Quest Journals
Journal of Research in Humanities and Social Science
Volume 10 ~ Issue 3 (2022)pp: 01-09
ISSN(Online):2321-9467
www.questjournals.org

Research Paper

Freedom of Trade Clause in the Indian Constitution: A Comparison with its Australian Counterpart

Dr. Harman Shergill
(Member, District Consumer Disputes Redressal Commission, Patiala)

ABSTRACT: *This Paper discusses the provisions pertaining to Freedom of Trade in India and Australia. It embarks on a comparative analysis of the two regimes in the field of Freedom of Trade. The Paper concludes by highlighting the similarities that exist between the two jurisdictions and the lessons to be learnt from the enforcement of the free trade clauses.*
KEYWORDS: *Freedom of Trade, Trade, Constitution of India, Commonwealth*

Received 07 Mar, 2022; Revised 20 Mar, 2022; Accepted 22 Mar, 2022 © The author(s) 2022. Published with open access at www.questjournals.org

I. INTRODUCTION:

A comparative approach to the law of different systems has a number of advantages . . . It may be advantageous to assist domestic legal systems facing hardship in identifying guiding principles or legal rules. . . . The process of comparison itself serves to elucidate what concepts and values truly shape our own laws[1] which is why, insofar as "there are . . . areas of law which have attracted a comparative treatment . . . The topics are often chosen because they represent an area where either of the legal systems is experiencing difficulty".[2] The point is that "it is interesting to see how other nations than India have their constitutional problems, and to see how they may be led to deal with them according to the special requirements of the time".[3]

There are apparent similarities between India and Australia which make a comparison of their respective legal systems appropriate. However, there is no reason to suggest that the resemblance among these systems will enlighten one any less than the differences that exist among them. Although similar problems justify similar solutions, ultimately, the utility of comparative studies depends on their capacity to discover differences.[4] Otherwise, the comparative analysis of distinct legal systems would not "renew and refresh the study of national law, which suffers from confining itself to the interpretation of positive rules and neglecting broad principles in favour of tiny points of doctrine".[5]

The great problem of any federal structure is to prevent the growth of local and regional interests which are not conducive to the interest of the nation as a whole. In order to avoid commercial rivalries and jealousies among the units, the framers of federal constitutions consider it absolutely necessary to incorporate a free trade clause which would

---

1 S. Kiefel, "English, European and Australian law: Convergence or Divergence?", 79 *Australian Law Journal*, 227 (2005).

2 *Ibid.*

3 Lord Wright, "Section 92 – A Problem Piece", 1 *Sydney Law Review* 145, 151 (1954).

4 Gonzalo Villalta Puig, "The Constitutionalisation of Free Trade in Federal Jurisdictions", Working Paper 4, *Centro de Estudios Políticos y Constitucionales*, (Madrid, Spain, 2011), *available at*: http://www.cepc.gob.es/docs/working-papers/working_paper4.pdf?sfvrsn=4, (accessed on June 5, 2015).

5 T. Weir, K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, Vol. 1, 3 (1998).

ensure the economic unity within the country.[6] Since the freedom of trade, commerce & intercourse is inextricable to the concept of federalism; it's worthy to note, at the outset, similar laws in two federal jurisdictions under consideration-India and Australia.

PROVISIONS UNDER THE CONSTITUTION OF INDIA

The scheme of the Constitutional provisions on the Freedom of Trade and Commerce emerges in the shape of Articles 301-307 of Part XIII of the Constitution of India.

Article 301 of the Constitution of India provides that subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

Further, Article 302 provides that Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one state and another or within any part of the territory of India, as may be required in the public interest.

Furthermore, Article 303 provides that notwithstanding anything in Article 302, neither the Parliament nor the Legislature of a State shall have the power to make any law giving, or authorizing the giving of, any preference to one State over another, or making or authorizing the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule. Moreover, Clause(2) of Article 302 provides that nothing in Clause (1) shall prevent the Parliament from making any law giving, or authorizing the giving of, any preference or making, or authorizing the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. Article 304(a) consists of two clauses where each clause operates as a proviso to Articles 301 and 303. According to Article 304(a), a State legislature may, by law, impose on goods imported from other States, any tax to which similar goods manufactured or produced within that State are subject, so however, as not to discriminate between goods so imported and goods so manufactured or produced.[7]

Article 304 empowers the States legislatures, notwithstanding anything in Articles 301 and 303, to make laws to regulate and restrict the freedom of trade and commerce to some extent. A restriction imposed by a State law on freedom of trade and commerce declared by Article 301 cannot be valid unless it falls within Article 304.

