bodies needed to be very well justified. The creation of the High Court, through the *Judiciary Act 1903*, would itself be strongly opposed as an unnecessary luxury[45] and it was not

surprising, therefore, that the estimated annual operating cost of the Inter-State Commission (£8000) was thought unwarranted by some,[46] especially given a belief that there would not be sufficient business to keep it occupied from day to day, let alone for seven years (the constitutional tenure of commissioners).[47] Suggestions[48] were made that the courts and state railway commissioners could deal with the problems with which the Inter-State Commission would be expected to deal – however the inappropriate nature of either of these two institutions had been the very reason for the inclusion of provision for an independent Inter-State Commission in the Constitution in the first place.

Stronger forces were at work in opposing the Bill than mere questions of economy and timing, however. These were represented by the Federal Steamship Owners of Australasia and the Australian Shipping Federation – whose marshalling of opposition to the Bill provides a neat and compelling case study of the influence and operation of a well-organised economic pressure group resisting the legislative initiatives of the nascent Commonwealth Government. Indeed the campaign of opposition orchestrated by the above two organisations predated equally concerted campaigns by various chambers of manufacturers and employers' federations against the Conciliation and Arbitration Act (no. 13 of 1904) and the union label clauses in the Trade Marks Act (1905). As such, Matthews's conclusion that the latter two bodies 'devoted their time almost entirely to resisting Commonwealth legislative measures regarded as 'socialistic' and inimical to the interests of private enterprise,[49] could be retrospectively applied to the opposition of the ship owners some years earlier.

The ship owners' protest[50] represented a combination of fear and self-interest and stemmed directly from the inclusion and definition of the term 'common carrier' in the Bill to include privately owned ocean-going vessels, trading between two states. The government, drawing on s 101's wide terms, had sought to override preferences in all forms of inter-state traffic, including ocean navigation. Thus an Inter-State Commission would not be restricted, as perhaps historically envisaged, to overseeing only state-owned railways and other forms of internal carriage. This was resented by ship owners who claimed that had they known that an Inter-State Commission could control their activities, then they would have opposed its inclusion in the Constitution during the 1890s.[51] However, the government's rationale for this wider reach was consistent, as Sir William Lyne explained: 'provisions relating to the inclusion of ocean-going steamships as common-carriers had to be made in the Bill to allow an Inter-State Commission to be of any use at all, for underlying the whole Bill was the prevention of trade being drawn unduly or unjustly from one state to another. All carriers must therefore be brought under the Bill.'[52]

The Steamship Owners, however, saw this form of supervisory control of all carriers as most unnecessary and highly undesirable. Anderson of the Orient Shipping Company complained that 'the measure contemplates a gross interference with private enterprise'[53] while Captain Webb of Huddart, Parker and Co. (and chairman of AUSNC) claimed, to the same effect, that 'nothing would do more to strangle Australian seaborne commerce more determinedly as the Inter-State Commission Bill would do if passed in its present form.'[54] Support in opposing the Bill was enlisted from broader commercial circles such as the Melbourne Chamber of Commerce which favoured a motion 'to combine with shipowners to prevent excessive legislative interference.'[55] As far as the chamber was concerned, the ship owners' experience made it follow, 'as a matter of course, that the government would have to assume management of private businesses in many other directions.'[56]

Vested commercial interests also lobbied state politicians and in this way the familiar and confusing issue of states' rights was introduced to blur the dispute. New South Wales MLA John Norton feared that 'the members of it (the Inter-State Commission) might make a decision affecting the industries of NSW, driving away the shipping from our port and thus affecting not only rich merchants but thousands of working men.'[57] New South Wales Premier John See argued both in NSW and Victoria that state rights ought to be safeguarded in the face of the proposed Inter-State Commission.[58]

In the light of Sir William Lyne's conviction that for an Inter-State Commission to be of any use at all, all modes of inter-state transport (including oceangoing ships) should come under the aegis of that body, the government's concession to the powerful and vested interests of the mercantile marine meant that the appeal and therefore urgency for Inter-State Commission waned. Towards the end of the Second Reading Debate, Knox summed up the mood of many in the parliament when he reflected – 'I have somewhat the feeling that we are dealing with an exhumed body after it had a decent sort of burial.'[59] It was not surprising, therefore, that despite his previous insistence on the importance of the measure,[60] Barton announced[61] that his ministry would not be proceeding with the Inter-State Commission Bill.[62]

The problems which would have justified the passage of the Inter-State Commission Bill did not disappear with its lapsing, however. The continuing nature of these problems and the whole issue of inter-state rivalry through protective measures was highlighted in two questions by Frank Tudor to the minister for trade and customs, Sir William Lyne, early in the second session of the first parliament (4 September, 1902):

> Whether, in view of growing dissatisfaction existing regarding the continuance of preferential railway rates and the fact that these rates tend to defeat interstate free trade, he means to reintroduce the Inter-State Commission Bill as early as possible next session?
>
> Whether he is aware that not only in the Eastern States but also in Western Australia, local products are carried at a much lower rate than imported products, and that strong public protests are now being made in those States against such rates?[63]

To these questions, Lyne answered – 'the great necessity for an

Inter-State Commission is being demonstrated in these and other ways, and the question of the re-introduction of an Inter-State Commission Bill will receive the early attention of the Government.' The government's 'early attention' did not materialise in this session which was plagued by the 'discursive loquacity of Members and the want of a strong guiding hand to keep them to their work.'[64]

The Third Parliament (December 1906 – February 1910) was dominated by Alfred Deakin whose 'Fusion' Ministry came to power on the basis of their appealing policy of 'New Protection.' Sawer has neatly described this policy as one 'by which tariff encouragement to Australian industry was linked with measures to prevent the growth of injurious monopolies and ensure fair prices for consumers and fair wages for workers.'[65] It was in connection with the latter aspect of the 'New Protection' that the minister for trade and customs, Senator Sir Robert Best, introduced a Bill for an Act relating to the Inter-State Commission on 1 October 1909.[66] This Bill, in essence, sought to deal with three issues.

First, in line with the Inter-State Commission's historical origins, it sought to create the machinery to make sections 102 and 104 of the Constitution operable. As such, it contained nothing 'either very novel or perhaps very debatable.'[67] It sought to 'maintain a real as opposed to paper freedom of trade between the States' and to deal with 'the highly anti-federal preferential rates which have ever been a source of friction.'[68] As already noted, however, this issue no longer aroused the intensity of feeling it once had due to the more accommodating attitudes of the state railway commissioners. Secondly, the Bill contemplated large investigatory duties for the Inter-State Commission, 'analogous in some respects to those possessed by the British Board of Trade.'[69] This would involve inquiry into diverse economic issues such as the question of the tariff, unemployment and immigration, although one caustic senator dismissed this aspect of the Bill as 'so much padding, so much flapdoodle.'[70] But thirdly, and the real 'agenda' behind Sir Robert Best's Inter-State Commission Bill of 1909 was Part V, pertaining to the industrial question bound up with the policy of the 'New Protection'. The Inter-State Commission was to be established as a federal industrial tribunal to 'decide whether variations between awards of state industrial tribunals, and the absence of awards in the case of some industries, constituted unfair business competition between the states.'[71] The contemporaneous *Boot Operatives Case*[72] before Judge Heydon, president of the NSW Industrial Court, provides an example of the difficulty the Inter-State Commission legislation was designed to overcome. Judge Heydon was reported as wishing to fix the labourers' wage at nine shillings per day, but was compelled to fix it at eight shillings because this was the Victorian rate. For if the NSW rate was higher, then NSW manufacturers would be at a distinct disadvantage. The state premiers acknowledged this equalisation problem at the 1909 Inter-State Conference where they resolved that the states should 'vest in the Commonwealth certain powers in respect of industrial matters.'[73] This was the raison d'être of Sir Robert Best's 1909 Inter-State Commission Bill.

