

## Chapter 2

# The Elusive Promise of the Inter-State Commission

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### Introduction

Between 2 and 5 June 1987, the High Court heard argument in *Cole v Whitfield*.<sup>1</sup> Michael Coper was second junior for the State of New South Wales led by Keith Mason QC SG and Ronald Sackville, his former colleague from the University of New South Wales. That brief, of course, afforded the perfect opportunity to road test some of the views he had formulated in *Freedom of Interstate Trade under the Australian Constitution*,<sup>2</sup> the magisterial if somewhat masochistic 1983 publication that had set out to ‘explain the elliptical and expound the unexpressed’, to quote Sir George Rich in *James v Cowan*.<sup>3</sup> Later that year, on 6 October 1987, the then Associate Professor Coper was appointed to the Inter-State Commission. He was only the eighth but the last appointee to that body.

Professor Coper succeeded Justice Mervyn Everett as the legal member of the Commission. Interestingly, Everett held a dual commission as a Federal Court judge and as the President of the Inter-State Commission on its re-establishment by the Hawke Government in 1984. As such, his tenure in both positions was constitutionally guaranteed albeit for different periods of time.<sup>4</sup>

There is a fitting historical connection between *Cole v Whitfield* and the Inter-State Commission. *Cole v Whitfield* famously placed s 92 in its proper historical context, informed by a deep understanding of the Convention Debates of the 1890s and what the Founding Fathers sought to achieve in the bold constitutional slogan that ‘*trade, commerce, and intercourse between the States shall be absolutely free*’.<sup>5</sup> Those same debates reveal that the Inter-State Commission was *the* constitutional body that, *inter alia*, was intended to monitor and police what Sir George Reid had referred to as the ‘*little bit of layman’s language*’<sup>6</sup> that was so fundamental to the constitutional compact.

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\* This chapter draws upon earlier articles: Andrew Bell SC, ‘The missing constitutional cog: the omission of the Inter-State Commission’, *BarNews*, Summer 2009/2010 and Andrew Bell, ‘Inter-State Commission’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 353.

1 (1988) 165 CLR 360.

2 Michael Coper, *Freedom of Interstate Trade under the Australian Constitution* (Butterworths, 1983) (*Freedom of Interstate Trade*).

3 (1930) 43 CLR 386, 422-3.

4 Constitution ss 72, 103(ii).

5 Constitution s 92.

6 *Official Report of the National Australasian Convention Debates*, Melbourne, 11 March 1898, 2367 (Sir George Reid).

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