Notwithstanding anything contained in Article 301 or 303, Article 304(b) authorizes a State Legislature to impose by law such reasonable restrictions on the freedom of trade, commerce and intercourse with or within that State as may required in public interest. The proviso to Article 304(b) says that no bill or amendment for this purpose shall be introduced in the State Legislature without the previous sanction of the President.

Moreover, existing laws[8] and nationalization laws are saved by Article 305 from the operation of Article 301 and Article 303 except insofar as the President may, by order, otherwise direct.[9]

Article 19(1)(g) of the Constitution of India

In addition to Article 301, Article 19(1) (g) confers on every citizen a fundamental right "to practice any profession, or to carry on any occupation, trade or business". "Reasonable restrictions" may be imposed on the exercise of this right "in the interests of the general public" and particularly, it shall not affect the operation of any law relating to the professional or technical qualifications necessary for the exercise of such right or a law

---

6 Faisal Fasih, "Freedom of Trade and Commerce", available at http://www.legalservicesindia.com/article/article/freedom-of-trade-&-commerce-148-1.html (Accessed on July 2, 2013).

7 *Id.*, at 828.

8 An "existing law" as defined in Article 366(10) means "any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of the Constitution by any Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation".

9 *Bangalore W.C. & S. Mills Co*. v. *Bangalore Corp.,* AIR 1962 SC 562.

creating the state monopoly in any trade, business, etc wholly or partially.[10] However, the restriction imposed must be by a law and not by an executive direction. There is an uncertainty about the relationship of Article 19(1) (g) with Article 301 and their scope and area of operation in the light of each other. Is one independent of the other? Do they operate in different and separate fields; or do they control the scope and meaning of each other? Is it of any consequence if the conclusion is reached that their scope and sphere is different from each other? As is discussed below, some of the High Courts have tried to answer these questions but the Supreme Court had no occasion to answer them categorically.[11]

POSITION IN AUSTRALIA

Internal trade reform first began in the mid-1980s largely as a result of efforts to improve Australia's competitive position through, among other actions, unilateral tariff reductions. Faced with increased competition from foreign suppliers, the Commonwealth, state and territorial governments cooperatively undertook a series of domestic economic reforms aimed at improving productivity and reducing costs for businesses.[12]

The power to legislate on: Trade and commerce with other countries, and among the States is given to the Parliament of Australia by Australian Constitution.[13]

The Commonwealth's power to legislate with respect to trade and commerce among the States and with other countries has been interpreted narrowly in the past by the High Court. This has occurred via two main means: (a) a narrow conception of what is encompassed by trade and commerce; and (b) an insistence on a strict division between interstate and overseas trade and commerce on the one hand (hereafter "constitutional trade and commerce", and intrastate trade and commerce (hereafter non-constitutional trade and commerce) on the other.[14] However, the terms "trade" and "commerce" have been broadly construed. The early case of *W & A McArthur Ltd* v. *Queensland,*[15] declared:

"Trade and commerce" between different countries—we leave out for the present the word "intercourse"—has never been confined to the mere act of transportation of merchandise over the frontier. That the words include that act is, of course, a truism. But that they go far beyond it is a fact quite as undoubted. All the commercial arrangements of which transportation is the direct and necessary result form part of "trade and commerce". The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations between mankind which the world calls "trade and commerce".

It includes financial transactions.[16] By virtue of the power, the Federal Government itself can participate in trade and commerce.[17] There is an incidental aspect to the power, allowing the Commonwealth to regulate peripheral matters, consistent with the

---

10 THE INSTITUTE OF COST ACCOUNTANTS OF INDIA, An Insight of Goods & Services Tax (GST) in India October 2015, 136 (Volume I - Text).

11 Though some observations were made in *Saghir Ahmed* v. *Uttar Pradesh*, AIR 1954 SC 728 at 742 and *State of Bombay* v. *R.M.D.C.*, AIR 1956 SC 699 at 713 but the question is still open as is clear from *Automobile Transport Co.* v. *State of Rajasthan*, AIR 1962 SC 1406 at 1423.

