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Constitutional Obstacles to Organised Marketing in Australia

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The famous (or infamous) command in section 92 of the Australian Constitution that interstate trade and commerce shall be "absolutely free" is only one of the many constitutional restrictions which bedevil organised marketing in Australia. The author, a constitutional lawyer, explains the impact of the Constitution upon organised marketing, and in language accessible to non-lawyers, unravels some of the complexities of the judge-made law of the Constitution. In addition to setting out what the law is, the paper attempts to convey the rationale behind the various constitutional provisions and the reasons behind the diversity of opinion in their interpretation. The paper concludes by examining the prospects for constitutional change.

1 Introduction

In a country with a unitary system of government, such as the United Kingdom, the success or failure of any organised marketing scheme may be judged entirely according to the merits or demerits of the scheme. A government with no legal constraints on what it can do may be praised or criticised entirely by reference to what it either has or has not done. However, in a country with a federal system of government, such as Australia, there are legal constraints on what *all* the various governments, federal and state, can do, and consequently the success or failure of organised marketing schemes is greatly affected by the constitutional framework within which such schemes must operate. Thus, the evaluation of government performance in Australia must take account of the added complication that there are some things which are beyond the power of the federal government, others which are beyond the power of the state governments, and some which are beyond the power of both, even when they are acting in concert. The purpose of this article is to set out, as lucidly as is possible for an audience not initiated into the complex and esoteric thoughtways of the judicial interpretation of the Australian Constitution, the constitutional considerations which limit the range of choices open to governments in Australia.

The Australian Constitution, which created the Commonwealth and converted the former colonies into States, both divides power between the Commonwealth and the States and puts restrictions on the ways in which those powers may be exercised. The scheme of the division of powers is that the Commonwealth may legislate only with respect to a defined list of topics, whereas the States retain a general legislative competence, unrestricted as to subject matter. This means that most of the Commonwealth's powers are concurrent with those of the States rather than exclusive to the Commonwealth, and in cases of inconsistency, such as might arise when

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the Commonwealth and a State both legislate on the same topic, the law of the Commonwealth prevails. One important power, the power to levy customs duties and excise duties and to grant bounties on the production or export of goods, is exclusive to the Commonwealth, but this is exceptional.

Apart from the division of powers and the consequent limits on Commonwealth legislative competence, there are prohibitions in the Constitution which place further limitations on what the Commonwealth and the States can do. The most notorious of these is section 92, which provides that trade, commerce and intercourse among the States shall be absolutely free. Under the present interpretation of section 92, this command applies both to the Commonwealth and the States, but it was not always so. The other main prohibitions relevant in the marketing context are the requirement that the Commonwealth may not use its taxation power so as to discriminate between States or parts of States, the related requirement that the Commonwealth may not by any law relating to revenue or trade and commerce give a preference to any State or part of a State, and the command already referred to that the States may impose neither customs duties nor excise duties nor grant bounties.

Before dealing in detail with each of these aspects of the constitutional framework, it is necessary to say something of the general background to the making of the Constitution and in particular the rationale behind the provisions relating to the economy. As in all federations, the people of the various colonies had enough in common to drive them to unite for certain purposes, yet were sufficiently diverse in their outlook and interests to resist total unification. Although the Constitution which resulted from the federal movement is contained in an Act of the British Parliament, so that legally it may have to be regarded as imposed rather than indigenous, the movement itself was emphatically Australian, and the Constitution represents the agreements and compromises hammered out by the delegates from the colonies in the late 19th century. Even if the State boundaries fall rather short of creating sensible regional groupings, the smaller colonies thumped the conference table very loudly and the smaller States today perhaps have a sense of identity out of proportion to their geographical inaptness, and one which has grown rather than diminished. Thus, in building on the existing colonial structure, we deliberately chose, three-quarters of a century ago, to live under a political system in which some of our demands would be pressed upon and met by the representatives of the nation as a whole and other demands would be made upon the representatives of the smaller community, the State.

Apart from a common concern about defence, the main uniting force was the desire to create a common market and to do away with the border tariffs which impeded the free flow of goods from one colony to another. Not all of these tariffs were intended to protect local industry from outside competition, as some were seen to be necessary simply as a source of revenue. In any event, their abolition was achieved by a number of overlapping provisions, primarily by sections 90 and 92; the former prohibited the States from levying customs duties (which included taxes on goods imported from other States as well as taxes on goods imported from overseas) and the latter required that interstate trade be absolutely free. One consequence of the abolition was, of course, that the States lost an important source of revenue, and much of the debate leading up to the enactment of the Constitution was concerned with the problem of how best to achieve a fair distribution amongst the States of the revenue to be derived from

the federal tariff. Various provisions of the Constitution, some now spent as they were merely transitional, are directed to this problem.

The provision in section 90 ensured that any question relating to an external tariff, such as whether Australia's policy as against the world should be free trade or protection, would be the responsibility of the federal Parliament. Hence, no doubt, the inclusion of excise duties in the prohibition, since otherwise a State inclined to free trade might set at nought any intended protective effect of a federal tariff by imposing a countervailing tax on local production. Bounties, also caught by section 90, could in opposite circumstances have a similarly disruptive effect on federal policy. However, the framers of the Constitution were also concerned to prevent the new *federal* body from reimposing the same barriers to free trade which were removed by the restrictions on State powers, as might occur if the federal body came to be dominated by any particular State or States determined to protect their own interests at the expense of the nation as a whole. This explains the presence in the Constitution of the provisions requiring uniformity of treatment by the Commonwealth and prohibiting preference or discrimination. In addition to the preference and discrimination provisions mentioned earlier, the Constitution repeatedly speaks of "uniform duties of customs" and specifically requires that bounties on the production or export of goods shall be uniform throughout the Commonwealth. However, it remains uncertain, as a matter of historical fact, whether section 92 was intended by the framers of the Constitution to apply to the Commonwealth.

Orderly marketing in Australia must therefore operate within the context of a Constitution drawn up to meet the perceived needs of the late 19th century. It is true that there is a mechanism for change built into the Constitution, but the extent of formal amendment has been small and in particular, *all* proposed changes in relation to organised marketing have failed to gain acceptance. The Constitution has changed in other ways, notably by judicial interpretation, and the course of this interpretation will now be examined in some detail. It is appropriate to begin with the area in which we perhaps suffer most from the legacy of the 19th century: the limited conception of the founding fathers of the powers required by the central government.

2 Limits on Commonwealth Legislative Power

One of the most serious gaps in the list of Commonwealth legislative powers is that there is no general power over the economy. If, for example, the Commonwealth government found it necessary as part of the fight against inflation to introduce an across-the-board wages and prices freeze, it would face the obstacle that such a move would almost certainly be beyond its power. The point here is that irrespective of whether a wages and prices freeze would be *effective,* the strategy is not even *available.* Moreover, unilateral State action is no solution to the problems of an Australia-wide economy, and experience suggests that uniform action by all the States acting in concert is highly unlikely. The national economy is today the Commonwealth's responsibility, yet the Commonwealth must make do, in managing the economy, with its list of specific powers.

The Trade and Commerce Power

So far as they relate to the economy, those specific powers include

power with respect to interstate and overseas trade and commerce, taxation, bounties, borrowing money, currency, banking, insurance, bills of exchange and promissory notes, bankruptcy and insolvency, corporations, and certain other topics which may occasionally have some economic relevance. The most important power for the purpose of supporting Commonwealth marketing legislation has been the trade and commerce power (section 51(i)) and it can be seen at once that the major limit of this power is that it does not extend, by its terms, to trade and commerce which is purely intra-State. Whatever the outer limits of the concept of "trade and commerce", the buying and selling of goods is at the very heart of the concept; it is rather to the limits suggested by the notion of "interstate" and "overseas" trade and commerce to which we must turn. Much of what is said here will be relevant to the task of defining interstate trade for the purpose of section 92, where, however, the main problem is to decide what it is from which interstate trade is required to be free.

The first point to notice is that to draw a distinction between inter- and intra-State trade is to engage in a rather subtle intellectual process. Just as the "Commonwealth" has no separate *geographical* existence from the States, but rather denotes the abstract grouping together for certain political purposes of the very same people who are divided into "States" for other political purposes, so too does the distinction between inter- and intra-State trade require more a metaphysical than a physical distinction. That is, unless one takes the impossibly narrow view that the only moment when an importer of goods from one State to another is engaged in interstate trade is the moment when the goods are physically crossing the border, it is apparent that every act of interstate trade must occur *within a State,* so that it might be seen to be at the same time both a part of inter- and a part of intra-State trade. In other words, the fact that a certain act of trade and commerce takes place wholly within a State is of no assistance in deciding whether or not that act is part of an interstate transaction.

The real question in relation to a transaction which has *some* interstate element is *how much* of the transaction is to be regarded as interstate. To continue the example of the importation of goods from one State to another, are the manufacture of the goods in the first State and their sale in the second State part of interstate trade? Could the Commonwealth regulate the ultimate *consumption* of the goods? The difficulty is to decide where the interstate transaction begins and where it ends. There are few general rules in this area, and the decided cases are descriptive rather than definitive. Here are some examples of matters held to be within the reach of the Commonwealth under s.51(i): the employment of transport workers in the loading and unloading of ships engaged in interstate trade;[1] conditions of hygiene in premises where meat is slaughtered for export;[2] the entering into contracts or agreements, in relation to interstate trade, in restraint of trade.[3]

Closely related to this question of what constitutes interstate trade, or perhaps just another way of looking at it, is the question of the extent to which the Commonwealth can regulate intra-State trade in the course

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1. *Huddart Parker Ltd.* v. *Commonwealth* (1931) 44 Commonwealth Law Reports 492. (This reference is to the case of *Huddart Parker* v. *Commonwealth, Commonwealth Law Reports* (hereinafter C.L.R.), Volume 44, 1931, beginning at page 492.)

2. *O'Sullivan* v. *Noarlunga Meat Ltd.* (1954) 92 C.L.R. 565.

3. *Redfern* v. *Dunlop Rubber Australia Ltd.* (1964) 110 C.L.R. 194.

of its regulation of interstate trade in order to make the regulation of the interstate trade effective. The traditional doctrine in the High Court has narrowed the ambit of s.51(i) here by insisting that intra-State trade may be regulated only when it is necessary for the effective regulation of interstate trade in a physical rather than an economic sense. Thus, the Court upheld Commonwealth control of air navigation throughout Australia so far as it related to safety considerations, since the safety of interstate flights could not be guaranteed unless *all* flights were subject to uniform control, but in the same case stopped short of permitting the Commonwealth to authorise, that is, to grant a commercial franchise for, purely intra-State flights, since in that instance the safety link was not relevant.[4] In a very recent case, a majority of the Court held that the Commonwealth could not validly authorise its own instrumentality TAA to fly purely intra-State routes, even as a segment of a larger interstate journey, if the only justification for such flights was that they would make TAA's interstate business more profitable.[5] Mr Justice Murphy dissented, finding the consideration of economic viability to be a sufficient link, but the traditional view, that because the Constitution distinguishes between inter- and intra-State trade the distinction must be maintained, however artificial it may be and however economically interdependent are the two branches of trade, prevailed.

