[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN NATIONAL AIRWAYS PROPRIETARY LIMITED . . . . . } PLAINTIFF;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

GUINEA AIRWAYS LIMITED . . . PLAINTIFF;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

MACROBERTSON-MILLER AVIATION COMPANY LIMITED . . . . . } PLAINTIFF;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

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MELBOURNE, *Oct.* 29-31; *Nov.* 1, 2.

SYDNEY, *Dec.* 14.

Latham C.J., Rich, Starke, Dixon and Williams JJ.

Constitutional Law (Cth.)—Legislative power—"Trade and commerce with other countries and among the States"—Power of Commonwealth to engage in commerce—Corporation—Monopoly—Freedom of inter-State trade—Power of Commonwealth as to Territories—Air navigation—Transport by air—Inter-State airlines—"Territorial" airlines—Statute—Validity—Severability—Airline licence—Regulation purporting to give Commonwealth officer uncontrolled discretion to grant or refuse licence—Substituted regulation invalid—Continuance in force of original regulation—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (i.), 92, 122—*Air Navigation Act* 1920-1936 (*No.* 50 *of* 1920—*No.* 93 *of* 1936)—*Australian National Airlines Act* 1945 (*No.* 31 *of* 1945)—*Acts Interpretation Act* 1901-1941 (*No.* 2 *of* 1901—*No.* 7 *of* 1941), *ss.* 15A, 46 (*b*)—*Air Navigation Regulations* (*S.R.* 1937 *No.* 81—1940 *No.* 25), *reg.* 79 (3).

The Parliament of the Commonwealth has power, under s. 51 (i.) of the Constitution, to create a body corporate with power to conduct inter-State services for the transport by air, for reward, of passengers and goods, but,

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because of s. 92, the corporation cannot be given the exclusive right to conduct such services.

The *Australian National Airlines Act* 1945 constituted the Australian National Airlines Commission as a body corporate (s. 6) with power to establish, maintain and operate airline services for the transport for reward of passengers and goods between States, between Territories and other places in Australia, and within any Territory (s. 19 (1)). The Act required the Commission to exercise its powers as fully and adequately as might be necessary to satisfy the need for specified services and provided that air licences (issued under the *Air Navigation Regulations* made under the *Air Navigation Act* 1920-1936) should cease to be operative so long as adequate services were provided by the Commission (s. 46). The issue of a licence under the *Air Navigation Regulations* to any other person than the Commission was prohibited unless the licensing authority was satisfied that, having regard to the airline licences operated by the Commission, the issue of a licence was necessary to meet the needs of the public with respect to inter-State airline services or territorial airline services (s. 47). The Act further provided that a person should not enter into a contract for the transport of any person or goods in the course of any prescribed inter-State airline service or territorial airline service operated by any person other than a person holding an airline licence in respect of that service not being a licence which was inoperative by virtue of s. 46 of the Act (s. 49).

Held :—

(1) In its relation to airline services between States the Act in general was a law with respect to trade and commerce among the States, within the meaning of s. 51 (i.) of the Constitution, but, in purporting to confer on the Commission a monopoly in respect of services between States and to create the offences mentioned in s. 49, it contravened s. 92 of the Constitution. Subsection 1 of s. 46 and so much of ss. 47 and 49 of the Act as referred to airline services between States were therefore invalid, but were severable.

(2) In so far as they related to territorial airline services, the provisions above mentioned were within the power conferred by s. 122 of the Constitution to make laws for the government of the Territories.

The *Air Navigation Regulations* 1937-1940, made under the *Air Navigation Act* 1920-1936, applied (by virtue of reg. 6) to "(*b*) air navigation in relation to trade and commerce with other countries and among the States, (*c*) air navigation within the Territories, and to aircraft engaged in such navigation." Regulation 79, which provided for the licensing of aircraft, provided, in sub-reg. 3 : "The Director-General may issue a licence (in these regulations referred to as 'an airline licence') upon such conditions, in addition to compliance with these regulations, as the Director-General considers necessary or he may refuse to issue the licence."

Held, by the whole court, that sub-reg. 3 of reg. 79, in its relation to transport between States, contravened s. 92 of the Constitution, and (*Latham* C.J. dissenting) was inseverable and therefore wholly invalid.