12 Kathleen Macmillan, *A Comparison of Internal Trade Regimes: Lessons for Canada*, (May 29, 2013), *available at*: http://www.ppforum.ca/sites/default /files/Macmillan%20-%20A%20comparison%20of%20internal%20trade%20regimes %20-%20lessons%20for%20Canada.pdf, (accessed on June 2, 2015).

13 Section 51(i), *Constitution of Australia*.

14 Anthony Gray, "Reinterpreting the Trade and Commerce Power", Vol. 36(1) *Australian Business Law Review*, (2008), *available at*: https://eprints.usq.edu.au/3973/1/Gray_Aust_Bus_Law_Review_v36n1.pdf, (accessed on May 13, 2015).

15 *W & A McArthur Ltd* v. *Queensland*, [1920] HCA 77, (1920) 28 CLR 530 (29 November 1920).

16 *Commonwealth* v. *Bank of New South Wales*, (1949) 79 CLR 497.

17 *Australian National Airways Pty Ltd.* v. *Commonwealth*, (1945) 71 CLR 29.

interstate/intrastate distinction.[18] It can include the absolute prohibition of trade and it doesn't matter that the law also concerns other topics.[19]

However, the High Court has also ruled that a distinction must be maintained between interstate trade and trade that is strictly within a State. In *Wragg* v. *New South Wales,*[20] Dixon J. remarked:

The distinction which is drawn between inter-State trade and the domestic trade of a State for the purpose of the power conferred upon the Parliament by Section 51(i) to make laws with respect to trade and commerce with other countries and among the States may well be considered artificial and unsuitable to modern times. But it is a distinction adopted by the Constitution and it must be observed however much inter-dependence may now exist between the two divisions of trade and commerce which the Constitution thus distinguishes. A legislative power, however, with respect to any subject matter contains within itself authority over whatever is incidental to the subject matter of the power and enables the legislature to include within laws made in pursuance of the power provisions which can only be justified as ancillary or incidental. But even in the application of this principle to the grant of legislative power made by Section 51(i) the distinction which the Constitution makes between the two branches of trade and commerce must be maintained. Its existence makes impossible any operation of the incidental power which would obliterate the distinction.[21]

But the distinction between interstate and intrastate activity is not absolute. In *Airlines of New South Wales Pty Ltd* v. *New South Wales (No 2),* Menzies J. noted:

If control of intra-State trade is necessary to make effectual the exercise of Commonwealth power, that control may be exercised by the Commonwealth itself regardless of the control exercised by a State and regardless, too, of the fact that at some previous time the Commonwealth, because of the control exercised by a State over its intra-State trade, refrained from the full exercise of its own power. Arguments based upon the extent of State legislative power, or, the extent to which that power has been exercised, to measure or confine the legislative power of the Commonwealth, must, since the *Engineers* Case, fall upon deaf ears.[22]

To that end, it has been held that Section 51(i) covers both interstate and intrastate activities where they are "inseparably connected".[23] However, the fact that an intra-state journey may economically be required in order to assure the operation of an interstate service has not been sufficient to allow the Commonwealth to regulate the entirety.[24]

The legislative power of the Commonwealth relating to trade and commerce in addition to Section 51(i) is also contained in Section 98 which lays down that the Parliament has power to make laws with respect to trade and commerce with other countries and among the States and it extends to navigation and shipping and railway property of any State subject to the other provisions of the Constitution. In this context, Sections 99 and 100 provided that the law relating to trade and commerce shall not give preference to any State or part thereof and the Commonwealth shall not curtail the right of a State or the residents to the use of water or river for the purpose of navigation or irrigation respectively. In addition to this general legislative power relating to trade and commerce, the Constitution contains legislative power with respect to certain specific subjects of trade and commerce such as currency and coinage, banking, insurance, bills of exchange etc.

---

18 *R* v. *Foster; Ex Parte Eastern and Australian Steamship Co Ltd.,* (1959) 103 CLR 256 (Commonwealth regulating the employment conditions of workers involved in interstate trade and commerce); see further on this issue David McCann "First Head Revisited: A Single Industrial Relations System under the Trade and Commerce Power", 26 *Sydney Law Review,* 75 (2004).

19 *Murphyores Incorporated Pty Ltd.* v. *The Commonwealth,* (1976) 136 CLR 1, 22 (Mason J). Also see *Supra* note 14.