While the Bill hardly aroused the intensity of opposition that had plagued its 1901 counterpart, nevertheless the *Sydney Morning Herald* reported the adverse reaction of the Sydney Chamber of Commerce, which resolved:

> This Council is of the opinion that up to the present no necessity has arisen to warrant the introduction of legislation to create an Inter-State Commission; and also that if further industrial legislation is deemed necessary, the powers of the existing Federal Industrial Tribunal should be sufficiently enlarged to obviate the necessity of creating another, and at the same time, very costly Federal department.[74]

The *Herald* also reported the views of a 'representative shipowner' who described the Bill as 'paternal, mischievous and objectionable legislation' and called for greater specificity both in relation to certain terms of the Bill and the proposed functions of the Inter-State Commission.

The greatest measure of opposition came from within the parliament, however. Since the success of the industrial portion of the Bill hinged on reference being made to the Commonwealth by the states, the government found itself in an embarrassing position for at the time Sir Robert Best introduced the Inter-State Commission Bill (10 October 1909), several months had elapsed since the Inter-State Conference and only one state (NSW) had introduced a model referral Bill into its own legislature. *The Age* pointed out[75] that the premiers had failed to reckon with their notoriously conservative legislative councils, rendering any reference of industrial power problematical while Senator Pearce taunted that 'these State Premiers are ephemeral and their promises go with them.'[76] In the course of a ninety minute speech,[77] he made the telling point that the value of the Inter-State Commission, namely its ability to ensure the equalisation of awards, would be compromised if not all states subscribed to the federal tribunal.[78] *The Age* could editorialise that 'in a session which is supposed to be a busy one it is a somewhat clumsy thing to pass a law 'in anticipation' of something which may never eventuate' and concluded critically that 'it is a somewhat feeble and uncertain mode of accomplishing the New Protection.'[79] This verdict was re-inforced in the parliament where the innovative Bill was allowed to lapse without trace amid familiar cries that it was both 'costly and unnecessary.'[80]

Thus the first decade of federation passed and the fourth arm of government, 'the necessary adjunct to the Constitution'[81] remained only a paper provision in that document. It was the victim of political whim in this period which had been characterised by the absence of any real party political dominance – the legacy, to quote Deakin's famous phrase, of having 'three elevens in the field' – and federal fiscal stringency. As the various federal governments strove to establish a national identity by equipping themselves with the paraphernalia of office, both the states and private business

alignments jealously guarded their own interests, strongly and, in the case of the Inter-State Commission, successfully resisting any concession to Commonwealth control.

Establishment

By 1912, much of the governmental machinery for the young nation of Australia had been set up. The Commonwealth Bank, together with a national system of currency and postal rates, had been established as had the High Court and a Commonwealth Arbitration system. Overseas, Australia was represented by its first High Commissioner in London (Sir George Reid) and its shores were protected by an incipient national navy. The economic policy of Tariff Protection and the racial policy of a 'White Australia' had been agreed upon.[82] Most symbolically perhaps (and after considerable deliberation) the site of Yass-Canberra had been chosen for the nation's capital. Yet for all this 'national' achievement, Australia remained something of a political paradox at the end of its first decade. Parochialism was evidenced by 'too much talk about state advancement, and far too much disparagement of one state by another.'[83]

Certainly the states each guarded their position jealously and the assertion of state rights *vis-a-vis* those of the Commonwealth[84] (even to the degree of overriding party unity)[85] naturally sustained strong notions of independent identity. Legally this was evidenced by the dual doctrines of 'implied prohibition' and 'immunity of state instrumentalities,'[86] ('a mixture of judicial discretion and gruff paternalism only thinly disguised')[87] and the fact that the states sought to look to the Privy Council and not the High Court for the settlement of constitutional inter-se questions.[88] Inevitably, the maintenance of distinct state identities dictated continued inter-state rivalry and discrimination, in various guises. A concrete example of this arose in *Fox v Robbins*[89] where the High Court unanimously invalidated a West Australian Act imposing a licence fee twenty-five times higher for publicans selling non-West-Australian liquor.[90]

The political frictions outlined above made the need for the Inter-State Commission perfectly plain. Indeed it was 'the precise psychological moment ... there being no doubt in any man's mind that the Inter-State Commission is needed.'[91] In 1912, Deakin lamented that 'its absence has already been seriously felt in this country.'[92] Accordingly, the Fisher government successfully rushed a Bill to establish the Inter-State Commission through the last session of the Fourth Parliament.[93] The Inter-State Commission was to be a body 'of high character, which could be trusted to act as the eyes and ears of the people as a whole.'[94]

The timing of the Bill was also bound up with a sense of political frustration on the part of the Fisher Labor government which was 'the first Government with an absolute majority in either House, let alone both.'[95] This frustration had its origins in the 'Fusion' government (1906–1909) in which, under Deakin and in alliance

Between 1911 and 1926 there were 12 failed proposals to amend the Australian Constitution, all seeking greater economic powers for the Commonwealth. This Norman Lindsay cartoon appeared in *The Bulletin* of 20 April 1911. The establishment of the Inter-State Commission in 1913 was in part a response to, and function of, Commonwealth Government frustration.

with his 'Liberal' party, the federal Labor Party pursued the policy of the 'New Protection.' One manifestation of this policy was the Excise Tariff Act (1906) exempting manufacturers from payment of excise duties on specified goods if, and only if, workers were provided with fair and reasonable conditions of remuneration. A majority of the High Court, however, 'heavily sedated by the State reserved powers doctrine,'[96] declared this central Act invalid.[97] This decision was followed a year later by *Huddart, Parker and Co. v. Moorehead*[98] in which the Commonwealth's corporation power (by which the federal government sought to regulate trusts and monopolies and outlaw restrictive trade practices) was narrowly construed.[99] The High Court's stance in these two cases dictated that the 'New Protection' lapsed for want of constitutional power.[100] If anything, this judicial conservatism strengthened in the period during which Fisher's Labor Party held historic majorities. The powers given to a royal commission to enquire into the activities of CSR were curtailed.[101] An attempt to smash the Coal Vend – an alliance of coal producers and inter-state shipping companies – was similarly thwarted by a majority High Court decision.[102]

In the face of these decisions providing an interpretation of the Constitution completely adverse to Labor's policies,[103] the case – and need for – constitutional reform, originally discussed at the

Labor Party's Conference in Brisbane (1908)[104] was confirmed. Accordingly, on 16 April 1911 Attorney-General WM Hughes put two questions first to the parliament and then to the people via the referendum mechanism. The first question was a sweeping request that the Commonwealth be given power over trade and commerce (generally and not restricted to inter-state or overseas trade, as in s 51(i) of the Constitution); industry; wages and conditions of employment; the right to arbitrate on all industrial disputes; and the power to control all business combinations and monopolies (undoubtedly a response to the *CSR* and *Coal Vend* decisions of the High Court). The second question asked specifically that the Commonwealth be given power to nationalise monopolies.

Both proposed amendments failed, receiving majority support only in Western Australia.[105] This failure can be attributed not only to conservative fear and some justifiable scepticism at the 'woolliness and vagueness'[106] of the arguments presented in favour of the amendments, but also to federal-state antagonisms within the Labor party. Joyner[107] has closely documented the 'hot and heavy' dispute which Hughes and NSW Labor leader Holman had become embroiled in over the question of the amendments, and highlights in particular the shrewd tactics of Holman which worked to undermine Hughes's proposals even amongst Labor supporters.

Thus, despite its decisive mandate, the Fisher government was frustrated by the joint activities of the High Court, the people at referendum and even some within their own party. While the hope of constitutional amendment still remained, yet the uncertainty of this initiative and the prospect of continued judicial obstruction dictated legislative boldness which resulted in the Inter-State Commission Act of 1912. That this measure was politically motivated and a response to the government's frustration is further supported by two factors – first, the personnel mooted for the Inter-State Commission; secondly, the extremely wide powers granted to that body under the Act.