The writer agrees[6] with the point made by Mr Justice Murphy in the course of his judgment that it is odd to exclude commercial considerations from the commerce power. The rationale of the traditional view is that once the economic interdependence of inter- and intra-State trade is recognised there would be nothing left of the distinction, and that this would derogate from our system of "dual federalism" by giving too much power to the Commonwealth, or at any rate, more than was intended by the Constitution. A corollary of this view would be that if it is desired to give the Commonwealth more power, then the Constitution should be amended. I shall comment more fully later on the proper role for the judges in this context and merely say here that section 51(i) does not by its terms explicitly *exclude* "intra-State trade", so that the constitutional text does not preclude the view that for economic reasons "trade among the States" may incorporate most of that trade which is carried on within the States. In similar circumstances, the United States Supreme Court has found no difficulty in taking such a view.

However, it is obviously the prevailing view which must be taken into account in assessing the constitutional obstacles to organised marketing. Clearly, on this view, the Commonwealth is unable to introduce marketing legislation, under section 51(i), which applies throughout Australia, but is restricted to regulating only those aspects of marketing which occur in the course of or are inseparably connected with interstate or overseas trade, with all the uncertainty attendant upon this unfortunate concept. Thus, while the Commonwealth might fix the price of a commodity sold in the

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4. *Airlines of New South Wales Pty. Ltd.* v. *New South Wales (No. 2)* (1965) 113 C.L.R. 54.

5. *Minister for Justice (W.A.) at the relation of Ansett Transport Industries (Operations) Pty. Ltd.* v. *Australian National Airlines Commission and the Commonwealth* (1976) 12 *Australian Law Reports* 17 (The *Australian Law Reports* are hereinafter cited as A.L.R.).

6. For a fuller critique of the decision, see Coper, "The Scope of the Commonwealth's Power to Establish Intra-State Airline Services" (1977) *Australian Current Law Digest* 37.

course of interstate trade, or compulsorily acquire the commodity, it could not do so throughout Australia unless total regulation was necessary to make the price-fixing or compulsory acquisition effective as to interstate or overseas trade. To the extent that the connection is merely economic, the validity of the total regulation would be doubtful. However, this precise question has not arisen for decision (no doubt because of the timidity of successive Commonwealth governments in the face of the prevailing High Court interpretation), and it is always rash to be dogmatic in predicting the course of judicial decision, not only because the outcome of each case depends to a certain extent on its own particular facts but also because doctrine which was once accepted may in the course of time be modified or even abandoned.

Nevertheless, it is the relatively strict prevailing doctrine which explains why so many existing marketing schemes were established by and operate under complementary Commonwealth and State legislation. The Commonwealth deals with the interstate and overseas aspects and the States attend to the intra-State aspects. These separate elements are often very interdependent, as in stabilisation schemes which depend on the relationship between export prices and home consumption prices, and the complexity of the schemes demands full cooperation between the Commonwealth and the States. Even then, the spectre of section 92 constantly lurks in the background, and cooperative schemes will be further examined in this context later.

Despite the High Court's strict insistence on the distinction between inter- and intra-State trade, there is one aspect of the interpretation of section 51(i) which has facilitated rather than hindered orderly marketing. In 1945, when the Chifley Labor government established the national airline TAA, the then major private domestic airline ANA challenged the legislation on the basis that under s.51(i) the Commonwealth could *regulate* interstate trade but was not permitted to *participate* in it. The argument was rejected,[7] as there was nothing in the wording of the grant of power to make laws "with respect to" interstate trade to suggest any such limitation, and although the High Court invalidated (on the basis of section 92) the attempt in the legislation to give TAA a *monopoly* by prohibiting private airlines from flying on interstate routes, the upholding of the mere setting up of the airline was highly significant. For although the decision restricted the Commonwealth to entry into the field on a competitive basis, the competitive advantages of government over private enterprise are such that a monopoly might easily be achieved in fact if not in law. This might have happened in the airline field had not the Liberal government of the 1950's been committed to the two-airline policy and the preservation of competition.[8]

In the marketing field, there are numerous examples of Commonwealth participation in marketing through its own trading boards: the Australian Dairy Corporation and the Australian Egg Board are both concerned with overseas marketing, and the Australian Wheat Board is the sole authority for the marketing of wheat in Australia and overseas, though this depends to a large extent on complementary State legislation. The Commonwealth

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7. *Australian National Airways Pty. Ltd.* v. *Commonwealth* (1945) 71 C.L.R. 29.

8. On the general question of Commonwealth participation in trade and commerce, see Sexton and Maher, "Competitive Public Enterprises with Federal Government Participation; Legal and Constitutional Aspects" (1976) 50 *Australian Law Journal* 209.

has also established regulatory boards which do not themselves trade in the product but make recommendations relating to such things as export quotas and promotional activities: for example, there are regulatory boards in relation to canned fruits, dried fruits, apples and pears, honey and wine. Many of the trading boards, of course, combine the marketing and promotional functions. A good example of this is the Australian Meat and Livestock Corporation, set up in 1977 for the purpose of both promoting Australian meat and controlling exports. The Corporation is empowered to purchase meat or livestock and to export or sell for export meat or livestock which it owns, and no other person is permitted to export meat or livestock without a licence granted by the Corporation.

The Taxation Power

Although the trade and commerce power is the most important one for Commonwealth participation in and regulation of marketing, the Commonwealth possesses other specific powers which have some potential to be used to achieve indirectly objects which cannot be achieved directly. Section 51(ii) confers power to make laws with respect to taxation, so that what cannot be *compelled* under section 51(i) by reason of its being an intra-State matter might be *induced* under section 51(ii) with tax incentives or disincentives. Thus, although the Commonwealth alone (that is, without complementary State legislation) could not *forbid* the sale of wheat, say, anywhere in Australia otherwise than through the Wheat Board (unless, of course, the wider view of the trade and commerce power found favour), it could impose a tax, even a prohibitive tax, on any person who did not sell his wheat through the Board. That person would be *legally* free to sell his wheat as he wished, but as a *practical* matter would have no option but to sell through the Board. Of course, this is subject to the prohibition in the taxation power on discrimination between the States, and also, in common with all Commonwealth powers, to the operation of section 92.

This kind of use of the taxation power has not always been accepted as valid by the High Court. In 1906, the Commonwealth imposed a tax on agricultural implements, but excepted goods manufactured under certain labour conditions. This was clearly an attempt to regulate, indirectly, conditions of labour, a matter otherwise outside Commonwealth power. The High Court held, by a majority, that the law was not a law with respect to taxation but was rather a law with respect to labour conditions and therefore invalid for lack of power.[9] However, this case was all but overruled in 1965 when the High Court unanimously upheld a Commonwealth law which exempted from income tax the investment income of superannuation funds if a certain proportion of the funds was invested in public securities.[10] The Court rejected the argument that the law was a law with respect to investment in public securities rather than with respect to taxation, on the ground that although the object of the law was plainly to encourage investment in government securities, and that this was its likely result, the only *legal liability* it imposed was to pay income tax under certain conditions. Some members of the Court commented that *in extreme circumstances* a really prohibitive tax might not be regarded as a law with respect to taxation but rather as a law with respect to the activity sought to be discouraged, but such a qualification is entirely inconsistent with the reasoning on which the decision was based.

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9. *R.* v. *Barger* (1908) 6 C.L.R. 41.
10. *Fairfax* v. *Commissioner of Taxation* (1966) 114 C.L.R. 1.

General Principles of Interpretation

The interpretation of the taxation power is a good example of the general principles of interpretation used by the High Court. The process here is often described as one of "characterisation". Is the impugned law to be "characterised" as a law "with respect to" taxation, that is, "on the topic of" taxation, or is it to be characterised as on some other topic? Generally speaking, the choices are not mutually exclusive, so that if the law can be seen to be on the topic of taxation it will not matter if it might also be regarded as relating to some other topic, such as investment in public securities, as well.

Nevertheless, the characterisation process involves rather arbitrary pigeon-holing, and most commentators find it hard to resist the conclusion that the judicial choice here is affected, even if it is not determined, by personal attitudes to centralism or States' rights as a political philosophy or even by a subjective assessment of the merits of particular legislation. The High Court strenuously denies the relevance of these policy questions, which ideally are no doubt best resolved in the political arena, but the very inconclusiveness of the notion of characterisation at least permits, and perhaps makes unavoidable, the intrusion of policy considerations into legal questions. On the other hand, the fact that the so-called purely legal approach does not compel a single right answer does not mean that the judge's discretion to implement his own policy preferences is unlimited. Once the criterion of "legal liability to pay tax" is accepted, for example, fidelity to that test should produce consistent and predictable results. Yet the hesitation about "extreme circumstances" demonstrates an unwillingness to accept all of the consequences that would flow from the test rigorously applied.

Another general principle illustrated by the taxation area is that the High Court no longer begins with an assumption that certain areas are by the Constitution "reserved" to the States, but rather interprets each head of Commonwealth power literally and independently of one another. Thus, the case of the tax on agricultural implements was wrongly coloured by the initial assumption that the regulation of labour conditions was a matter intended to be left to the States. Similarly, it is not to be implied from the omission of intra-State trade from section 51(i) that the Commonwealth cannot intrude into this area by use of its other powers.

It is worth noting that although today's orthodoxy is that this principle of interpretation is the very embodiment of a purely legal approach, its original adoption had the great political *consequence,* whether accidental or intended, of strengthening the power of the Commonwealth at the expense of that of the States. Acceptance of the legal liability test under the taxation power tends to the same result, and less than complete fidelity to the test would suggest a concern about that result. Questions of the extent to which such factors do or do not, should or should not, and should or should not be seen to influence judicial decisions on the interpretation of the Constitution, raise intractable jurisprudential issues which lawyers continue to debate. These issues cannot be pursued here, but it is important to keep in mind throughout this article that their brooding omnipresence tends to make the exposition of doctrine more descriptive than explanatory.

The Corporations Power

The taxation power has great potential for indirect regulation, and it is no doubt political constraints which explain why the power has not been

used in any large or dramatic way. Two other powers of enormous potential are the power to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth (section 51(xx)), and the power to make laws with respect to external affairs (section 51(xxix)). Both have limited but quite important application to marketing schemes.