20 *Wragg* v. *New South Wales,* (1953) 88 CLR 353 (June 9, 1953).

21 *Available at:* https://en.wikipedia.org/wiki/Section_51(i)_of_the_Constitution_of_ Australia.

22 *Airlines of NSW Pty Ltd* v. *New South Wales (No 2),* (1965) 113 CLR 54 (February 3, 1965).

23 *Redfern* v. *Dunlop Rubber Australia Ltd.,* (1964) 110 CLR 194 (February 25, 1964).

24 *Attorney-General (WA)* v. *Australian National Airlines Commission (Western Australia Airlines case,* (1976) 138 CLR 492 (December 17, 1976).

The free trade clause of the Australian Constitution is embodied in Section 92[25] which states (in part) that:

"On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free".[26]

Hence, Section 92 added the word 'intercourse' along with trade and commerce which are present in Section 51(i). Intercourse includes commercial as well as non-commercial intercourse. Once the act of the inter-state trade, commerce or intercourse has begun, the protection of Section 92 comes into operation and continues till the completion of the act. However, the difficulty arises in determination of the commencement and completion of the Act.[27]

In the case of *James* v. *Commonwealth*,[28] the High Court observed:

We are definitely of opinion that Section 92 lays down a general rule of economic freedom, and necessarily binds all parties and authorities within the Commonwealth, including the Commonwealth itself, because, as was pointed out by the Privy Council itself, it establishes a "system based on the absolute freedom of trade among the States".[29]

The cases on Section 92 have evolved two dimensions of choice namely individual right theory and free trade theory. That is, formulating the principles which delimit the concept of freedom and applying those principles to factual situations. Much of the early litigations were dominated by the first kind of choice like in *W and A Mc Arthur Ltd.* v. *Queensland*,[30] a Queensland statute fixing maximum price for goods was declared invalid as the law purported to operate on a contract of sale, which required goods to move inter-state. In this case, individual right theory was adopted, though there was some reference to the possibility of a state favouring its own industries against those of another state by fixing prices to give a local advantage. On the other hand, the decision given by Justice Evatt in the case of *Milk Board (NSW)* v. *Metropolitan Cream Pvt. Ltd.*,[31] supported free trade theory. In this case, a scheme for marketing of milk was held valid even though it expropriated the milk for the purpose of controlling both inter-state and intra-state trade and fixed the price at which milk from another state was to be sold. In fact, till the end of 1930s, the decisions tended to conform to free trade theory.[32]

But the *Bank Nationalisation* case[33] and *Hughes and Vales* case[34] conform to the re-emergence of the individual right theory. Justice Dixon was the supporter of individual right theory and during that time number of legislations which had a considerable economic or practical effect on inter-state trades were upheld as indirectly affecting that trade only. Consequently, the restriction placed on the production of margarine was held valid[35] and importation from abroad of an aircraft was held valid as inter-state trade began after

---

25 "Section 92: On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation".

26 Chapter IV - Finance and Trade, *Constitution of Australia.*

27 Faisal Fasih, "Freedom of Trade and Commerce", available at http://www.legalservicesindia.com/article/article/freedom-of-trade-&-commerce-148-1.html (Accessed on July 2, 2013).

28 *James* v. *Commonwealth,* (1935) 52 CLR 570 (June 11, 1935).

29 *The Colonial Sugar Refining Company Limited* v. *Irving (Queensland),* 1906 UKPC 20 (28 March 1906).

30 (1920) 28 CLR 530.

31 (1939) 62 CLR 116.

32 *Supra* note 27.

33 (1949) 79 CLR 477.

34 (1953) 87 CLR 49.

35 *Grannall* v. *Marrickville Margarine Pvt. Ltd.*, (1955) 93 CLR 55.

importation of aircraft.[36] However, Justice Barwick who succeeded Justice Dixon stated that the object of Section 92 was to preserve the common market of Australia being hampered by the State action and the right of the individual to trade and move inter-state was derived from this object. Thus, in his theory, both the free trade approach and individual right approach appear to merge.[37]

There was yet another shift in the interpretation of Section 92 when Justice Mason, Justice Stephen and Justice Jacobs mentioned factors like the nature of the regulation, the mischief it was designed to remedy, the goal it seeks to achieve and the effect that legislation has on the relevant inter-state trade that have to be taken into account in determining the reasonableness of a regulation. Later on, in *Uebergang* v. *Australian Wheat Board,*[38] Justice Murphy was of the opinion that the Commonwealth Parliament has sufficient power to override or negate any State legislation inimical to national commerce.[39]