It was widely rumoured before, during and after the passage of the Act that Attorney-General Hughes would become the first president of the Inter-State Commission.[108] Indeed, so certain did the appointment seem that candidates for his federal seat had already presented themselves.[109] During the passage of the Inter-State Commission Bill, the *Sydney Morning Herald* had expressed some concern over the prospect of Hughes's appointment to this supposedly neutral and independent body:

> It is very questionable whether the very wide powers granted by the Bill should be administered by a politician, however able, who has been so prominently associated with certain controversies, as the present Attorney-General.[110]

One of the controversies alluded to was Hughes's insistence that Commonwealth powers should be expanded to facilitate the development of a national, central economy.[111]

That Hughes and the Fisher Labor government saw the Inter-State Commission as a potential vehicle by which it could implement 'national' economic policies and circumvent the sources of frustration it had encountered during its period of office is confirmed by a recollection of Mr Matthews (member for Melbourne Ports) in 1920:

> I remember well what happened in the 1913 election when we asked the people for increased powers. I know what we intended to do with those powers if we got them. It was understood at the time that the present Prime Minister (Hughes) was to be the President of the Inter-State Commission which was to have vast powers...The Inter-State Commission is a ridiculous body, because it never received the powers which it was thought would be conferred on it through this Parliament obtaining further legislative powers itself.[112]

From this, it is clear that the government intended that its increased powers (as a result of referendum submissions identical to those of 1911 – though now presented as six separate questions) could be well utilised by the Inter-State Commission with the forceful and, at the time, still ideologically sound Hughes at the helm.[113] It may also explain why the Fisher government made no appointments to the Inter-State Commission prior to the May 1913 election and simultaneous referendum (despite making two appointments to the High Court in the same period)[114] for the perceived usefulness of the Inter-State Commission was contingent upon a further extension of its potential jurisdiction which would have been possible had the referenda proposals been successful.[115] In many respects then, Labor's narrow loss in both the political and referenda campaigns of 1913 was a pre-natal blow for the Inter-State Commission.

Irrespective of political motivation, the Bill, which had been assured of bi-partisan support when Deakin ventured that the commission 'will become a great institution and a body of high character'[116] was easily passed in December 1912. In speaking to the Bill, Hughes in a fulsome and perhaps expectant manner, described the Inter-State Commission's powers as 'judicial as well as administrative and investigatory… In short, the functions of an Inter-State Commission under this Bill are to be a Standing Commission of Inquiry (with Royal Commission powers)[117]; a Board of Trade – to act as an independent critic; a Board of Advice;[118] an active guardian of the Constitution;[119] and a Commerce Court (with the powers of a Court of Record).'[120] The breadth of the commission's scope, as envisaged in the Bill, is best evinced by clause 16 which is provided:

> The Commission shall 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:
>
> (a) the production of and trade in commodities;
>
> (b) the encouragement, improvement and extension of Australian industries and manufactures;

> (c) markets outside Australia, and the opening up of external trade generally;
>
> (d) the effect and operation of any Tariff Act or other legislation of the Commonwealth in regard to revenue. Australian manufactures. and industry and trade generally;
>
> (e) prices of commodities;
>
> (f) profits of trade and manufacture;
>
> (g) wages and social and industrial conditions;
>
> (h) labour, employment and unemployment;
>
> (i) bounties paid by foreign countries to encourage shipping or export trade;
>
> (j) population;
>
> (k) immigration; and
>
> (l) other matters referred to the Commission by either House of the Parliament, by resolution for investigation.

In response to this extraordinary economic litany, one parliamentary wit quipped that 'if you added astronomy, they (the Commissioners) might be able to fill their time.'[121]

Part V of the Bill purported to invest the Inter-State Commission with judicial power. It was to be a court of record in relation to commercial causes. Attorney-General Hughes drew attention to the fact that 'commerce courts now settle commercial disputes with dispatch. They are presided over by men who understand such causes, and the procedure is free from those forms and ceremonies, long and wearily drawn out, which sometimes hamper inquiries in Courts of Law'.[122] Hughes went on to predict that 'if it (the Inter-State Commission) commands the respect of commercial men by its despatch of business and impartiality, its powers will be availed of to a very large extent'.[123]

Despite the obvious great expectations for the Inter-State Commission, together with the easy and relatively uncontroversial passage through the parliament, the Bill was not without some detractors. In the light of the Inter-State Commission's subsequent demise (within one constitutional term of seven years) it is pertinent to note the several criticisms levelled against the Inter-State Commission Bill in 1912. Livingstone (member for Barker) defensively intoned that 'if this sort of thing goes on, there will not be very much left for the Parliament to do,'[124] while Matthews (member for Melbourne Ports) was trenchant in his criticism that the Inter-State Commission represented 'a wasteful duplication of machinery to discharge functions which might be sufficiently carried out by our well-equipped Departments.'[125] This theme of redundancy and duplication was continued by Senator Vardon (South Australia) to the effect that 'if a good many of these matters are not covered by our Arbitration Court, I do not know what is.'[126] Perhaps the most apposite criticism of all was the terse remark from Greene (member for Richmond) that 'its proposed scope is too wide.'[127] This accorded with the *Herald's* judgment that the three men to be appointed commissioners would need to be 'supermen who probably did not exist.'[128]

In the event, the task of appointing commissioners fell to the Cook-Forrest Liberal government which had narrowly defeated Fisher's Labor Party at the May, 1913 elections.[129] Cook, who had opposed the creation of the Inter-State Commission in 1901,[130] made the bold appointment of A B Piddington[131] as chairman, with George Swinburne[132] and Sir Nicholas Lockyer[133] as fellow commissioners. The enthusiasm of the commissioners for their new position and the expectation they held were well distilled by Swinburne who wrote that 'the honour that has been conferred on me is very great and the work that the Commission can do for the economical development of Australia is very far-reaching and can be of greater use than any Parliament or public body.'[134]

Achievement

On 8 September 1913, the minister for trade and customs, Littleton Groom, directed the newly created Inter-State Commission to investigate and report on:

> Any industries now in urgent need of tariff assistance
>
> Anomalies in the existing Tariff Acts…
>
> The lessening where consistent with the general policy of the Tariff Acts, of the costs of the ordinary necessities of life, without injury to the workers engaged in any useful industry.[135]

The Tariff Inquiry was striking for the 'scientificity' of its approach, designed to circumvent the problems parliament had previously encountered when dealing with tariff matters of 'voting in the dark.'[136] The elevation of the tariff from the parliamentary forum to a quasi-scientific level was seen as necessary because 'what confronts us (the Parliament) in Tariff discussions is the interdependence of industries. It is this which makes the Protectionist voter of one moment the Free Trade voter of the next…and so a scientific instrument becomes mutilated.'[137] The *Age* reported Sir Joseph Cook as thinking that 'the marvel is that the tariff has been made a football for politicians for so long when the business-like method such as now adopted (by the Inter-State Commission) was possible all the while.'[138]

The Inter-State Commission undertook a massive survey of industry, and embarked on an investigation which led to six hundred and sixty-six applications being received and one thousand two hundred and thirty-seven witnesses[1] being examined, Piddington concluding that 'this body of evidence is, we believe, such as has not previously been obtainable for the purposes of tariff revision.'[139] The massive response of industry indicated an eagerness to co-operate with the Inter-State Commission and seemed a vindication of the government's initiative of removing the tariff determination from the parliamentary sphere.