As with the taxation power, the corporations power was early given a restricted interpretation, and again by reason of the "reserved" State powers approach. In 1908, the High Court invalidated trade practices legislation purporting to apply to corporations throughout Australia, because this entailed an intrusion into the state sphere of intra-State trade.[11] Although the reserved powers doctrine had been abandoned much earlier, the High Court did not directly overrule this case until 1971,[12] and the corporations power is now the source of such important legislation as the *Trade Practices Act* and the *Prices Justification Act,* the latter of which established the Prices Justification Tribunal. It is no objection to legislation passed under this head of power that it operates wholly intra-State. The only limitation is that it apply to the type of corporations specified in section 51(xx), and that it be a law "with respect to" those corporations.

The major problem in relation to the former limitation is the ambit of "trading" corporation. It has been suggested that this would not include a purely manufacturing corporation, but since manufacture is carried on only for the purpose of trade, the suggestion is unlikely to be accepted; on the other hand, the concept may exclude many municipal and governmental corporations.[13] The major problem in relation to the latter limitation is again the problem of characterisation: is a law which fixes the price at which all corporate milk producers may sell their products throughout Australia a law with respect to corporations (and therefore valid) or a law with respect to Australia-wide price-fixing of milk products (and therefore invalid)? As noted earlier, if it can be regarded as both then it should be upheld, but there are some who argue that the corporations power supports only laws which deal with matters relevant to corporations *as such,* that is, *in their capacity as* corporations. Thus, a law dealing with corporate structure or corporate identity would be valid, but a law dealing with the *external activities* of corporations would be invalid, because there is no necessary connection between the activities and the fact that they are being engaged in by corporations. However, by upholding in 1971 the validity of trade practices legislation under the corporations power, the High Court has set its face against this view, as restrictive practices are not unique to corporations but may be engaged in by individuals as well. The problem yet to be solved is what *range* of corporate activities will be held to be within power. There is very little case law in the area, and once again the inevitable arbitrariness of the pigeon-holing process makes it impossible to predict, at least on a purely legal basis, whether the hypothetical milk products price-fixing law would be held to be valid or invalid.

The relevance of the corporations power to orderly marketing is clearly limited by the fact that it can support only laws which are directed at producers, and other persons, who are corporations. In some industries

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11. *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1908) 8 C.L.R. 330.
12. *Strickland* v. *Rocla Concrete Pipes Ltd.* (1971) 124 C.L.R. 468.
13. See *R.* v. *Trade Practices Tribunal; ex parte St. George County Council* (1974) 130 C.L.R. 533.

this will allow more extensive regulation than in others, but despite the increasing trend of even small businesses to trade as a company, the corporations power will be of no assistance in areas where the effectiveness of orderly marketing demands the regulation of everyone in the industry.

The External Affairs Power

The external affairs power, on the other hand, is of less limited, though more remote, application, and is beset by similar uncertainties. Briefly, the external affairs power permits legislation within Australia to implement international obligations, so that if the Commonwealth government enters into a treaty with another country or countries, legislation may be passed to give effect to that treaty domestically.[14] There is a difference of opinion in the High Court as to whether the external affairs power will support legislation giving effect to any treaty whatsoever, regardless of its subject-matter, or whether the power is confined to implementing only those treaties whose subject matter is inherently "international" in character.[15] The difficulty with the former view is that in opening up the prospect of Commonwealth regulation of any field whatsoever, simply by entering into an agreement with another country in relation to that field, it makes nonsense of the deliberate specificity and limited nature of the list of powers assigned to the Commonwealth. The difficulty with the latter view is that it is impossible to devise satisfactory criteria for deciding which international agreements are truly international in character and which are not.

If the former view were to prevail, it is clear that a major unexplored source for Commonwealth marketing legislation would be available, although the proponents of that view have qualified it by excepting legislation which was not "bona fide", that is, legislation passed pursuant to a treaty entered into merely for the purpose of expanding the Commonwealth's domestic jurisdiction. The content of this exception is unclear, as is the nature of the materials upon which the Court could judge the elusive question of legislative intention. In the light of the lack of actual use of the external affairs power in the marketing context, there is no point in exploring it further, but it is worth mentioning that even if the latter (narrow) view were to prevail, there would be substantial arguments, given the interdependence of domestic economies and the world economy, in favour of the validity of domestic collective marketing arrangements, if that were necessary to give effect to marketing obligations undertaken internationally.

The Defence Power

Of the other Commonwealth powers, perhaps the most important for marketing, at least in actual use, has been the defence power (section 51(vi)). The defence power is unlike the other legislative powers, where the validity of legislation is tested by characterising its subject-matter, in that the relevant question is whether any given measure could be regarded as for the purpose of the defence of Australia. Although this is a purposive test, the Court asks not whether the measure is *necessary* or *appropriate,* for that is a legislative decision, but rather whether it is *relevant,* whether it has a "real connection" with defence. The scope of the power varies according to the

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14. Treaties entered into by the government do not automatically become part of the law of Australia; they merely give rise to international obligations.
15. See *R.* v. *Burgess; ex parte Henry* (1936) 55 C.L.R. 608.

degree of danger of external aggression at the particular time, so that it is at its most extensive in wartime. For example, during the first world war the High Court upheld a Commonwealth law which authorised the price of bread to be fixed in any prescribed area,[16] and thereby made it clear that the defence power was not restricted to the provision and maintenance of armed forces. Even in post-war periods, the Court has upheld such measures as controls on supply of cream as relevant to the winding-up of wartime arrangements.[17] In peacetime, the defence power has its least relevance for orderly marketing.

Other Legislative Powers

There are some further Commonwealth powers which deserve a mention. The power to make laws with respect to the acquisition of property on just terms for any purpose in respect of which the Parliament has power to make laws (section 51(xxxi)) has given rise to litigation mainly on the question of precisely what constitutes "just terms", particularly in relation to wartime marketing schemes involving the compulsory pooling of goods. The States are under no similar obligation to provide just terms, so that any question of compensation for compulsory acquisition in a State marketing scheme is entirely in the discretion of the State Parliament, or of any body to whom that responsibility might be delegated by the Parliament. The Commonwealth has plenary power in the territories (section 122), so that nothing that has been said in relation to the limits on other Commonwealth powers has any application to the laws which the Commonwealth can enact to apply within a territory, even the requirement that the acquisition of property be on just terms. The Commonwealth also has power to make laws with respect to fisheries in Australian waters beyond territorial limits (section 51(x)). The meaning of "territorial limits" is uncertain, but even if it be held to exclude the Commonwealth from waters within three miles of the coastline, there is little doubt that the Commonwealth could regulate fisheries in this area under the external affairs power.[18] In the absence of such regulation, State fisheries legislation will continue to apply.[19]

The Grants Power

In addition to its regulatory powers, the Commonwealth has various powers to spend money in a way that can be relevant to organised marketing. Apart from the specific power to make laws with respect to bounties on the production or export of goods (section 51(iii)), there are two ways in which the Commonwealth can carve out spheres of influence in areas which it cannot directly regulate for lack of legislative power. The first is that under section 96 of the Constitution, the Commonwealth Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit. Although apparently intended only as a transitional provision designed to alleviate the rigour of the non-discrimination provisions in their application to the natural inequality of the States, section 96 has been interpreted in a way that has given it great importance in Commonwealth-State relations. The High Court has held that there is virtually no limit to the kind of conditions which the Commonwealth may impose, even if acceptance of them is likely to weaken the independence of the

16. *Farey* v. *Burvett* (1916) 21 C.L.R. 433.
17. *Sloan* v. *Pollard* (1947) 75 C.L.R. 445.
18. See *New South Wales* v. *Commonwealth* (1975) 8 A.L.R. 1.
19. See *Pearce* v. *Florenca* (1976) 9 A.L.R. 289.

States, because there is no compulsion on the States to accept the grant.[20] Legally this is so, but as a practical matter, of course, the States have no choice. Since the Commonwealth introduced uniform income taxation during the second world war, by imposing its own tax and offering to reimburse the States on condition that the States refrain from imposing State income tax, the States cannot survive without handouts from the Commonwealth. Legally, the States remain free to reimpose their own income tax, but politically such a move has never been regarded as feasible. Moreover, it would require simultaneous action by all of the States, and this is unlikely because the smaller States, that is, those with the least capacity for independent revenue raising, have usually regarded themselves as better off under the grants system. Different Commonwealth governments make different uses of the grants power — the present Liberal government is purporting to hand back some responsibility to the States for revenue raising whereas increased use of tied grants was central to the philosophy of the previous Labor government — but the power enables the Commonwealth to coerce the States into doing anything the Commonwealth wishes. Again, the limits are political rather than legal. The relevance of section 96 to marketing, therefore, in addition to its uncontroversial role in enabling the Commonwealth to grant financial assistance to the States, is that in any scheme requiring joint action, the Commonwealth has available to it a weapon of coercion — the threat of withholding a grant — which can be used against any recalcitrant State.[21]

The Appropriation Power

The second avenue of indirect influence is that under section 81 of the Constitution the Commonwealth can appropriate money "for Commonwealth purposes". The High Court is divided on the question of whether Commonwealth purposes are restricted to the areas of Commonwealth legislative competence (including the rather vague idea that there are some additional purposes inherent in the mere existence of the Commonwealth as a nation), or whether they extend without limit to any purpose the Parliament chooses.[22] The former view would read "Commonwealth" in section 81 to mean the *polity* and the latter view would read it to mean the *people* of Australia. In any event, even if the latter view is correct the power is only one of appropriation, and if the object of expenditure is outside any head of legislative power, the appropriation cannot be accompanied by any regulatory measures. In 1975, the Australian Assistance Plan (a social welfare scheme in which Commonwealth money was spent and policy decisions made by local community groups) was upheld by a majority of the High Court under section 81,[23] but the chronic diversity of reasoning in the Court left the ambit of s.81 unsettled. However it does provide a way in which money can be given directly to people in industries in need of assistance, although the same result can be achieved by making a grant

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20. *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 373; *Victoria* v. *Commonwealth* (1957) 99 C.L.R. 575.

21. Section 96 is also important in the later discussion of discrimination, uniformity and preference.

22. *Attorney-General (Victoria) (at the relation of Dale)* v. *Commonwealth* (1945) 71 C.L.R. 237.

23. *Victoria* v. *Commonwealth* (1975) 7 A.L.R. 277.

to the States under section 96 on condition that it simply be handed over to the intended recipients.[24]

Discrimination, Uniformity and Preference

Having now traversed the limits on Commonwealth legislative power in the sense of areas outside the defined list of powers, it is appropriate to turn to the limits on Commonwealth power in the sense of express restrictions on the use of the powers within that defined list. Section 92 is one of these but requires separate treatment later. Section 51(ii) prohibits discrimination between States or parts of States in the use of the taxation power, section 51(iii) requires uniformity of bounties, and section 99 prohibits preference in any trade or revenue law to one State or part thereof over another State or part thereof.