In short, Section 92 was undoubtedly intended to achieve a degree of economic unity and a common market. But this doctrine of free trade could not be considered in isolation without taking into consideration the right of the individual. Individual right was not the object of Section 92 but it can be regarded as a means to achieve the object declared by Section 92 i.e. freedom of trade and commerce among the States.[40]

In 1988, in the case of *Cole* v. *Whitfield*,[41] the High Court of Australia (HCA) developed a test of invalidity under Section 92. The test declares a law or measure invalid if it imposes a burden on interstate trade that is discriminatory in a protectionist sense.

The problem in the text of Section 92 is that it does not state what interstate trade is to be absolutely free from. As a solution to that problem, the *Cole* v. *Whitfield* test of invalidity under Section 92 imposes a ban on discriminatory burdens of the protectionist kind. The test developed by the HCA in *Cole* v. *Whitfield* was applied in subsequent Section 92 cases such as *Bath* v. *Alston Holdings Pty Ltd.*,[42] *Castlemaine Tooheys Ltd* v. *South Australia*,[43] *Barley Marketing Board (NSW)* v. *Norman*,[44] and, more recently, *Betfair Pty Ltd.* v. *Western Australia*.[45]

The test is not concerned with the fact that a law or measure restricts the free movement of goods within Australia. Rather, for a law or measure to be found to contravene Section 92, the HCA must be satisfied that it imposes a burden on interstate (as compared to intrastate) trade and that such burden is discriminatory in a protectionist sense.[46] In other words, a burden is discriminatory in a protectionist sense if it confers a comparative competitive advantage on intrastate traders over interstate traders, or removes a comparative competitive disadvantage from intrastate traders.[47]

Protectionism, as a criterion of invalidity, renders the *Cole* v. *Whitfield* test of invalidity under Section 92 a historical, narrow, and economically inefficient. It is, therefore, not a surprise that Geoffrey Sawer once remarked:

"The handling of this section by the Courts has been one great constitutional failure . . . The failure may be partly due to the bad drafting of Section 92, but it is also due partly to

---

36 *R.* v. *Anderson: ex parte Ipec-Air Pvt. Ltd.*, (1965) 113 CLR 177. This case was affirmed in *Ansett Transport Industries* v. *Commonwealth*, (1977) 139 CLR 54.

37 *Supra* note 27.

38 (1980) 145 CLR 266.

39 *Supra* note 27.

40 *Supra* note 27.

41 *Cole* v. *Whitfield*, (1988) 165 CLR 360.

42 *Bath* v. *Alston Holdings Pty Ltd.*, (1987) 165 CLR 411.

43 *Castlemaine Tooheys Ltd* v. *South Australia*, (1990) 169 CLR 436.

44 *Barley Marketing Board (NSW)* v. *Norman*, (1990) 171 CLR 182.

45 *Betfair Pty Ltd* v. *Western Australia*, (2008) 234 CLR 418.

46 J.G. Starke, "The Cole v. Whitfield Test for Section 92 Explained and Applied: The Demise of the Theory of "Individual Rights", 65 *Australian Law Journal* 123 (1991).

47 Gonzalo Villalta Puig, "The Constitutionalisation of Free Trade in Federal Jurisdictions", Working Paper 4, *Centro de Estudios Políticos y Constitucionales*, (Madrid, Spain, 2011), *available at*: http://www.cepc.gob.es/docs/working-papers/working_paper4.pdf?sfvrsn=4, (accessed on June 5, 2015).

limitations of our legal technique, which make it difficult for our Courts to handle complex political and economic conceptions".[48]

This is not so much an exoneration of the HCA as it is a recognition of its own technical shortcomings.[49] Thus, Christopher Staker wrote:

"Given the difficulties which have always surrounded the interpretation of Section 92, and the inherent difficulty of giving concrete application to such abstract notions as "free trade", comparative studies of provisions similar to Section 92 in jurisdictions outside Australia are bound to be of assistance in any consideration of how the interpretation of Section 92 may further develop".[50]

Despite its reaffirmation by the HCA only recently,[51] the test of discriminatory protectionism remains inconsistent with the federal purpose of Section 92 to create and preserve a single market for Australia.[52]