The ability of the commission to take a comprehensive purview of the whole tariff issue was reflected in its report, which discussed

the tariff in relation to, for example, the conflicting interests of different industries, the cost of raw materials, salaries and wages, efficiency of workers and local prejudice against the use of Australian goods.[140] It is clear that the Inter-State Commissioners 'accepted protection, but not naively.'[141] The critical and scientific approach of the Inter-State Commission to the tariff was far from universally appreciated, however. At a time when protection had become a 'faith and dogma',[142] *The Age*[143] claimed to identify in the Inter-State Commission's report 'numerous anti-Protectionist' arguments while even mild criticism of manufacturing industry efficiency aroused displeasure.[144] The Inter-State Commission's conclusions did not convince parliament that 'Protection involved anything else but protection' and the Fisher Government, returning to office in 1914, implemented their own tariff which was not altered as a result of the Inter-State Commission's report.[145]

The determination of the tariff was still a highly sensitive political issue. The delegation of the tariff issue to the Inter-State Commission, however practically justified and scientifically desirable, aroused great resentment on two counts – first, it created a perception that the Cook government was neglecting its responsibilities[146] and secondly, it fuelled the view that the role and duty of parliament was being seriously invaded by the Inter-State Commission.[147] These complaints were buttressed by *ad hominem* attacks on two of the commissioners[148] which made it inevitable that some stigma would attach itself to the institution of the Inter-State Commission and its public perception. Increasingly, parliamentarians saw the Inter-State Commission's work on the tariff as encroaching upon the legislature's responsibility and came to view the Inter-State Commission as a distinct threat to their sovereignty. As one pompous member put it:

> I do not want the opinions of Mr. Piddington and Mr. Swinburne on these matters. My electors sent me to this House because they know what opinions I hold on the Tariff question, and I am prepared to decide on the evidence and not to allow the Inter-State Commission to think for me.[149]

It was most unfortunate that the Inter-State Commission's first and by far its most extensive task should generate such hostility to the body. It could not but affect and damage its public image in this vital formative period. In the course of the following years, the Inter-State Commission undertook a series of reports including on new industries, British and Australian trade in the South Pacific and an inquiry into the cause of increased prices.

The Wheat Case

Of more significance than any of its reports though also connected with the war-time situation, was the Inter-State Commission's involvement in the so-called *Wheat Case (NSW v Commonwealth* (1915) 20 CLR 54) in which the Commonwealth, acting on behalf of several Riverina wheat growers, brought a complaint before the commission in its 'judicial' capacity relating to the NSW Wheat Acquisition Act (1915). This Act permitted the New South Wales Government, after due Gazette notification, to compulsorily acquire wheat produced in NSW in return for 'appropriate' compensation. The question which arose was whether this Act operated to validly prevent the making of a contract for an inter-state sale of wheat or whether such a contract and course of dealing was protected by s 92 of the Constitution.

This case was highly significant for the following reasons: (i) it determined the fate of the Inter-State Commission as far as its judicial functions, contained in Part V of the Inter-State Commission Act, were concerned; (ii) as a consequence of (i), it provides us with the only opportunity to compare approaches taken by the High Court and the Inter-State Commission to the same matter. Furthermore, it discloses somewhat imperfect reasoning on the part of the majority of the High Court in what turned out to be a critical and fatal decision as to the Inter-State Commission's constitutional role.

In this essentially mercantile matter, the Inter-State Commission by a majority of two to one (Piddington in dissent), invalidated the NSW statute, finding it obnoxious to the central principle contained in s 92 of the Constitution. 'In matters of foreign and inter-state trade,' wrote Lockyer, 'there are no States.'[150] Swinburne, cynical of the NSW Legislature's purported rationale (the exigencies of war) offered a frank assessment of the situation, undistracted by legal precedent:

> The evidence given was that there was a considerable inter-state market for wheat at the time of the passing of the Act, which the Act stopped; in fact, there was little wheat business doing in N.S.W., as the best price given to N.S.W. buyers was 5s. to 5s. 1d. per bushel on truck at station, compared to 5s. 6½d. per bushel on truck at station by inter-state buyers.[151]

Lockyer was equally candid in stating his view that the effect of the Act was to 'sever N.S.W. commercially from the remaining States of the Commonwealth'[152] and he thus refused to permit the circuitous curtailing of the positive declaration enshrined in s 92. Clearly the emphasis behind the judgments of the two non-legal members of the commission was born of commercial insight, assisted by a flexibility of approach to the problem. Even in his dissent, it could be said that Piddington was guided by these two considerations for his decision was dictated by the exceptional circumstances of wartime 'synchronised with an unusually poor harvest.'[153] It was on this basis that he justified NSW's temporary[154] assertion of the right of 'eminent domain.'

Under s 73(iii) of the Constitution, appeals to the High Court on questions of law are permissible from a decision of the Inter-State Commission, and an appeal was lodged by the New South Wales Government. The *Wheat Case*[155] appeal has been described as 'a landmark appeal in the history of Australia because its constitutional implications had a supreme effect on the perception of the whole framework of the Constitution.'[156] At stake was not only the

immediate future of NSW wheat but the whole judicial competence of the Inter-State Commission. Of the five questions the High Court was required to consider on appeal, the first was the most fundamental: [157]

> Had the Inter-State Commission jurisdiction to hear and determine the petition, to grant the injunction or to make the order for costs.

In other words, could the Inter-State Commission validly exercise the judicial power of the Commonwealth? An ambiguous affirmative response is suggested by consulting the Convention Debates of the 1890s. Mr Kingston remarked that 'we are conferring on the Inter-State Commission judicial powers of the highest order',[158] whilst George Reid noted that the 'tribunal would have the independence of a High Court.'[159] The High Court, however, in 1903 had denied themselves recourse to the Convention Debates for the purpose of ascertaining the intention of the 'founders.'[160] Matthews's (member for Melbourne Ports) caution of 1912 – 'neither the Attorney-General nor anyone else can say what the High Court will determine with respect to any power that we may desire to confer on the Commission'[161] proved well-founded for, in the event, a majority of four High Court judges held that the judicial power of the Commonwealth had been invalidly conferred on the Inter-State Commission. Isaacs J considered that 'very explicit and unmistakable words would be required'[162] for the Inter-State Commission to exercise judicial power and concluded that these were not present in s 101 of the Constitution. Hence, Part V of the Inter-State Commission Act, purporting to confer judicial power on the commission, was held by a majority to have no constitutional basis. Isaacs's conclusion was totally at odds with not only the express reference to 'adjudication' in s 101 but also with the constitutional commentary of Quick and Garran to the effect that s 101 'clearly enables part of the actual judicial power of the Commonwealth to be vested in the Inter-State Commission.'[163]

The High Court's decision in the *Wheat Case* embodies an intriguing personal clash between Isaacs and Barton (who delivered the leading judgments for the majority and minority respectively). The decision of Isaacs, whom Deakin had described as 'dogmatic by discipline, full of legal subtlety and the precise literalness and littleness of the rabbinical mind,'[164] in effect left the Inter-State Commission as nothing more than a standing commission of inquiry.[165] The net effect of this decision coincided with aspirations Isaacs expressed some eighteen years previously as a young Victorian delegate in the Melbourne Convention Debates:

> I want to eliminate the constitutional creation of the Inter-State Commission. I think it a great mistake that we should erect this body – a fourth branch of Government.[166]

On the other hand it will be recalled that it was under Barton's first federal government that a Bill to establish an Inter-State Commission (with full adjudicatory functions) was introduced. Barton's forceful dissenting judgment in the *Wheat Case*, described by Sawer as 'particularly brilliant'[167] and by Coper as 'blistering'[168], was also significant in view of his reputation as the 'concurring' judge.[169]

Two particular points made by Isaacs in his judgment warrant close attention. Taking up the stated constitutional function of the Inter-State Commission '…to execute and maintain laws relating to trade and commerce with such powers of adjudication and administration …', Isaacs stated that 'these words imply a duty to actively watch the observance of those laws, to insist on obedience and to take steps to vindicate them if need be. But a court has no such active duty.'[170] In doing so, Isaacs held that the Inter-State Commission's curial powers were inappropriate and invalid. The question arises, however, as to exactly how any body could 'insist on obedience… and take steps to vindicate the observance of laws' without the type of judicial powers contained in Part V of the Inter-State Commission Act – specifically the power to award damages (s 30); grant injunctions (s 31); make declarations (s 32); and fix penalties (s 34).