These provisions have caused the High Court considerable difficulty and have again been the subject of differing opinions. The major unresolved issue is whether any discrimination or preference in relation to different localities automatically infringes the constitutional prohibition, or whether the prohibition applies only when the localities are selected *as* States or parts of States, that is, *because* they are States or parts of States. The latter view is not easy to grasp, but involves the idea of the selection of a locality *considered as* a State or part of a State, that is, discrimination or preference in relation to a State or part of a State *as such*. The difference of opinion is illustrated by a case in 1936 in which the High Court divided on the question of whether section 99 was infringed by a licensing system for seamen which operated in ports in some States but not in others.[25] Some of the judges held that this locality-based preference was unconstitutional, but others disagreed on the ground that the preference was based on locality alone and not on locality *as* part of a State. Of course, even on the view that mere locality-based discrimination or preference is prohibited, what is prohibited is discrimination or preference according to *geographical* criteria, so that sections 51(ii) and 99 will not apply if regions are selected according to non-geographical criteria such as, for example, the economic and developmental needs of the region. Whatever Parliament says in its legislation, it will still be up to the High Court to decide what is the *true* basis of the selection of different regions for special treatment, but there are limits to the ability and inclination of the Court to go behind what is stated in an Act, and it is not difficult to frame legislation in a way that avoids purely geographical discrimination or preference. Specific mention of even such factors as climate and isolation, although they *arise* from locality, could well assist in avoiding the constitutional prohibitions.

It should be remembered that the prohibition on discrimination applies only to tax laws, and that the prohibition on giving preference applies only to trade laws and revenue (that is, in effect, tax) laws. Nevertheless, these provisions are of considerable importance in the marketing context. While their rationale in preventing the Commonwealth from playing favourites amongst the States is readily understandable, they do cause problems for regional development, which is frequently necessary in order to remedy some natural or historical inequality. Any scheme for tax relief or other

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24. Of course, if the financial assistance amounts to a bounty on the production or export of goods, then it must be uniform throughout Australia. This is discussed below.

25. *Elliott* v. *Commonwealth* (1936) 54 C.L.R. 657. See also *Commissioner of Taxation* v. *Clyne* (1958) 100 C.L.R. 246.

assistance to particular rural industries confronts these constitutional obstacles, though as noted above the obstacles can be overcome if a scheme can be devised to operate satisfactorily without reference to purely geographical criteria in the provision of assistance.

A tax law which struck a different rate for residents of different States would clearly offend section 51(ii).[26] On the other hand, a tax law which on its face applied uniformly throughout Australia would not offend the section, even if, by reason of different circumstances existing in different States, its actual operation was not uniform.[27] For example, a Commonwealth tax on any particular product wherever produced in Australia would not be discriminatory merely by reason of the fact that the product was produced in some States and not others. A more difficult example is a Commonwealth tax which provided for an exemption in any State in which certain specified conditions were fulfilled; this would probably not offend section 51(ii), at least so long as all of the States were capable of fulfilling the conditions, because any discriminatory effect would depend on State action.

On this last point, differing views were expressed in a case in 1968 in relation to the validity of a section of the Commonwealth *Poultry Industry Levy Collection Act*.[28] The Act authorised any State Egg Board in a State which had entered into an agreement with the Commonwealth under which the State Egg Board would collect the Commonwealth levy, to retain the levy out of money owed by the Board to the taxpayer. The answer differs here according to whether the situation is characterised as discrimination in the *law* (which would infringe section 51(ii)) or as discrimination on the *facts* (which would not). The argument for the former characterisation is that it was the Commonwealth *law itself* which invited State cooperation and which contemplated different responses, whereas the argument for the latter characterisation is that any discrimination depended on the *factual circumstance* of which States entered into an agreement with the Commonwealth.[29] The Court was unanimous that the provision for the payment of the levy to be made to the State Egg Board was valid, even though this arrangement might be made in some States and not others, since this merely went to the method of collection of the tax; the provision for *retention* of the levy out of money owed, on the other hand, was seen by a majority of the judges as putting taxpayers in some States under a disadvantage not shared by taxpayers in other States and was held to be invalid.

Apart from the problem of distinguishing legal from factual discrimination, there is rarely any difficulty in deciding what discrimination is, since it simply means unequal or different treatment. Deciding what a *preference* is, on the other hand, is more difficult. The High Court has defined a

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26 In *Cameron* v. *Deputy Federal Commissioner of Taxation* (1923) 32 C.L.R. 68, this principle was applied to invalidate a law which prescribed a different method of valuing livestock for income tax purposes in different States.

27. *Colonial Sugar Refining Co. Ltd.* v. *Irving* (1906) Appeal Cases 360 (Privy Council).

28. *Conroy* v. *Carter* (1968) 118 C.L.R. 90.

29. As the Commonwealth itself appeared to have the power to refrain from entering into an agreement, the former characterisation is probably the better one. See Rose, "Discrimination, Uniformity and Preference — Some Aspects of the Express Constitutional Provisions" in Zines (ed.) *Commentaries on the Australian Constitution* (Butterworths 1977) 191 at 208.

preference as a "tangible commercial advantage", but was unable to agree in the seamen's licensing case mentioned earlier whether the licensing system amounted to a preference or not. Every preference entails discrimination, but mere discrimination does not necessarily give a preference in the above sense. It has been held that no tangible advantage was given by a law which provided for unequal numbers of growers' representatives from different States on a Commonwealth Dried Fruits Control Board,[30] but that a preference was given where licences to carry dried fruits interstate had to be obtained from prescribed State authorities and no authority was prescribed for two States.[31]

A further question in relation to preference and discrimination is whether the prohibitions have any effect in relation to section 96 grants. The role of section 96 in redressing the balance between the States by offsetting the natural or historical inequality perpetuated by the preference and discrimination provisions has already been mentioned, but it was once argued that a legislative scheme in which uniform taxation was imposed in all States, but in which the proceeds from one State were returned via a section 96 grant to the taxpayers in that State, in effect created an exemption from taxation in one State and therefore *amounted to* discrimination in taxation as between the States.[32] The High Court rejected the argument, on the basis that the discrimination prohibition applies only to *tax* laws and that a section 96 grant is not a tax law. On appeal, the Privy Council expressed the qualification that in *some* circumstances a scheme taken as a whole *might* be regarded as effecting discrimination in taxation, but it is impossible to give any content to this qualification without altogether denying the principle on which the scheme in question was upheld. The purported qualification is yet another example of the tension in the judicial process between the pursuit of doctrinal consistency and the result-oriented desire to preserve an escape hatch. In any event, the upshot of the law on this point is that the Commonwealth can get around the discrimination prohibition by taxing the States equally in one Act (a tax Act) but returning the proceeds unequally in another Act (a grants Act). If this mocks the real intention of the discrimination and preference provisions, it at least has the effect of facilitating regional assistance. Moreover, since the Commonwealth was created for the very purpose of attending to the national interest, and was created with internal mechanisms to safeguard the States such as equal State representation in the Senate, it would hardly be remarkable if in the last resort the specific provisions in the Constitution designed to protect the States left a substantial amount of discretion in the Commonwealth to decide what is in the national interest.

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30. *Crowe* v. *Commonwealth* (1935) 54 C.L.R. 69.

31. *James* v. *Commonwealth* (1928) 41 C.L.R. 442. Note that this was so even though it appeared that there was no preference in *fact* since no dried fruits were processed in those two States.

32. *W. R. Moran Pty. Ltd.* v. *Deputy Federal Commissioner of Taxation (N.S.W.)* (1940) 63 C.L.R. 338. The case involved a scheme to subsidise wheat production by a tax on flour. The proceeds of the tax on the *millers* (which was expected to be passed on to consumers in the form of higher bread prices), were returned, via section 96 grants, to the *wheatgrowers* in all States except Tasmania, where hardly any wheat was produced. In order that Tasmanians were not put in the position of paying tax and getting no benefit from it, the amount collected from Tasmania was returned to Tasmania on the understanding that it would be used to reimburse the millers. Section 51(ii) would clearly not have permitted the Commonwealth to tax only the millers in the mainland States.

As the foregoing exposition suggests, most of the disputed questions in this area have concerned preference and discrimination. There is little law on the precise meaning of uniformity in relation to bounties on the production or export of goods, but it would be surprising if it meant anything other than non-discrimination, despite the different choice of words in sections 51(ii) and 51(iii). Thus, section 51(iii) would not require that the same article attract the same bounty throughout Australia and therefore preclude, say, a graduated scale according to quantity, but would rather require that the bounty operate with the same effect wherever the article were found. As with preference and discrimination, it would also appear that the uniformity requirement in section 51(iii) can be circumvented by channelling the money through the States under section 96, that is, by granting financial assistance to a State on the condition that the State simply hand the money over to the producers or exporters.

The Interstate Commission

While on the topic of preference and discrimination, the provision in section 101 of the Constitution for an Interstate Commission should be mentioned. It is contemplated by this section that the Commission shall have such powers of adjudication and administration as the Commonwealth Parliament deems necessary for the execution and maintenance of the provisions of the Constitution, and the laws passed thereunder, relating to trade and commerce. Section 102 provides that the Commonwealth Parliament may forbid any preference or discrimination by a State or State authority in relation to railways, if such preference or discrimination is undue and unreasonable, or unjust to any State, but that it is up to the Interstate Commission to decide whether the preference or discrimination is unreasonable or unjust.

The Commission was duly set up by Act of Parliament in 1912, but in 1915 the High Court held that because of the strict separation in sections 71-80 of the Constitution of "judicial" power from "non-judicial" power, the combination of adjudicative and administrative powers conferred on the Commission by the Act rendered the Act invalid.[33] In 1975 the Whitlam Labor government revived the Commission in a modified form, but the present government, while it has not repealed the 1975 Act, has not yet taken steps to bring it into operation. The Commission could play a valuable role in a wide range of activities, including not only investigation and fact-finding but also the fixing of rates and charges, including determinations as to the reasonableness of interstate transport charges.[34]

Implied limits on Commonwealth power

In the opinion of some judges, the express provisions in the Constitution do not exhaust the possible limits on the legislative power of the Commonwealth. Those judges would say that there is a further limitation, not *expressly* stated in the Constitution but *implied* from its overall scheme and inherent in the nature of federalism, that the Commonwealth cannot use its powers so as to weaken the independence of the States or to interfere with them in the exercise of their constitutional functions. The Commonwealth could not, it is asserted, address a law to the States and command

33. *New South Wales* v. *Commonwealth* (1915) 20 C.L.R. 54.
34. On the 1975 Act, see Coughlin, "Court or Commission? — A Detailed Examination of the Interstate Commission Bill 1975" (1975) 49 *Australian Law Journal* 614.

the States to do or refrain from doing anything; federalism demands that the parties to the federation be independent of each other and unable to tell each other what to do.