Therefore, in the past, power of the Commonwealth to make laws with respect to trade and commerce among the states and overseas has been interpreted quite narrowly,[53] with a corresponding reduction in the ability for the Commonwealth to regulate business. This difficulty was in the past compounded by an interpretation given to Section 92 which created difficulties for both Federal and State Governments in their attempts to regulate business.[54] The High Court has not followed the same path as has its American equivalent in interpreting the clause on which Section 51(i) was based.[55]

It is pertinent to mention that while on one hand, Section 92 in the Australian Constitution provides an express grant to the Commonwealth to regulate "Trade and Commerce….among the States",[56] and on the other hand, it provides for an injunction that trade, commerce and intercourse among the States shall be absolutely free. For several years, before the decision of the Privy Council in *James* v. *The Commonwealth*, already referred to, the dominant theory recognized by the Australian High Court was that Section 92 did not inhibit the Commonwealth, lest, it was said, there should be a gap in the Constitution.[57] Courts have interpreted Section 92 to mean that a measure violates the constitutional requirements if it is of a protectionist and discriminatory nature and it confers a local advantage.

While the Australian constitution has played an important role in market integration, the two truly distinguishing features of the Australian regime are: (1) the high degree of intergovernmental cooperation and (2) the institutional support for the single market.[58]

Trade between Australian states is governed by the Mutual Recognition Accord of 1992 which was modelled on the EU example as established in the 1979 *Cassis de Dijon*

---

48 G. Sawer, "Constitutional Law" in G.W. Paton (ed.), *The Commonwealth of Australia: The Development of its Laws and Constitution,* 71, 76 (1952).

49 *Supra* note 47.

50 C. Staker, "Section 92 of the Constitution and the European Court of Justice", 19 *Federal Law Review,* 322, 323 (1990). C. Staker, "Free Movement of Goods in the EEC and Australia: A Comparative Study", 10 *Yearbook of European Law,* 209 (1990).

51 *Betfair Pty Ltd.* v. *Western Australia,* (2008) 234 CLR 418.

52 *Supra* note 47.

53 *Beal* v. *Marrickville Margarine Pty Ltd.*, (1966) 114 CLR 283; *Wragg* v. *New South Wales,* (1953) 88 CLR 353; *Attorney-General (WA)(ex rel Ansett Transport Industries (Operations) Pty Ltd*. v. *Australian National Airlines Commission*, (1976) 138 CLR 492.

54 *Commonwealth* v. *Bank of New South Wales,* (1949) 79 CLR 497; *North Eastern Dairy Co Ltd.* v. *Dairy Industry Authority of New South Wales,* (1975) 134 CLR 559; *Hughes and Vale Pty Ltd.* v. *New South Wales (No. 1*), (1954) 93 CLR 1; cf *Cole* v. *Whitfield,* (1988) 165 CLR 360.

55 Anthony Gray, "Reinterpreting the Trade and Commerce Power", Vol. 36(1) *Australian Business Law Review,* (2008), *available at*: https://eprints.usq.edu.au/3973/1/Gray_Aust_Bus_Law_Review_v36n1.pdf, (accessed on May 13, 2015).

56 This express grant is to be found in Section 51(i) of the Australian Constitution.

57 P.K. Tripathi, *Freedom of Trade Commerce and Intercourse in the Constitution of India,* 5-6 (1988).

58 *Supra* note 12.

case[59]. The mutual recognition requirements were supported by additional measures to bring about regulatory uniformity.

The second phase of Australia's coordinated plan for market efficiency was a series of initiatives intended to reduce regulatory fragmentation and create a "seamless national economy". In 2006, the inter-jurisdictional Council of Australian Governments (COAG) began a process of identifying regulatory 'hot spots' or areas where inconsistencies and duplication create the most compliance costs for business. They include such matters as rail safety legislation; chemicals and plastics regulation; national trade licensing; occupational health and safety laws; wine labelling; food regulation and consumer product safety. The COAG has since formed the Business Regulation and Competition Working Group and the different levels of government in Australia have begun to take concrete steps to deliver on the agenda.[60]