Isaacs, by acknowledging that a court was not competent to perform the function of 'execution and maintenance', but at the same time denying the Inter-State Commission the powers required to fulfill this role, unwittingly touched upon the very legacy of the High Court's decision in the *Wheat Case*, namely the creation of a major constitutional vacuum. The commissioners were acutely aware of this and claimed, at length, in their second annual report,[171] and yearly thereafter, that the decision emasculated the

Inter-State Commission and effectively prevented it from being an active watchdog of inter-state trade and commerce.

The second and somewhat ironic issue to note from Isaacs J's judgment in the *Wheat Case* stems from the following observation:

> Indeed, in reply to a question the Court, learned counsel for the Commonwealth claimed that the Inter-State Commission could now validly try such a case as the *Vend Case* or Customs Prosecutions. It would be rather remarkable to permit two laymen to overrule a lawyer in a criminal case.[172]

The obvious corollary to this may be stated rhetorically – 'would it not be equally remarkable to allow lawyers to rule on violation of s 92 of the Constitution in respect of what the High Court many years later in *Cole v Whitfield* appreciated and identified as an essentially factual inquiry concerned with economic protectionism?' It is appropriate to note here that, perhaps not surprisingly, the High Court's decision on the facts of this case differed to that of the Inter-State Commission majority.

The High Court's decision may be construed either as an inchoate expression of the strict 'separation of powers' doctrine enshrined in the *Boilermakers' Case*[173] or else, in the colorful words of Sugden, as an exercise of 'judicial virtuosity'[174] resembling very much 'the action by which some medieval court of law endeavoured to stultify a rival court.'[175] Professor Colin Howard has put it rather more bluntly – 'The High Court disposed of the invasion of its own area of interest by deciding that s 101 did not mean what it said.'[176]

Demise

In one swoop, then, a majority of the High Court had stripped the Inter-State Commission of that feature which distinguished it from any other board or commission and which made it constitutionally unique. The despondent commissioners stated frankly, in a letter to the prime minister (14 April 1915) that 'the practical utility to the Commonwealth of the Commission has now been so reduced as to hardly warrant its continuance.'[177] Their importunate correspondence with the prime minister and various ministers regarding their diminished powers and, by dint of this, responsibility, did not receive attention commensurate [178] with the commission's urgings. A proposal to circumvent the High Court's decision by referendum[179] was postponed, presumably due to the pressures and demands of war-time[180] and references to the commission's hamstrung state occurred in every annual report from 1915. A ray of hope that the Inter-State Commission's judicial powers might be restored glimmered by way of a June 1918 letter from Acting Prime Minister Watt to Piddington to the effect that:

> Ministers are willing to consider at a suitable time the bestowal by statutory enactment of judicial and other related powers upon the Commission but, before determining that matter, have asked me to invite you to enumerate the functions which, in your opinion, the Commission could beneficially discharge if clothed with such additional authority. [181]

Cabinet decided not to introduce legislation dealing with the matter, however.[182]

The tone of a letter from Swinburne to Defence Minister Pearce, soon after his resignation from the commission in December 1918, was a far cry from his enthusiastic correspondence of 1913, previously cited: 'The Commission, with its powers depleted, became merely a very expensive permanent Enquiry Board without much reason for existence, and for such I had no inclination. My two colleagues were also very dissatisfied with the position in which they found themselves.'[183]

The final death knell came for the Inter-State Commission when, in March 1919, commissioners Piddington and Lockyer together with Deputy-Commissioner Mills[184] were requested by the government to inquire into the sugar industry, not under the auspices of the Inter-State Commission but as a royal commission. Despite assurances[185] from the minister, Massey Green, that this was no reflection on the Inter-State Commission nor a pointer as to its future, as the commissioners feared,[186] no reason was supplied as to why the inquiry should be styled a royal commission rather than an investigation under s 16.

Parliament's final verdict on the Inter-State Commission's performance was passed in the November 1920 session of the 8th Parliament. Sir Littleton Groom had introduced a Commonwealth Court of Commerce Bill, taking up a suggestion of Justice Powers[187] and heeding the insistent requests of the commissioners, to restore the Inter-State Commission's judicial powers. By this Bill, the president of the Inter-State Commission would also be a judge of the Court of Commerce and, in this way, the legalistic peccadillo raised by the majority of the High Court in the *Wheat Case* could have been circumvented.[188] This Bill received minimal support, however, and its reading in the House of Representatives afforded various members the opportunity to make a frank assessment of the Inter-State Commission's performance.

Mr Bamford described it as 'the most useless body that was ever created by this Parliament' [189] and 'if abolished today', claimed Mr Page, 'no one would be any the worse off.[190] Sir Robert Best, who was responsible for the 1909 Bill, expressed 'distinct opposition to the continuance of the Inter-State Commission and to the creation of a Court of Commerce.'[191] while Mr Fleming concluded that 'we have never had a body polity in this community which has been of less real service than that Commission, and if its life can be judiciously ended now, it would be wise to end it.'[192] Parliament's verdict was clear enough.

The newspapers were rather more penetrating in their analysis of the commission's failure and more balanced in their assessment of its performance. *The Age* acknowledged that the commission's weakness stemmed from the government's 'refusal to carry out many of its recommendations, thus robbing the work of much practical value.[193] The commission, as it stood in 1919, was not the august body contemplated by the framers of the Constitution

'possessing power to promote the public welfare', rather 'its findings and recommendations were destitute of force and could be ignored with impunity by all concerned in the maintenance of laissez-faire.'[194]

The issue, as presented by the press, was whether the Inter-State Commission should be 'mended or ended'.[195] Although the position seemed clearer cut[196] in the parliament than the papers, nevertheless the general thrust of newspaper opinion was that the commission should be put out of its misery and 'cast out into the lumber room of so much official machinery. It is questionable whether there is any real need for the Commission's existence.' [197] The Sydney *Daily Telegraph* was rather more forthright:

> Instead of a Bill to provide relief work for the unemployed Inter-State Commission, the taxpayers would better appreciate legislation that would relieve them of the expense of maintaining its barren existence.[198]

When Piddington's constitutional term of seven years expired in August 1920, no new appointments were made to the commission which was left in a state of 'suspended animation',[199] there being a commission but no commissioners.[200]

Conclusion

Why was it that this body which was deemed sufficiently vital as to warrant formal inclusion in the Constitution and which, upon its inception, was hailed as a 'great institution',[201] indeed as 'a necessary adjunct to the Constitution,'[202] suffered such an early and undistinguished demise?

Colin Howard has summarised the inherent problems which the Inter-State Commission faced by stating that 'if it is to be given any effective powers, which the Constitution certainly contemplates, it is bound to interfere with a number of other powerful, vested interests.'[203] Kolsen has put it another way: 'The Inter-State Commission ... was allowed to disappear, one fears, because it was grinding no-one's axe.'[204] That the Inter-State Commission was a threat, real or perceived, to other established power bases, either because of its wide constitutional jurisdiction or its guaranteed independence, is perfectly plain. The enormous grant of power in s 101 of the Constitution, reflecting the important role the Inter-State Commission was intended to play in the federal compact, was paradoxically responsible for its weakness. Furthermore, the very width of the constitutional grant of power, as exploited in the 1912 Act, was also responsible for blurring the original purpose of the Inter-State Commission to act as a constitutional and independent watchdog of s 92. The chief consequence of this was that the Inter-State Commission's historical role was lost sight of.