In its most extreme form, this theory was knocked on the head as early as 1920, when in the famous *Engineers* case the High Court held that Commonwealth industrial law applied to State employees.[35] The theory of full immunity had proven unworkable, and the *Engineers* case was the culmination of the erosion of the theory over a series of cases which had purported to find exceptions to it. The case was also important in a wider sense because it laid down a general principle of constitutional interpretation which precluded vague implications from the Constitution and which emphasised strict reliance on its express terms; just as the extent of Commonwealth power was expressly defined, so too were the restrictions on the exercise of that power.

However, the *Engineers* doctrine was in turn eroded by later decisions, and a new, revised version of the old immunities doctrine was gradually smuggled back in. In 1947, the High Court struck down a Commonwealth law which required the States to bank with the Commonwealth Bank,[36] but the diversity of reasoning in the case left the state of the law completely unsettled. Some judges said that although the law was within the Commonwealth's banking power (section 51(xiii)), the Commonwealth could not *discriminate* against the States by putting a burden upon them that was not shared by other people, so that the law would have been valid (subject to section 92) if *everyone* had been compelled to bank with the Commonwealth; the States must take the legal system as they find it.[37] Others said that even a law of general application would be invalid if it had the *effect* of burdening the States, that is, even if the burden was shared with others; this view did not entail blanket immunity but went very close to the pre-*Engineers* doctrine. Two judges denied that there were any implied limits on Commonwealth power; one of them therefore dissented and upheld the law, but the other agreed with the majority that the law was invalid, for the different reason that it was not really a law with respect to banking at all — it was rather a law with respect to the States and therefore not within any express head of Commonwealth power.[38] In 1971, the question arose as to whether Commonwealth payroll tax applied to the States in their capacity as employers, and although the Court agreed in the result that the tax did apply, the law remains unsettled because each of the earlier views received some support.[39]

The relevance of all of this to organised marketing is that many Commonwealth marketing schemes purport to apply not only to private producers

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35. *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129.

36. *Melbourne Corporation* v. *Commonwealth* (1947) 74 C.L.R. 31.

37. Note that the discrimination asserted here is *against* the States, not, as in the prohibition in s.51(ii), *between* the States. When, two years later in 1949, the Commonwealth avoided any discrimination against the States by nationalising the banks so that both States and ordinary citizens were equally affected by the denial of private banking facilities, the High Court still found this to be invalid, but on a different ground altogether, namely, section 92.

38. This approach to characterisation was contrary to the typical approach explained earlier in this article whereby the alternative pigeon-holes are not regarded as mutually exclusive.

39. *Victoria* v. *Commonwealth* (1971) 122 C.L.R. 353.

but also to the States or to State authorities and instrumentalities, and, moreover, depend for their efficacy on such extended application. For example, section 10 of the *Australian Meat and Livestock Corporation* Act 1977 prohibits (unless a licence is granted) the export of meat and livestock from Australia by any person, *including a State and an authority of a State,* other than the Corporation. If the view that a law of general application which burdens a State is invalid is accepted, then there may be some doubt about the validity of the above provision, although even on that view the obligation on the States to pay payroll tax was held not to constitute a burden. However, in the writer's opinion the better view is the one which denies that there are implied limits on Commonwealth powers, so that the meat and livestock law, clearly being a law with respect to overseas trade and commerce under section 51(i), would be valid. It is offered as the better view for the two reasons which underpinned the decision in the *Engineers* case: the idea of implications from the nature of federalism is extremely vague, and if the Commonwealth and the States attempt to detrimentally interfere with each other, the remedy should be political rather than judicial. Of course, the interpretation of express words also involves vagueness and uncertainty, but to extend this even further by *implying* grounds for invalidating Commonwealth laws is unnecessary and undesirable. When in doubt, judges should give the benefit of it to the legislature and defer to the decision of the elected representatives of the people. Furthermore, the idea of the "rule of law" supports the contention that neither the Commonwealth nor the States should be exempt from the general operation of the legal system, even in relation to each other's laws.[40]

3 Section 92: Freedom of Interstate Trade

Section 92 has been the most often litigated section of the Constitution. Even at the time of writing this article an important case concerning the wheat equalisation and stabilisation scheme is awaiting decision. Rules for the interpretation of section 92 have come and gone, earlier decisions have frequently been overruled (some only to be revived by a later Court), all attempts to modify section 92 by constitutional amendment have failed, and after seventy-five years and over one hundred cases the interpretation of the section is as unsettled as it ever was.

The reasons for this uncertainty are of general application to nearly all questions of constitutional interpretation: the text is inconclusive, a choice must therefore be made between competing interpretations and competing political philosophies, and social and economic changes and changes in the composition of the High Court cause the support for the

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40. The question of whether and to what extent State laws bind the Commonwealth is as uncertain as the converse question discussed in the article. The prevailing view is that the Commonwealth is immune from State laws (see *Commonwealth* v. *Cigamatic Pty. Ltd.* (1962) 108 C.L.R. 372), not because of the pre-*Engineers* doctrine of reciprocal immunity, but for reasons of historical impossibility; the Constitution provides that the States shall continue to have the powers they had as colonies, and this did not include any power in relation to the Commonwealth because the Commonwealth did not then exist. However, this view is under attack; not only are categories of exceptions recognised, but also the Commonwealth can readily protect itself from the States by passing legislation which will prevail over inconsistent State law.

different interpretations to fluctuate. These problems are compounded rather than resolved by the system of precedent because although earlier cases are given due respect, the judges differ greatly in their attitudes to whether an earlier case can be "distinguished" and also, if it cannot, to whether it ought in any event to be followed or overruled. However, these general problems are all the more acute in relation to section 92 because the "little bit of layman's language",[41] which was so attractive to the framers of the Constitution as a rhetorical slogan that captured the common political sentiment of the time, fails absolutely to disclose what it is from which interstate trade is to be free. Mr Justice Rich once remarked with eloquent despair that "some hint at least might have been dropped, some distant allusion made, from which the nature of the immunity intended could afterwards have been deduced by those whose lot it is to explain the elliptical and expound the unexpressed."[42]

It is clear enough that the framers of the Constitution were concerned *primarily* to abolish the tariff barriers between the colonies; whether they were concerned *only* to do this is not so clear. But regardless of what the framers' intentions really were, the view that section 92 is directed only to *fiscal* impositions on interstate trade receives some textual support from the surrounding sections in the Constitution, even though such an interpretation would, in the light of the prohibition of State taxes on the importation of goods in section 90, give section 92 a very limited operation. Moreover, the objection that interstate trade may be burdened not only by fiscal charges but also by a State imposing some non-fiscal restriction such as the complete prohibition of the entry of certain goods from another State, is met by the answer that in such a case the Commonwealth could legislate under section 51(i) to protect interstate trade and thereby oust inconsistent State legislation. However, the view which confines section 92 to the abolition of monetary burdens has been adopted only by Mr Justice Murphy[43] and has not found favour with the rest of the present Court or with any previous one.

The early rejection of the fiscal burdens theory, coupled with the commonsense conclusion that section 92 could not require the chaos entailed by freedom from *all* laws, left the Court with the difficulty of deciding which laws were proscribed and which were not. Various approaches emerged. One view was that only laws "directed against" interstate trade infringed section 92, but this was sometimes taken to require *discrimination* against interstate trade while at other times the emphasis was on the *purpose* or *object* of the impugned law. These emphases overlapped, since the absence of discrimination tended to demonstrate a purpose other than interference with interstate trade. The acquisition by a State of all wheat in the State for wartime purposes, for example, might be valid, even if it included wheat the subject of interstate contracts,[44] whereas the acquisition of dried fruits, as part of an equalisation scheme designed to keep the domestic price up by restricting the amount marketed in Australia and forcing the surplus onto the overseas market, would be invalid.[45]

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41. The famous words of Sir George Reid during the debates on the drafting of the Constitution.
42. *James* v. *Cowan* (1930) 43 C.L.R. 386 at 422.
43. See *Buck* v. *Bavone* (1976) 9 A.L.R. 481 at 498.
44. *New South Wales* v. *Commonwealth* (1915) 20 C.L.R. 54.
45. *James* v. *Cowan* (1932) 47 C.L.R. 386.

However, the purpose test involved the Court in investigations which were incomplete if they were confined to the terms of the legislation and invidious if they were not. So another view developed which emphasised the *effect* of the impugned law; this view, of course, only highlighted the difficulty of deciding which effects were *detrimental* to the freedom of interstate trade and which were *beneficial* to it. Indeed, it was the desire to avoid this difficulty which led the High Court in 1920 to adopt the apparently simple solution of holding that the Commonwealth was not bound by section 92 but that interstate trade was immune from virtually any State law which affected it.[46] Unfortunately, when in 1936 the Privy Council overruled the High Court's view that section 92 did not apply to the Commonwealth,[47] the wide effect given to the section on the basis that only State laws were caught lingered on well after this original rationale disappeared.

By the early 1950's, and because of the emphasis on effect rather than purpose, the view prevailed that section 92 protected *individuals* rather than interstate trade as a whole.[48] Thus, even if the overall volume of interstate trade was unaffected, or even increased, by State coordination of road and rail transport and the consequent denial of licences to some interstate road hauliers, section 92 was still infringed because it protected the right of each and every carrier to carry goods interstate if he so wished.[49] And in the *Bank Nationalisation* case,[50] the Privy Council invalidated a law which prohibited private banking, even though banking business would continue, albeit with different owners, because the individual rights of the former owners were infringed. To the Privy Council, and to a majority of the High Court, this individual rights theory followed inexorably and self-evidently from the words of section 92. Yet it is interesting to note that while the framers of the Constitution were concerned to promote free trade as against protectionism, this is an entirely different question from the promotion of private enterprise as against socialism.

The Privy Council laid down two propositions in the *Bank* case which remain the starting point for the modern law on section 92. Firstly, the section invalidates only those laws which impose a "direct" restriction on interstate trade, as distinct from an indirect or consequential impediment which might fairly be regarded as remote, and secondly, the section is not infringed by laws which are merely "regulatory". Thus, section 92 is infringed only by laws which *both* have a direct effect on interstate trade *and* are not regulatory. To put it another way, section 92 is not infringed if the impugned law has only an indirect effect on interstate trade *or* if it is regulatory.