COMPARATIVE ANALYSIS

An analysis of the Australian trade regime discussed suggests a number of observations relevant to India. The first concerns the motivation behind addressing internal barriers and role that it plays in the design of the regime. Australian regime is primarily motivated by a desire to enhance productivity in the face of competition from foreign imports. In fact, the cornerstone of their reform efforts was mutual recognition schemes directly borrowed from a major trade partner. The Australian experience underscores how adjustment to foreign trade pressures can be leveraged as an impetus for reforming domestic markets.[61]

Before embarking upon a discussion on the differences in the two regimes, it is essential to consider their similarities *inter se*. The basic architecture of the legal regime of Australia provides some indications of similarity with the position in India. Both the jurisdictions rely to a greater extent on judicial review to enforce constitutional provisions governing market integration. Under both the jurisdictions examined, individuals and businesses have direct access to courts or tribunals whose task it is to determine whether a measure is incompatible with constitutional requirements for free internal trade. The decisions of these courts and tribunals are final and enforceable. The Supreme Court of Australia is the final arbiter in resolving cases involving impediments to internal trade.[62]

The free trade clause in the Indian Constitution i.e. Article 301 has been borrowed almost verbatim from Section 92 of the Australian Constitution. However, there are some apparent distinctions between the two. Firstly, in the historical context, Section 92 of the Australian Constitution was intended to abolish State custom barriers. However, as a result of judicial decisions, it applies to both the Commonwealth as well as the States. This was recognised in the decision of *James* v. *Commonwealth of Australia*,[63] in which a Commonwealth statute requiring a licence for inter-state shipments of dried fruits was declared unconstitutional by the Privy Council.[64] On the other hand, in India, Article 301 of the Constitution includes both the inter-state and intra-state i.e. within the territory of State, freedom of trade and commerce. That is, it imposes a restriction on the legislative power of both the Parliament and the State Legislatures. Secondly, the presence of the word "absolutely free" in the Australian Constitution presented many difficulties. Trade and commerce could not be regulated by the Centre. The restriction was to be spelled out by the Court whereas in India, the Constitution expressly lays down restrictions on Article 301. The

---

59 *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein*, Case 120/78, European Court Reports, 649 (1979).

60 Adam Liptak, "Supreme Court Upholds Health Care Law in Victory for Obama", *N.Y. TIMES*, 5-4 (June 28, 2012) *available at:* http://www.nytimes.com /2012/06/29/us/supreme-court-letshealth-law-largely-stand.html?page wanted=all; Matt Negrin & Ariane de Vogue, "Supreme Court Health Care Ruling: The Mandate Can Stay", *OTUS NEWS*, (June 28, 2012), *available at:* http://abcnews.go.com/Politics/OTUS/supreme-court-announces-decision-obamas-health-carelaw/story?id=16663839&page=2#.UCF9Ixy1l0s..

61 *Ibid*.

62 *Ibid.*

63 (1936) AC 578.

64 *Supra* note 6.

restrictions are contained in Articles 302 to 305. This is necessary because no freedom is absolute but regulated and relative. Thirdly, Australian Constitution does not have any provision like Article 19(1)(g) of the Indian Constitution.[65]

Another distinguishing architectural aspect is the institutional support for internal trade in Australia. Australia's Productivity Commission is charged with regularly monitoring the effectiveness of its mutual recognition schemes and is credited with improving their operation. A spirit of cooperation characterizes the Australian regime with states given substantial powers that they are meant to exercise in concert with the commonwealth government.

Further, the Australian approach has been very effective in addressing incompatible technical, regulatory and professional licensing standards. Australia adopted the mutual recognition regime as a way of fostering internal trade despite divergent professional labour standards and regulatory requirements between regions. The advantage of a mutual recognition regime is that it is a pragmatic mechanism for overcoming incompatible regulatory regimes and yet does not require a major bureaucracy to oversee. Australia remains very committed to further market integration with the passage of national legislation and cooperative efforts by sub-federal governments to harmonize policies and standards.[66]

Through the active participation of their Council of Australian Governments, Australia also regularly monitors the operation of its internal market and seeks out foreign trade arrangements that serve its reform objectives including, most recently, regulatory cooperation.[67]

Of all the reasons for further comparative analyses, one is particularly important from a practical point of view. India is emerging as one of the largest players in world trade today with the window of opportunity for exporters becoming ever larger and more transparent. It is obviously in the interests of those traders and of India as a whole to ensure that obstructions to the free movement of goods and services within India are kept to a minimum.

65 *Supra* note 6.

66 *Ibid.*

67 *Ibid.*