Apart from its paradoxical constitutional weakness, in its statutory form, the Inter-State Commission was fatally flawed. It fell victim, as Mr Kelly (member for Wentworth) had predicted in 1912, to 'the thing which invariably happens when too much sail is carried in a very strong wind.'[205] So wide were the terms of the 1912 Act (for reasons already explored – notably the Fisher Labor government's political frustration with the High Court) that the Inter-State Commission was never able to establish an identity and thus assert its value in protecting the public interest. It was over burdened with a veritable miscellany of tasks, most of which were unrelated to the central role which the federation delegates had envisaged for the commission as 'an active guardian of the Constitution' and 'watch-dog over inter-state trade.' Parliament's unappreciative and, at times, hostile reception of various commission reports, notably the monumental tariff inquiry, reveals a resentment at the apparent erosion of a staple parliamentary function, and the vested interests of business did nothing to encourage the existence and survival of a nascent regulator.

Furthermore, the High Court's decision in the *Wheat Case* is susceptible of an interpretation of institutional rivalry and a concern on the part of the majority of the High Court to prevent an encroachment into its jurisdiction. It is certainly intriguing to speculate whether the tortured history of the interpretation and application of s 92 of the Constitution in the High Court up until the 1988 decision in *Cole v Whitfield* (1988) 165 CLR 360 would have been the same had the very body designed principally to administer its application survived and been permitted to perform its intended constitutional role. In *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327 at 352, Latham CJ observed (without any attendant legislative reaction) that section 92 is:

> not a completely self-executing provision. It may operate to invalidate Federal or State statutes, but it cannot, of its own force, deal with cases of, e.g., discrimination in the administration of valid legislation. *If sec. 92 is to be fully operative, it needs an administrative organization to deal with and to correct interferences with the freedom of inter-State trade and commerce which are the result of administrative action under legislation which is not itself an infringement of sec. 92. The Inter-State Commission is that administrative organization,* but it cannot function unless there are laws for it to "execute and maintain." [emphasis added]

A further and personal element should not be overlooked when analysing the demise of the Inter-State Commission. It will be recalled that it was WM Hughes who introduced the 1912 Bill and Hughes whom it was rumoured would be the Inter-State Commission's first president. In so far as his support for the Inter-State Commission arose from a personal motivation, by 1919–1920, Hughes had achieved leadership and personal success in the political field, both at home and on the international stage. The importance of the Inter-State Commission may well have diminished in his influential eyes, especially in view of a more co-operative attitude of the High Court to government initiatives during the war years. Furthermore, Piddington's failure to be re-appointed to the commission in 1920 may itself be attributed to a personal clash with Hughes dating back to early 1913 when Piddington's resignation from the High Court had embarrassed

the then attorney-general. Indeed 'Hughes was scathing about Piddington, whom he described as having resigned from his great office like a panic-stricken boy'.[206] Piddington's actual leadership of the Inter-State Commission may also be questioned for Sir Robert Garran, when writing Piddington's obituary many years later, did not list the presidency of the Inter-State Commission amongst his many achievements.[207]

Postscript

The Inter-State Commission was briefly re-established in 1983 by the Hawke government but, within a few years, it was subsumed by the Industry Commission, a successor to the Industries Assistance Commission, in turn the successor of the Tariff Board. The restrictive interpretation given to s 101 of the Constitution by the majority of the High Court in the *Wheat Case* was never tested or revisited.[208]

Endnotes

1. Cited in JA La Nauze *The Making of the Australian Constitution* Melbourne 1972, p.35. (For a discussion of the history of the precise wording of section 92, see JA La Nauze 'A Little Bit of Lawyers Language: The History of "Absolutely Free" 1890-1900' in AW Martin *Essays in Australian Federation* Melbourne 1969).
2. Cited in La Nauze *op cit* p.112.
3. Ibid., p.34.
4. e.g. Official Report of the National Australasian Convention Debates, Adelaide 1897 (hereafter cited as Convention Debates, Adelaide) pp.1118-9 per BH Wise.
5. National Australasian Convention Debates, Sydney 1891 per Sir John Donaldson p.667.
6. Commonwealth Parliamentary Debates Vol. 3, p.3097 per Sir George Reid.
7. See generally NG Butlin *Investment in Australian Economic Development 1861-1900* Cambridge 1964, pp.321-333.
8. Convention Debates, Adelaide p.1127.
9. Ibid., p.1116.
10. Ibid., p.1128.
11. Convention Debates, Melbourne (1898) p.2283 per Sir Josiah Symon, 'It would introduce political questions and matters of policy that would tend to derogate from the position which the High Court should occupy under this Constitution.'
12. Compromise was a critical feature of the Convention Debates. La Nauze *op cit* entitles his ninth chapter 'Crisis and Compromise' and writes (p.160) that 'members had learned during the weeks in Adelaide that there must be compromise, that questions must not be pushed to such an extreme that solutions completely unacceptable to some of the states would be forced on them by mere numbers.
13. Cited in La Nauze *op cit* p.156 (clause 96).
14. Convention Debates, Adelaide p.1128.
15. Ibid., p.1139.
16. La Nauze *op cit* p.216.
17. 21 February 1898 – 25 February 1898.
18. Convention Debates, Melbourne p.1513 per Sir Charles Kingston - 'if we intend to have an Inter-State Commission, let us say so in the Constitution in the plainest possible way.'
19. e.g. Sir Edward Braddon, Convention Debates, Melbourne p.1537 – 'Never mind what appeal there is to the High Court, I object that we are giving to this body the responsibility of deciding in matters of every sort relating to trade and commerce.'
20. See Convention Debates, Melbourne p.1529.
21. per Sir John Quick CPD Vol. 5 p. 5657.
22. CPD Vol. 69, p.7142. See also CPD Vol. 6, p.7070 per Sir John Poynton.
23. Convention Debates, Melbourne p.2276 per Henry Dobson.
24. Ibid., p.2283 per Sir Josiah Symon.
25. Background material on these two models is provided in J. Quick and RR Garran *The Annotated Constitution of the Australian Commonwealth* 1901 ed. Sydney 1976 pp.896-901.
26. Convention Debates, Melbourne p.1529.
27. Quick and Garran *op cit* p.899.
28. Ibid., p.921.
29. Convention Debates, Melbourne p.1515 per Sir William McMillan.
30. Ibid., p.1521.
31. e.g. F Alexander, *Australia Since Federation* Melbourne 1972; R. Ward *The History of Australia: The Twentieth Century* New York 1977 p.12.
32. Barton was leader of the Conventions in Adelaide in 1897 and Melbourne, 1898. Sir Samuel Griffith, who would become the first chief justice of the Commonwealth in 1903, had been leader of the 1891 Sydney Convention.
33. 29 and 30 March 1901.
34. *Sydney Morning Herald* 18/1/1901.
35. Ibid.
36. Commonwealth Parliamentary Debates (CPD) Vol. 2, p.2668.
37. e.g. CPD vol. 2, pp.2678-82.
38. per Edmund Barton CPD Vol. 6, p.7070.
39. CPD Vol. 5, p.5664.
40. per Mr Batchelor CPD Vol. 6, p.7073.
41. e.g. Barton: 'There is no intention on the part of the government to abandon the Bill, or to defer its consideration until another session.' CPD Vol. 3, p.3273.
42. G Sawer *Australian Federal Politics and Law 1901- 29* Melbourne 1956 p.26.
43. The 'Braddon Clause' (after the Tasmanian premier) is s 87 of the Commonwealth Constitution and provides that:

    > During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and excise, not more than one fourth shall be applied annually by the Commonwealth towards its expenditure. The balance shall, in accordance with this Constitution, be paid to the several States.