These general propositions give little guidance for decisions on particular facts, and the task of the High Court in subsequent cases has been to give the propositions some concrete content. This has occurred at two levels, namely, by the elaboration of doctrine and by the accumulation of examples of its application from case to case. At the former level, Sir Owen Dixon, a former and very influential Chief Justice of the High Court,

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46. *W.A. McArthur Ltd.* v. *Queensland* (1920) 28 C.L.R. 530.
47. *James* v. *Commonwealth* (1936) 55 C.L.R. 1.
48. Even so, section 92 protects individuals not in the sense of conferring a right to sue for damages, but rather in the sense of enabling an individual to safely ignore any law which infringes the section.
49. *Hughes and Vale Pty. Ltd.* v. *New South Wales (No. 1)* (1954) 93 C.L.R. 1.
50. *Commonwealth* v. *Bank of New South Wales* (1949) 79 C.L.R. 497.

developed the idea that to have a direct effect on interstate trade a law must operate by its terms on something which is itself an essential part of interstate trade and not merely incidental to it; that is, the "criterion of operation" of the law must be some aspect of interstate trade itself. This would not invalidate a law which prohibited, say, the manufacture of a product, so long as the manufacture was not regarded as a part of interstate trade even if the *practical* or *economic* consequence of the law was to stop the importation of the product from one State to another, importation being unquestionably a part of interstate trade; the law would not infringe section 92 because it did not operate by its terms upon importation but rather upon manufacture.[51] This was held to be so even where the manufacture was for the sole purpose of interstate sale.[52] The "Dixonian" doctrine is clearly artificial and legalistic, but from a *policy* point of view it should be noted that the *effect* of the doctrine is to narrow the scope of section 92 and therefore, correspondingly, to assist in the furtherance of organised marketing.

However, the Dixonian doctrine had a sting in the tail; it purported to allow an exception if the impugned law impaired the freedom of interstate trade "by circuitous means or concealed design". This qualification, coupled with the inevitable differences of opinion on what constituted interstate trade, made the certainty claimed for the Dixonian doctrine more illusory than real. This is well illustrated by the contrast between two important decisions in the 1950's: a New South Wales law which fixed the price of potatoes in New South Wales was held to validly apply to the sale of potatoes imported from Tasmania,[53] yet a Queensland law which required fish to be sold through a Board was held to infringe section 92 in its application to fish imported from New South Wales.[54]

From the time of his appointment in 1964, the present Chief Justice, Sir Garfield Barwick, has refused to accept the Dixonian gloss on the propositions in the *Bank* case and has taken practical and economic considerations into account in determining whether the effect of a law on interstate trade is direct or indirect. Since a majority of the present Court now agree with Sir Garfield, the Dixonian doctrine may be regarded as having been superseded, even though it was widely thought to have settled what was the correct approach to section 92, despite its uncertainty in application. However, those judges who agree with Sir Garfield are clearly concerned that this view opens up an enormous area of immunity from government regulation. Their escape will undoubtedly lie in taking a broad view of the notion of laws which are merely "regulatory", the second prong of the test in the *Bank* case.

The idea that regulatory laws are compatible with the freedom guaranteed by section 92 stems from the unimpeachable starting point that section 92 could not possibly have been intended to prevent laws on topics such as public health. A State law which prohibited the importation of diseased milk from another State, a law which on either the Dixon or the Barwick view would be held to have a direct effect on interstate trade, would certainly

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51. *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 55.
52. *Beal* v. *Marrickville Margarine Pty. Ltd.* (1966) 114 C.L.R. 283.
53. *Wragg* v. *New South Wales* (1953) 88 C.L.R. 353.
54. *Fish Board* v. *Paradiso* (1956) 95 C.L.R. 443.

be valid as mere regulation.[55] But a satisfactory *general* definition of what is regulatory is elusive. One has been attempted in these terms, that laws permissible as regulatory are those which are necessary to create a framework, an orderly society, in which the members of the society are free to trade. These laws are not *exceptions* to the freedom guaranteed by section 92 but rather are necessary to *ensure* it. Thus, free in section 92 means free within a framework which accommodates the mutual rights and duties of those who must operate within it and therefore leaves them free to trade in a way which anarchy and chaos would not. Legislation prohibiting restrictive trade practices has been held not to infringe section 92 on this basis.[56] In the area of interstate transportation, to take another example, the idea of reasonable regulation would clearly permit laws imposing speed limits and limits on the dimensions and weight of loads.

The problem with the concept of regulatory laws is that it forces the High Court, whatever the Court itself says, into assessing the validity of a law by reference to its *desirability*. It might be thought that this is a legislative rather than a judicial task, and to give the High Court due credit, it takes into account any history or pattern of legislative judgment that certain business practices, say, are undesirable.[57] But this deference to legislative judgment cannot be absolute, for that would deny any role to section 92 at all. Clearly, the *Constitution* has made a judgment that certain things shall be beyond even legislative control, and at the very least this means that any legislative judgment by a State that one of its industries needs protection against competition from other States must give way to the judgment in the Constitution in favour of the common market. The real difficulties arise, of course, in cases which go beyond simple protection; resort to commonsense, which perhaps provides the answer in areas such as health and road safety, is of little assistance where the absence of consensus necessitates a choice between conflicting interests. As was the case with the view which exempted the Commonwealth from the operation of section 92, one of the attractions of the view which confines the application of section 92 to fiscal burdens is that it avoids this kind of legislative choice, although problems remain in defining precisely what a fiscal burden is and when it falls on interstate trade.

The foregoing exposition of the principles relating to the interpretation of section 92 will have made it clear that a factual summary of all of the actual decisions on section 92 would convey little insight into the law in this area, even if such a summary were possible in this short space.[58] However, examples drawn from two recent important cases will be useful in illustrating the operation of the general principles currently in vogue.

In 1972, the High Court considered whether a Tasmanian law which prohibited the sale in Tasmania of coloured and flavoured margarine could validly apply to the sale of such margarine imported from New South Wales.[59]

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55. However, this might not have been so clear during the period when section 92 was held not to apply to the Commonwealth.
56. *Mikasa (New South Wales) Pty. Ltd.* v. *Festival Stores* (1972) 127 C.L.R. 617.
57. See *Samuels* v. *Readers Digest Association Pty. Ltd.* (1969) 120 C.L.R. 1.
58. Of the many texts and reference works available in this area, readers are especially referred to Professor Geoffrey Sawer's masterly summary of the law and policy relating to section 92 in his *Australian Federalism in the Courts* (Melbourne University Press 1967) at pp. 174-195.
59. *S.O.S. (Mowbray) Pty. Ltd.* v. *Mead* (1972) 124 C.L.R. 529.

Of the seven judges, two applied the Dixonian test and held that despite the practical or economic consequence that trade in coloured and flavoured margarine between New South Wales and Tasmania would cease, the law did not have a direct effect on interstate trade because its criterion of operation (sale) was not a part of that trade; one judge rejected that test and found the effect to be direct precisely because of the practical consequences; two judges also rejected the Dixonian test but found in any event (on the basis of practical considerations) that the sale *was* a part of interstate trade, thereby satisfying the test; and two judges did not decide the question of directness since they found the law to be merely regulatory. The three judges who found the effect of the law on interstate trade to be direct held that the law was not regulatory, and the difference of opinion on this last point illustrates a frequent difficulty in this area. Was the law a prohibition of trade in *coloured and flavoured margarine,* or was it merely regulation of trade in *margarine* by prohibiting trade in a particular subtype? In other words, was the relevant commercial product margarine or coloured and flavoured margarine? Those who opted for the latter may have perceived the purpose of the law to be the protection of the local dairy industry, but since the legislative purpose test is out of favour, such factors are rarely made explicit. In any event, the Tasmanian law applied equally to the sale of local and imported coloured and flavoured margarine, so that any attempted protection was against a competing product rather than the same product from a competing State. The result of the case was a 4 to 3 majority in favour of non-infringement of section 92, but the diversity of reasoning made the decision inconclusive in point of principle.

In 1975, the Court considered a challenge to the New South Wales Dairy Industry Authority Act, which regulated the supply of milk in New South Wales.[60] The Act included an array of provisions found in many modern marketing schemes: provision for compulsory acquisition and vesting of the milk in the Authority, prohibition of the sale of milk without a licence (to which conditions could be attached), and provision for price-fixing. The Act also prohibited the sale of unpasteurised milk in New South Wales, but the effect of a regulation made under the *Pure Food Act* was that no milk could be sold in New South Wales unless it was pasteurised by the holder of a licence under the Act, that is, unless it was pasteurised *in New South Wales.* The plaintiff was a Victorian milk producer who sold milk in New South Wales without a licence under the Act.

The High Court held that the plaintiff was protected by section 92 and therefore immune from the operation of the Act. There was little doubt that the plaintiff was engaged in interstate trade — if a person who brings his goods from one State to another in order to sell them in the second State is not engaged in interstate trade, then who is? This was found to be so, even by one of the judges who had held the sale in the 1972 case to be intra-State; he distinguished the earlier case on the somewhat artificial basis that the plaintiff there, a Tasmanian retailer, had not brought his goods across the border to sell them but had simply obtained them from New South Wales for the purpose of resale in Tasmania. But as in the 1972 case, for those judges who rejected the Dixonian doctrine it did not matter whether the sale of the milk in New South Wales was a part of interstate trade or not, since the provisions of the Act relating to

60. *North Eastern Dairy Co. Ltd.* v. *Dairy Industry Authority of New South Wales* (1975) 7 A.L.R. 433.

the sale of the milk, including the compulsory acquisition provisions, had a direct effect on its importation.

On the question of regulation, the fact that the Act purported to "regulate and control the quality, supply and distribution of milk for the purpose of ensuring the wholesomeness and purity of milk in the interests of public health"[61] was not conclusive. The Court held that the operation of the Act went beyond what was reasonably necessary for this purpose, as the licensing and vesting provisions, for example, could not be regarded as the only practicable way of securing the wholesomeness and purity of milk. The Court will generally allow the legislature some discretion in deciding the best means of achieving a public health objective, but here, of course, the Act was clearly concerned not only with public health but also with commercial matters such as the stability of the industry and a reasonable return for producers. Even the requirement that the milk be pasteurised in New South Wales was held to infringe section 92 because it went beyond what was reasonably necessary. There was no suggestion that milk pasteurised in Victoria was unhealthy or of inferior quality to that pasteurised in New South Wales, and the effect of the requirement that it be pasteurised in New South Wales (perhaps the intended effect) was to exclude Victorian pasteurised milk from New South Wales altogether. When seen in this light, the legislation was a very clear case of the kind of State protectionism which, whatever the doubts surrounding the full extent of the constitutional guarantee, section 92 was intended to prevent.

One can feel considerable sympathy for the plight of New South Wales dairy farmers, yet one must also acknowledge that section 92 was designed to foster a common market for the greater economic good of the nation as a whole. The Constitution requires that any assistance to needy producers must be given in a way that does not compromise the constitutionally preferred interests. On the other hand, the wider the effect of section 92, the greater the gap in total legislative power in Australia, which many would see, despite the mechanism for amending the Constitution, as undemocratic. In determining the outer limits of section 92, at least on the current set of principles, the High Court has to balance the community interest in free trade against the community interest in government regulation of commerce. According to their social philosophy, some judges will lean towards free trade and others towards government regulation; Chief Justice Barwick is an example of the former and Mr Justice Murphy of the latter. The other judges on the present Court lean towards neither extreme, and to the extent that this is due to an absence of any particular social philosophy, there is a corresponding search for legal principles which will resolve section 92 cases without the need to resort to social or political or economic factors. Yet strict reliance on such principles has in the past often been abandoned when it has appeared to endanger the accomplishment of even the minimum objectives of section 92, as is evidenced, for example, by the circuitous means qualification to the Dixonian doctrine.

What are the implications of all of this for organised marketing? Firstly, it means that unless an organised marketing scheme is regarded as merely "regulatory", it cannot extend, compulsorily, to anyone engaged in interstate trade. As the 1975 dairy industry case indicates, the ordinary commercial considerations argued to justify organised marketing are not at present regarded as sufficient to uphold such schemes as regulatory. However, it is

61. Section 17 of the Act.

not inconceivable that if the High Court is able to perceive an overwhelming consensus in the community in favour of the advantages of organised marketing — stability in the industry concerned, an assured market and a reasonable return for producers, a regular supply and a reasonable price for consumers — then it may eventually defer to that consensus and permit organised marketing schemes to apply to interstate traders. This is much more likely, of course, in relation to Commonwealth marketing schemes or cooperative Commonwealth-State schemes, since State schemes are much more likely to be seen as motivated by parochial protectionism. The currently pending case concerning the Commonwealth-State wheat stabilisation and equalisation scheme, which was argued in the High Court in October-November 1977 but at the time of writing has not been decided, directly raises this issue, and it will be interesting to see how the court deals with a scheme that is not affected by the protectionism which tainted the New South Wales milk scheme. That the law is in a state of flux is underlined by the remarkable fact that during the argument in the case counsel for the Commonwealth appeared to be on the verge of suggesting to the Court that it return to the blanket rule that the Commonwealth is not bound by section 92. At present, nothing in the interpretation of section 92 can be taken for granted.

Because the current emphasis in the Court is on the narrow question of whether a particular plaintiff is entitled to the protection of section 92 rather than on the more abstract question of whether the impugned law is valid or invalid, the Court's decision is likely to be couched in particular, not general terms. If the plaintiff is immune from the Acts which comprise the scheme, then the scheme still has force in relation to anyone not engaged in interstate trade, unless it is impossible to read the Acts so as to "sever" the partial invalidity. Indeed, most schemes these days attempt to foreclose the possibility of total invalidity by inserting a clause which requires the Act or Acts to be read "subject to section 92". Whether or not such a device is legally effective the practical success of a marketing scheme which is forced to exempt interstate traders depends on the relative profitability of interstate trade and, if a producer feels he can do better outside the scheme, the attractiveness of any inducements to stay in it. A typical inducement is a Commonwealth bounty for those who stay in the scheme. But a voluntary scheme will only succeed when there is sufficient inducement to stay in it; the hide and leather scheme, for example, collapsed around 1955 because bonus payments to those in the scheme stopped when the high export price, on which the payments depended, dropped.

To recapitulate, a plaintiff needs to show, in order to obtain the protection of section 92, that the law from which he seeks protection has a direct effect on interstate trade, and is not merely regulatory. With the demise of the Dixonian doctrine, the law can operate on intra-State trade and for practical and economic reasons still have a direct effect on interstate trade, but it is reasonably clear from the cases that a successful plaintiff must also establish, in addition to the directness of the effect and the non-regulatory character of the law, that he himself is engaged in interstate trade. This is because he would otherwise have no standing to bring an action; the Court is unlikely to invalidate an Act in relation to some purely hypothetical instance of interstate trade, even if on its face the Act strongly appears to infringe section 92.

Finally, it should be mentioned that just as the particularity of the plaintiff's situation is important, so too is the precise nature of the law alleged to be a burden. It is dangerous to generalise too much about "market-

ing schemes" since different aspects may be differently treated. An outright prohibition on dealing with a product is more likely to be regarded as a burden than a restriction on the price at which it may be sold. Indeed, there has been no direct decision of the High Court as yet on the question of whether price-fixing could be regarded as regulatory. Whether compulsory acquisition is a burden might depend on the extent of compensation, though this has not been taken into account to date. Where there are particular decisions on these questions, it is often unsafe to generalise beyond their particular facts, and cases decided before the *Bank* case (1949) are particularly suspect, since they were decided on principles now held to be unsound.

Although it can be said with confidence that section 92 has been a substantial obstacle to organised marketing, the precise ambit of its operation is, and will no doubt remain, tantalisingly uncertain. This result is perhaps no more than we deserve for expecting a court to give legal content to a piece of political rhetoric.

4 Section 90: Duties of Excise[62]

While section 92 is the major constitutional obstacle to organised marketing in Australia, section 90 also deserves separate consideration, as it imposes substantial restrictions both on the ways in which the States can raise money to finance the administration of marketing schemes and also on the ways in which they can spend money to assist producers. Section 90 prohibits the States from imposing customs duties or excise duties or granting bounties on the production or export of goods. These matters are within the exclusive power of the Commonwealth. The notions of customs duties and of bounties have not been much explored in the cases, but the concept of excise duties has greatly troubled the High Court. The best starting point is to keep in mind the basic idea that customs duties are taxes on the importation of goods whereas excise duties are taxes on their local production or manufacture.

It is widely thought that the historical explanation for the withdrawal from the States of the power to levy excise duties is that otherwise the States could interfere with Commonwealth tariff policy by inhibiting the production of goods in an industry which the Commonwealth wished to protect. This is the converse of the more obvious situation in which State customs duties or bounties could protect a local industry contrary to the national interest as determined by the Commonwealth. If this rationale had been adopted by the High Court as the guiding principle in deciding what was a duty of excise, then it might have been constitutionally unobjectionable for a State to tax the production of goods of a class which were not the subject of Commonwealth customs duty.[63] It might also have been unobjectionable for a State to impose a tax which applied to both local and imported goods, since any effect on Commonwealth tariff policy would be cancelled out by the equal incidence of the tax. A State *sales* tax which did not discriminate between local and imported goods would not infringe

62. A more extensive treatment of this topic can be found in Coper, "The High Court and Section 90 of the Constitution" (1976) 7 *Federal Law Review* 1.
63. Indeed, an earlier draft of section 90 explicitly provided for this.

section 90 on this view, but a State tax on the *manufacture* of goods within the State *would* infringe the section because such a tax necessarily discriminates against local goods.

This rationale possibly influenced the early decisions on section 90, which defined excise duties as indirect taxes on the manufacture or production of goods imposed in relation to the quantity or value of the goods.[64] However, the subsequent trend was to widen the definition of excise, and this occurred for two reasons. Firstly, the High Court generally approached section 90 as if it were looking for an abstract dictionary definition of the term excise rather than for a meaning signalled by its customs-related context; no doubt the cause of certainty was thought to be best served by such an approach. The term excise had come to have a very wide meaning in the United Kingdom because it covered any kind of tax which happened to be collected by the Department of Excise, and these included many miscellaneous licence fees. The Australian usage has never become as extensive as the British, but a wide definition was inevitable once the term was no longer anchored by its context.

Secondly, to the extent that the Court *has* taken the purpose of section 90 into account, some judges have perceived a *different* purpose from that embodied in the tariff policy argument. The ever-influential Sir Owen Dixon believed that section 90 was intended to give the Commonwealth "real control of the taxation of commodities".[65] In other words, if the States were able to levy excise duties then they could hamper the execution of some Commonwealth policy related to general control of the economy, such as the stimulation or depression of consumer demand through the taxation (or non-taxation) of certain goods. It became apparent that on this view, a non-discriminatory sales tax on a commodity *would* infringe section 90 because a sales tax was said to have precisely the same effect on demand for the commodity as a tax on manufacture, that is, the tax would be passed on to the consumer in the form of higher prices. Although these alleged effects were not tested by theoretical analysis or empirical evidence, which might well have shown widely differing effects according to economic conditions and the nature of the commodity, the assertion was sought to be justified as a broad generalisation which could be made by reference to common experience.

Historically, there is no support for the Dixon view that section 90 was intended to give the Commonwealth exclusive control over the taxation of goods. Surprisingly though, there is equally little explicit support for the tariff policy argument. If the High Court were to attempt to define excise duties by reference to what the framers of the Constitution really intended, it would find the historical material inconclusive and unhelpful. As with section 92, the idea of economic unity which propelled the federal movement was necessarily vague and more a matter of sentiment than a precise set of principles. This both explains and justifies the High Court's definitional approach, but in attempting to achieve certainty by being true to a definition and at the same time trying not to lose sight altogether of the perceived purposes of section 90, the Court has compromised both objectives.

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64. *Peterswald* v. *Bartley* (1904) 1 C.L.R. 497.
65. *Parton* v. *Milk Board (Victoria)* (1949) 80 C.L.R. 229.

The successive widening of the definition of excise reached the point that by the mid-1960's three things were clear. Firstly, a tax could be an excise even if it was levied at some stage in the production and distribution of goods subsequent to manufacture; thus, a Victorian tax of ⅛d. per gallon of milk sold in Melbourne was invalid.[66] Secondly, a tax could be an excise even if it was not *precisely* related to the quantity or value of goods, so long as it bore a *natural* relationship; thus, a State tax of £1 per half acre of land planted with chicory was held to be invalid as a tax on the chicory, even though (because of possible crop failures and the like) there was no *necessary* relationship between the amount of the tax and the quantity of chicory actually produced by the planting.[67] Thirdly, although it was a pretty good *indication* that a tax was an excise if it was an indirect tax,[68] this factor was neither necessary nor sufficient. But these three propositions provided only *negative* guidance. The *positive* aspect of the definition of excise in the mid-1960's was said to be that it was a tax "directly related" to goods, that the "criterion of liability" to pay the tax must be the taking of some step in the production or distribution of the goods.[69]

In a striking parallel with the development of the law on section 92, Sir Garfield Barwick, from the time of his appointment as Chief Justice in 1964, refused to accept that the "criterion of liability" was the definitive test of whether a tax amounted to a duty of excise. In his view, the "substantial operation" of the tax was critical. The difference of opinion is well illustrated by the Tasmanian tobacco case in 1974.[70] The Court held in that case that a tax on consumption is not a duty of excise (a holding which itself demonstrated the tensions between purpose and precedent, since earlier dicta to this effect was followed despite a concession that a consumption tax, although a direct tax, had the same effect as a tax on manufacture or sale), but differed on whether the tax in question was in *fact* a tax on the consumption of tobacco (and therefore not an excise) or a tax on the purchase of tobacco (and therefore an excise). Some judges said it was a consumption tax because the liability was on the consumer and the criterion of liability was consumption; no legal liability to pay tax arose until tobacco was consumed. Other judges, including Sir Garfield, said it was in reality a purchase tax; because there was provision for vendors to collect the tax at the time of purchase, and because it was unrealistic to expect that any tax would be collected other than by this arrangement, the "substantial operation" of what appeared on its face to be a consumption tax was that it amounted to a tax on the entry of tobacco into consumption.