44. See G Sawer *op cit* p.28 – 'Turner forced his fellow Ministers to exercise the utmost economy in the running of their Departments. Some federal services were unduly starved ... '
45. Ibid., p.24.
46. e.g. Mr Wilks CPD Vol. 6, p.7063.
47. e.g. McLean CPD Vol. 6, p.7064.
48. Higgins CPD Vol. 6, p.7035.
49. TV Matthews *Business Associations and Politics* PhD Thesis (Syd.) 1973 p.161.
50. SMH 12/7/1901 provided a schedule of protesting shipping firms. These included: The Australian United Steam Navigation Company Ltd. Burns, Philp and Company Limited. The Adelaide Steamship Company, Limited. Australian and East African Line The China Steam Navigation Company The White Star Line Peninsular and Oriental Steam Navigation Company Ltd. The Anglo-Australasian Steam Navigation Company.

51. SMH 13/7/1901.
52. Ibid.
53. Ibid.
54. Ibid.
55. *The Age* 16/7/1901.
56. Ibid.
57. SMH 11/7/1901.
58. *The Age* 18/7/1901, SMH 11/7/1901.
59. CPD Vol. 6, p.7075.
60. CPD Vol. 3, p.3273.
61. CPD Vol. 12, p.11238.
62. In the light of the Shipowners' tremendously effective campaign, it is worth noting Sawer's (*op cit* p.48) comment on the Second Parliament – 'Federal control of inter-state and overseas navigation in Australia, proposed in the first Parliament, was again postponed when the Watson Government referred to a Royal Commission a Navigation Bill introduced by the first Deakin administration.'
63. CPD Vol. 46, pp.15781-2.
64. Henry Gyles Turner *The First Decade of the Australian Commonwealth* Melbourne, 1911 p.55.
65. G Sawer, op cit p.40.
66. CPD Vol. 52, p.4009.
67. SMH 11/10/1909.
68. Ibid.
69. Ibid.
70. per Senator Sir George Pearce CPD Vol. 52, p.4445.
71. Sawer *op cit* p.73.
72. Reported in SMH 20/10/1909.
73. *Inter-State Conference Proceedings* (p.vi).
74. SMH 23/10/1909.
75. *The Age* 13/10/1909.
76. CPD Vol. 52, p.4441.
77. *The Age* 14/10/1909.
78. CPD Vol. 52, p.4433.
79. *The Age* 13/10/1909.
80. per Senator Pearce CPD Vol.52, p.4429.
81. per Sir John Quick CPD Vol. 5, p.5657.
82. CMH Clark *A Short History of Australia* London 1964 p.195. 'In a sense, White Australia was one gigantic act of Protection.'
83. Views of JJ Fraser *Australia: The Making of a Nation* London 1910, cited in FK Crowley (ed.) *A New History of Australia* Melbourne 1974 p.309.
84. Described by A Deakin *Federated Australia* as 'an open wrestle for mastery.' p.94.
85. See C Joyner 'Attempts to Extend Commonwealth Powers 1908-19' in *Historical Studies* Vol. 9 pp.295-307. Joyner (*passim*) points especially to the on-going clash between Holman (NSW Premier) and WM Hughes.
86. See DL Wright 'The Political Significance of Implied Immunities' in JRAHS Vol. 55, pp.380-99. At p.395 'The overall effect of the doctrine was to sustain State powers and restrict those of the Commonwealth.'
87. Brian Galligan *Politics of the High Court* St Lucia 1986 p.91.
88. e.g. *Webb v Outrim* [1907] AC 81. Wright *op cit* at p.387 - 'To prefer the Privy Council to the High Court was also a way of indicating dislike of all things associated with the Commonwealth and was comparable to the tendency exhibited in some other disputes to emphasize the Imperial connection at the expense of Federal ties.'
89. (1909) 8 CLR 115.
90. For a succinct description of the facts and decision in this case, see M Coper *Freedom of Inter-State Trade* Sydney 1983 pp.11-12. This case provided the High Court with their first opportunity to interpret s 92.
91. *The Age* 16/11/1912.
92. CPD Vol 65 p. 2361.
93. The Bill had its first reading in the House of Representatives on 11 December 1912 and was assented to less than two weeks later on 24 December.
94. CPD Vol. 69, p.7071 per Alfred Deakin.
95. R Ward *The History of Australia - The Twentieth Century* New York 1977 p.76.
96. PH Lane *A Manual of Australian Constitutional Law* Sydney 1984 (3rd ed.) p.68.
97. *R v Barger* (1908) 6 CLR 41.
98. (1909) 8 CLR 330.
99. For a useful discussion of these decisions and their political ramifications, see B Galligan *op cit* pp.86-89.
100. CMH Clark *op cit* p.194.
101. *Attorney-General (C'wth) v CSR Co. Ltd* (1913) 17 CLR 644.
102. *Adelaide Steamship Co. Ltd v R. and Attorney-General (C'wth)* (1912) 15 CLR 65.
103. This sentiment, summarised in *Labour Call* 13/3/1912: 'The powers of the Federation have been cut down by successive decisions of the High Court until at present they are admittedly futile,' cited in B Galligan *op cit* p.90.
104. Galligan *op cit* p.87.
105. Figures for this referendum are set out in Appendix A of F Alexander *Australia Since Federation* Melbourne 1972.
106. CMH Clark *op cit* p.199.
107. C Joyner *op cit* pp.297-302.
108. e.g. *Launceston Examiner* (1/10/1912); *Sydney Morning Herald* (12/12/1912) and (13/3/1913) *Argus* (4/3/1913); *Hobart Mercury* (24/3/1913).
109. e.g. JP Cochran (MLA – NSW). See SMH 13/3/1913.
110. SMH 12/12/1912.
111. Hughes first put such arguments in his famous *Case for Labor*: See *Sydney Daily Telegraph* 9/10/1907, 21/12/1907, 1/2/1908, 3/4/1909.
112. CPD Vol. 94, p.6173.
113. DI Wright in Hodgins, Wright and Heick *Federalism in Canada and Australia: The Early Years* Canberra, 1978, has described WM Hughes (p.224) as 'the leading representative of a new generation of politicians who were unwilling to let constitutional forms stand in the way of achievements of their social ends.'
114. Powers and Rich JJ.
115. For Referenda results, see F Alexander *op cit* Appendix A.
116. CPD Vol. 65, p.2361.
117. *Inter-State Commission Act* (No. 33 of 1912) Part III.
118. Ibid.
119. Ibid., Part IV.
120. Ibid., Part V.
121. per Mr. Archibald CPD Vol. 69, p.7078.
122. CPD Vol. 69, p.7070.
123. Ibid.
124. CPD Vol. 69, p.7130.
125. CPD Vol. 69, p.7113.
126. CPD Vol. 69, p.7609.
127. CPD Vol. 69, p.7118.
128. SMH 12/12/1912.
129. This loss meant that the Labor Party had forfeited the opportunity to appoint three men to high quasi-judicial office - a cause for regret. In the next parliament, Carr (Member for Macquarie) said '... I think we were foolish not appointing the ISC when we had the chance. I make no bones about it.' CPD

Vol. 70, p.728.
130. CPD Vol 6, p.7065.
131. Bold because earlier in 1913, Piddington resigned on a point of honour from the High Court bench, only days after his appointment amid a hostile professional reaction and media attack. For a general account, see Graham Fricke, *Judges of the High Court* Melbourne 1986 (Chapter 8 - 'Albert Piddington: The Judge who Never Sat') and also see the entry for Piddington in the *Oxford Companion to the High Court of Australia* as well as David Ash's companion piece in this issue of *Bar News*.
132. Swinburne had been a prominent Victorian (Liberal) State politician whose appointment to the ISC may have been based on his expertise in relation to the River Murray. He had been minister for public works and agriculture and was responsible for the establishment of the State Rivers and Water Supply Commission. For a more general account see EH Sugden and FW Eggleston *George Swinburne - A Biography* Sydney 1931.
133. Sir Nicholas Lockyer was a career public servant who had been NSW's first commissioner of taxation and collector of customs. At the time of his appointment to the ISC he was Commonwealth comptroller-general of customs. For further information, see *Australian Dictionary of Biography* Vol. 10, pp.130-131.
134. Letter from Swinburne to Mr J Coates - cited in Sugden and Eggleston *op cit* pp.314-315.
135. Recorded in ISC First Annual Report (21/10/1914) p.l.
136. per Alfred Deakin CPD Vol. 69, p.7074.
137. per Mr Kelly (member for Wentworth) CPD Vol. 69, p.7082.
138. *The Age* 16/1/1914.
139. Minutes *op cit* p.199.
140. Tariff Investigation Report *op cit* (*passim*).
141. JA La Nauze 'The Inter-State Commission' in *Australian Quarterly* Vol. 9, No.1 (1937) p.52.
142. WK Hancock *Australia* London 1929, p.77.
143. *Age* 29/4/1915.
144. Leon Glezer *Tariff Politics* Melbourne 1982, p.8.
145. Minutes *op cit* p.270 record correspondence from minister for trade and customs, Frank Tudor (10/8/1915) stating that 'it had been decided that the tariff schedules, as presented to the House of Representatives, should stand for the present.' i.e. They would not be adjusted in the light of the Inter-State Commission's recommendations.
146. e.g. Mr Page CPD Vol.70, p.861: 'We have been told that something will be done when the ISC has dealt exhaustively with the Tariff. No doubt, Ministers thank God that there is an ISC. They are able to get over the fence, under the fence-;-round the fence and through the fence now that they have it to put everything on.'
147. e.g. Mr Higgs CPD Vol. 2567: 'I should like to warn the Australian manufacturers that he must not depend on the Inter-State Commission but that he should continue to demand from this Parliament a revision of the Tariff ... referring the Tariff to the Inter-State Commission has not settled the fiscal question. It has to be fought out.'
148. *contra* Piddington CPD Vol.74, p.1572; *contra* Swinburne CPD Vol. 74, p.1038.
149. per Mr. Catts CPD Vol. 74, p.1634.
150. *Inter-State Commission Seizure-of-Wheat-Case Decision* (14/4/1915) p.41.
151. Ibid., p.36.
152. Ibid., p.40.
153. Ibid., p.8.
154. Ibid., p.27.
155. *NSW v Commonwealth* (1915) 20 CLR 54.
156. per Everett J in '*Role and Activities of the Inter State Commission*' Bureau of Transport Economics Transport Outlook Conference Canberra 1984 p.6.
157. 20 CLR 54 at 57.
158. *Melbourne Convention Debates (1898)* p.2459.
159. Ibid., p.1529.
160. *Tasmania v Commonwealth* (1904) 1 CLR 329 at 332.
161. CPD Vol. 69, p.7112.
162. 20 CLR 54 at 90.
163. J Quick and R Garran *The Annotated Constitution of the Australian Commonwealth* 1901 (ed) reprinted Sydney 1976 p.900.
164. JA La Nauze (ed) Alfred Deakin *The Federal Story* Melbourne 1944 p.70.
165. Piddington, in a letter (14/14/1915) to Fisher candidly stated (Inter-State Commission Minutes) the consequences of the High Court decision – 'There is thus nothing we can do which could not be done from time to time at much less expense to the country by a Parliamentary Committee or a Royal Commission.'
166. Melbourne Convention Debates (1898) p.2279.
167. G Sawer *Federalism - An Australian Jubilee Study* Melbourne 1952, p.259.
168. Coper *op cit* p.17.
169. G Fricke *op cit* p.21.
170. 20 CLR 54 at 93.
171. Inter-State Commission second annual report (4/11/1915) p.3: 'This decision affects so fundamentally the future functions and the utility of the Commission …'
172. 20 CLR 54 at 93.
173. *R v Kirby: ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
174. Sugden and Eggleston *op cit* p.322.
175. Ibid., p.307.
176. C Howard *Australia's Constitution* Melbourne 1978, p.50.
177. Inter-State Commission Minute Book *op cit* pp.253(a-d).
178. Between 14 April 1915 and 11 March 1920 no less than twenty items of correspondence are recorded dealing with this issue. Minute Book *passim.*
179. Minutes p.262. It was proposed that the Constitution be altered in the following way: s 71 would provide that 'The judicial power of the Commonwealth will be vested in a Federal Supreme Court and the Inter-State Commission ... ' s 101 would provide that: 'There shall be an ISC with such judicial power and such powers of administration ... ' .
180. As per correspondence – Hughes to Piddington (26 August 1915) Minutes p.273.
181. Cited in *Royal Commission into the Constitution* (1929) Evidence p.177.
182. As per correspondence – JA Jensen (Minister for Trade and Customs) to Piddington (22 August 1918) Minutes p.326 B.
183. cited in Sugden and Eggleston *op cit* p.352.
184. Mills, deputising for Swinburne, was the Commonwealth comptroller-general for customs.
185. Correspondence (28 March 1919) Minutes p.332 B.
186. As per correspondence – Piddington to Greene (20 March 1919) Minutes p.332 B.
187. *NSW v Commonwealth* (Wheat Case) 20 CLR 54 at 107.

188. According to G Sawer *op cit* p.204, fn.134: 'It is probable, though not certain, that the proposed scheme (an ingenious subterfuge) would have been constitutionally valid.'
189. CPD Vol. 94, p.6166.
190. Ibid., p.6168.
191. Ibid., p.6167.
192. Ibid., p.6170.
193. *Age* (17/1/1919).
194. *Mining Standard* (30/1/1919).
195. *Argus* (20/3/1919).
196. *The Age* 1/3/1919).
197. Ibid.
198. *Sydney Daily Telegraph* (4/4/1919).
199. Phrase used by Sir Robert Garran in the course of giving evidence to Royal Commission into the Constitution (1929) p.54.
200. The 1912 Act was officially repealed in 1950.
201. per Alfred Deakin CPD Vol. 69, p.7075.
202. per Sir John Quick CPD Vol. 5, p.5655.
203. Howard *op cit* p.50.
204. Kolsen and Docwra "Constitutional and Institutional Problems in Regulating Inter-State Trade" in Twohill (ed) *Government Regulation of Industry* , 1981. p.69.
205. CPD Vol. 69, p.7081. That the commission, as provided for in the 1912 Act, carried 'too much sail' was confirmed by the significant fact that many of its designated functions were taken over in the 1920s by full-time bodies such as the Tariff Board and the Development and Migration Commission. These were statutory bodies and, not being rooted in the Constitution, were entirely subject to parliamentary control.
206. Fricke op. cit pp.81-83.
207. 19 ALJ 69.
208. For an account of the Inter-State Commission in its second re-incarnation, see M.Coper 'The Second Coming of the Fourth Arm' (1989) 63 ALJ 731.

Australian Miscellany at Law

TK Doyle was a Victorian barrister who practised in the mid-twentieth century. An opponent stated some proposition of law. Doyle asked him: 'What is your authority for that?' His opponent replied: 'The best of all authorities, common sense.' Doyle said to the judge: 'Your Honour will note that my learned friend has not brought his authority to court with him.'

Owen Dixon, in one of his addresses, told the story of an occasion when counsel appearing before Sir Thomas a'Beckett in a patent case quoted from a well-known book on patent law. A'Beckett asked if it were a reputable book. Counsel asked why not. 'Oh,' answered a'Beckett, 'I thought that the last passage you read must be wrong. It sounded like common sense.'

In *McLaughlin v City Bank of Sydney* (1912) 14 CLR 684 at 700 Griffith CJ observed that: 'The law of England is generally consistent with common sense and common honesty, and if there are any exceptions I am not disposed to take an original part in adding to the list.'

This is an extract from a work in progress being compiled by Leslie Katz and Keith Mason, provisionally named An Australian Miscellany at Law. The authors would welcome information about anecdotes, cases and histories illustrating the humanity of those who practice the law. Please contact them at keith.mason.2@gmail.com