The judges who favour the substantial operation test clearly do so in order to give effect to their perception that the purpose of section 90 is to give the Commonwealth exclusive control over the taxation of goods. The judges who favour the criterion of liability test are more impressed by the need to achieve certainty and, also, possibly influenced by a desire to avoid the erosion of State finances and revenue sources brought about

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66. *Parton's* case, *supra* n. 65.
67. *Matthews* v. *Chicory Marketing Board (Victoria)* (1938) 60 C.L.R. 263.
68. In the sense of John Stuart Mill's definition that "a direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."
69. *Bolton* v. *Madsen* (1963) 110 C.L.R. 264.
70. *Dickenson's Arcade Pty. Ltd.* v. *Tasmania* (1974) 130 C.L.R. 177.

by too wide a definition of excise. But at times the substantial operation lobby has also deferred to the need for certainty. In another aspect of the tobacco case, those judges followed an earlier decision which had enabled Victoria to tax the sale of liquor by the device of requiring sellers to have a licence and charging a fee for the licence calculated by reference to the value of liquor purchased by the seller in a period prior to the currency of the licence.[71] A narrow majority in the liquor case said this was not a tax on the goods, but rather a tax on the right to carry on the business of selling them.[72] The decision was not only followed in the tobacco case but was also affirmed again in 1977.[73] Yet the Court has not applied a blanket rule in giving its stamp of approval to the licence fee device, for in a case decided at the same time as the tobacco case, it distinguished the liquor case and invalidated as an excise a fee charged for a licence to process fish, even though the fee was calculated by reference to a prior period.[74] The ironic result is that the substantial operation lobby has brought about a situation where a prior period fee for a licence to manufacture is an excise, but a prior period fee for a licence to sell is not — a result consistent with the tariff policy view of section 90, but not with the wider taxation of goods view. In any event, the consequence of this partial and half-hearted concession to following precedent, compounded by chance majorities and over-subtle points of distinction, is that (for the moment at least) the States can levy sales taxes by carefully drafting legislation similar to that in the liquor case.

The most recent case on section 90 concerned a Queensland tax on the ownership of stock. In 1977, the High Court invalidated a stock tax which since 1915 had financed important measures against the introduction and spread of stock disease.[75] The Court of six was evenly divided, in which case the Judiciary Act gives the Chief Justice a casting vote. The statutory majority said that the tax on the number of cattle, sheep and swine owned was in effect a tax on their product; although the tax bore no necessary relationship to the quantity of meat, wool, and milk produced, it was sufficient that it bore a natural relationship. The statutory minority said that the criterion of liability to the tax was mere ownership of stock, regardless of the purpose for which the stock was kept, and that this was not a tax on any step in the production or distribution of goods; the owners were taxed merely because they were owners, not because they were producers. The even division of opinion makes the case very inconclusive, and there may well be further challenges to State stock taxes.

In the light of the conclusions in the other parts of this article, it will come as no surprise to readers to conclude here that the state of the law on section 90 is highly volatile and unstable. An excise duty is essentially

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71. *Dennis Hotels Pty. Ltd.* v. *Victoria* (1960) 104 C.L.R. 529.
72. Strictly, this reasoning applies regardless of the licence period. The relevance of the prior period to the majority was that liability to pay tax did not arise until a licence came up for renewal and if it were not renewed, no tax would be payable on purchases for sale under the current licence. Moreover, there might be discrepancies between purchases and sales and between periods. These factors, and the difficulty of precisely passing the tax on, combined to persuade the majority that the tax was not sufficiently related to the liquor. The minority took a broad view and said that despite the discrepancies the tax amounted to a sales tax on virtually all liquor sold in Victoria.
73. *H. C. Sleigh Ltd.* v. *South Australia* (1977) 12 A.L.R. 449.
74. *M. G. Kailis (1962) Pty. Ltd.* v. *Western Australia* (1974) 130 C.L.R. 245.
75. *Logan Downs Pty. Ltd.* v. *Queensland* (1977) 12 A.L.R. 484.

a tax on manufacture or production, and Mr Justice Murphy would now confine it thus and exclude non-discriminatory taxes,[76] but the idea that it is a tax on goods has demanded some relationship between the tax and the quantity or value of the goods, so that a fixed annual tax, say, on producers, would not be an excise, even though it could be called a tax on production. As with other overhead costs, it would no doubt enter into the price of the goods, but it would not be regarded as a tax *on* the goods. At present a majority of the Court would regard a sales tax as a duty of excise, assuming the necessary relationship between the tax and the goods, but the States can circumvent this if they decide it is feasible to bring in cumbersome and complex licensing schemes of the kind in the liquor case.

The consequence of section 90 for organised marketing, therefore, is that the States will often have to finance marketing schemes from general revenue rather than with money raised from those who are to benefit from the scheme. However, if there is a very close relationship between the money which is raised and the services which are provided to producers out of the proceeds, then it is possible that the levy will not be regarded as a tax but rather as a "fee for services rendered". This means that it will not be a duty of excise, for a duty of excise is simply a particular kind of tax; if on the threshold question there is no tax, then there cannot be an excise. The cases here appear to require considerable specificity in the services which the levy is to provide if it is not to be regarded as a tax. For example, a charge by the Victorian Egg Board to create a fund to pay for the grading, testing and marking of eggs by the Board was held to provide a specific benefit and service to those who had to pay the charge,[77] whereas contributions to defray the administrative expenses of a statutory body have been regarded as taxation rather than as fees for services rendered.[78] One anomaly in this area is that it has been held that if a product is compulsorily acquired and administrative expenses are deducted from compensation paid out of the proceeds of resale by the statutory body, then this is not taxation.[79] Thus, the High Court has in effect encouraged the States to finance marketing schemes not by simple and direct taxation but by the more drastic method of compulsory acquisition.[80]

5 Prospects for Change

Formal amendment to the Constitution requires a majority vote at a referendum not only of all voters throughout Australia but also of a majority of voters in a majority of States. Moreover, it can only be at the initiative of the Commonwealth — the States have no power to call a referendum to alter the Constitution. Proposed changes specifically relating

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76. See *H. C. Sleigh, supra* n. 73, and *Logan Downs, supra* n. 75.
77. *Harper* v. *Victoria* (1966) 115 C.L.R. 117.
78. *Parton's* case, *supra* n. 65; *Kailis'* case, *supra* n. 74.
79. *Crothers* v. *Sheil* (1933) 49 C.L.R. 399. But compare *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (1937) 56 C.L.R. 390, where a scheme in which producers bought back flour at a higher price than was paid for its acquisition was held to amount to taxation.
80. For criticism by an economist on this point, and on the High Court's general interpretation of section 90, see the excellent article by H. W. Arndt, "Judicial Review under Section 90 of the Constitution: An Economist's View" (1952) 25 *Australian Law Journal* 667 and 706.

to marketing have been put to the electorate on three occasions: in 1937, the proposal was to exempt Commonwealth marketing laws from the operation of section 92; in 1944, the proposal was to add "organised marketing of commodities" as an additional head of Commonwealth legislative power; and in 1946, the proposal was to add the topic "organised marketing of primary products" to the list of Commonwealth powers and to exempt laws made under that power from the operation of section 92. All of these proposals were rejected, but the last only because of the double majority rule. That is, the 1946 proposal was approved by an overall majority of voters but by a majority in only three States. The favourable overall result may have been due to the success of wartime marketing schemes, and the ultimate failure to the difference of opinion between the political parties. Other proposals in 1911, 1913 and 1919 to delete the interstate and overseas restriction from section 51(i) also failed to gain acceptance.

Some proposals never reached the stage of being put to the electorate. For example, the Royal Commission on the Constitution recommended in 1929 (when the prevailing High Court view was that section 92 did not apply to the Commonwealth) that section 92 be amended to confine it to the prohibition of fiscal burdens and that the Commonwealth be given power to modify or annul any State law which interfered with freedom of interstate trade. In 1959, the Joint Parliamentary Committee of Constitutional Review recommended that the Constitution should be amended to give the Commonwealth power to give effect to any marketing scheme for a primary product which had the support of 60% of the producers, and to do so free from the operation of section 92. Neither recommendation was acted upon.

There are some who say that the failure of a proposal at a referendum indicates that the people genuinely do not want the proposed change. There are others who say that the pattern of negative voting in Australia is explained by other factors which include conservatism, lack of understanding, and sheer perversity. Also, of course, the smaller States have a disproportionate influence because of the double majority rule. Whatever the explanation, the rigidity of our Constitution turns the spotlight to other mechanisms for change.

One such mechanism is that the States can refer powers to the Commonwealth under section 51(xxxvii). This power has not been much used, partly because of uncertainty in the law relating to the retrieval of referred powers and partly because of State parochialism. Another mechanism is for the Commonwealth and the States to cooperate and pass uniform legislation, but as noted earlier, the disadvantage of this is that one State may withdraw and destroy the whole scheme; withdrawal may create an incentive for speculative interstate trade and create a dumping ground for it. Moreover, section 92 currently applies even to joint Commonwealth-State schemes.

The main burden for constitutional change has fallen on judicial interpretation. The words of the Constitution are often ambiguous, and the judges must choose between competing interpretations which rest on competing policies. In making these choices, there is no doubt that the judges do respond to perceived social pressures, so that even if it is impossible to secure a constitutional amendment in relation to organised marketing, the substantial consensus in favour of organised marketing in areas where long-term stability is important will exert a subtle influence. No doubt the judges will continue to disagree, but the chronic diversity of opinion on the Court is no more than a reflection of diversity of opinion within the community and of the complexity of our social arrangements.

There are no easy answers in the search for principles to guide the High Court in constitutional interpretation. Resort to history is unsatisfactory, not merely because it is often inconclusive, but also because it may be quite inappropriate to impose 19th century conceptions on 20th century needs. In any event, the founders themselves would no doubt have intended that the Constitution be interpreted so as to accord with changing social and economic circumstances. Organised marketing was as rare in the 19th century as it is commonplace in the 20th century, so it is little wonder that in this area resort to the founders' intentions is largely fruitless.

Readers of this article will inevitably have been frustrated by the absence of certainty in the law relating to organised marketing. Certainty, however, is only one goal of the legal system, and some lack of certainty is the price we have to pay if the judges are to attempt to develop the law in response to social and political change. Any failure by the High Court to respond to pressures to allow the full implementation of organised marketing is hardly more blameworthy than the failure of the electorate to do so.