Per Rich and *Dixon* JJ.: Statutory Rules 1940, No. 25, which provided for the substitution of the invalid sub-regulation for the original sub-reg. 3 of reg. 79, did not disclose an intention to repeal the original, independently of the adoption of the new, sub-regulation, and, the latter being invalid, the original sub-reg. 3 remained in force.

DEMURRERS.

Australian National Airways Pty. Ltd., a company incorporated in Victoria, brought an action in the High Court against the Commonwealth, its Treasurer and Minister of State for Air and Civil Aviation and the Director-General of Civil Aviation. In its statement of claim the plaintiff alleged that it was formed for the purpose of and had for many years carried on and was still carrying on the business of carrying passengers, goods and mails for reward by air throughout the Commonwealth; it had for many years carried on, and still carried on, in the course of its said business, regular public transport services each providing for the transport by air for reward of passengers and goods, and operating from one place in Australia to other places in Australia; some of such services had scheduled stopping places in two or more States, and some were wholly intra-State; such services had been and were carried on in accordance with and on routes specified in airline licences purporting to have been issued to the plaintiff by the Director-General of Civil Aviation under Part VII. of the *Air Navigation Regulations*. The statement of claim asserted the invalidity of the *Australian National Airlines Act* 1945 and of particular provisions thereof and of the *Air Navigation Regulations* in terms which are sufficiently indicated in the terms of the declarations claimed. In addition to injunctions which are not here material, the plaintiff claimed:—(1) A declaration that Part VII. of the *Air Navigation Regulations* (Statutory Rules 1937 No. 81 as amended) is not authorized by the *Air Navigation Act* 1920-1936, and is beyond the powers of the Governor-General in Council, and void. (2) Alternatively, a declaration that such Part of the said Regulations, if upon its true construction it confers upon the defendant the Director-General of Civil Aviation an absolute and uncontrolled discretion to refuse to issue, to refuse to renew, or to cancel, any airline licence or licences, is unauthorized, *ultra vires*, and void as aforesaid. (3) A declaration that the *Australian National Airlines Act* 1945 is beyond the powers of the Parliament of the Commonwealth, contrary to the provisions of the Constitution of the Commonwealth, and void. (4) Alternatively, a declaration that ss. 46, 47 and 49 of the said Act are beyond the powers of the said Parliament, contrary to the said Constitution, and void.

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The defendants demurred to the statement of claim on the grounds :—(*a*) That the facts alleged do not show any cause of action to which effect can be given by the Court against the defendants or any of them. (*b*) That Part VII. of the *Air Navigation Regulations* is duly authorized by the *Air Navigation Act* 1920-1936 and is a valid and effective exercise of the powers conferred upon the Governor-General in Council by the said Act. (*c*) That the *Australian National Airlines Act* 1945 is a valid and effective exercise of the legislative powers of the Parliament of the Commonwealth.

The above-mentioned action is referred to hereunder as the first action.

Guinea Airways Ltd., a company incorporated in South Australia, and MacRobertson-Miller Aviation Co. Ltd., a company incorporated in Western Australia, each brought an action against the above-mentioned defendants, the statement of claim in each action being identical with that of the plaintiff in the first action except as to the routes on which services were conducted. The services of Guinea Airways Ltd. were described as follows :—" One of such services has scheduled stopping places in one State and a Territory of the Commonwealth ; one has scheduled stopping places in two or more States ; and some are wholly intra-State. . . . The plaintiff prior to the year 1942 carried on also . . . similar regular public transport services wholly within the Territories of the Commonwealth of Papua and New Guinea. Such services were suspended owing to the war with the Japanese, but the plaintiff is desirous of reopening the said services." The service of MacRobertson-Miller Aviation Co. Ltd. was described as " operating from Perth in the State of Western Australia to Katherine in the Northern Territory, with numerous scheduled intermediate stopping places both in the State of Western Australia and in the Northern Territory."

The defendants demurred to the statement of claim in each of these actions on the same grounds as in the first action.

The three demurrers were heard together. The order in which it was decided that counsel should address the Court is indicated by the following report of the argument.

Barwick K.C. (with him *Coppel* K.C. and *Sholl*), for Australian National Airways Pty. Ltd. By s. 6 of the *Australian National Airlines Act* 1945 the Australian National Airlines Commission is constituted as a body corporate. Its powers and duties are provided for in ss. 19 et seq., the effect of which is to give it a complete trading power in respect of air transport. The effect of ss. 46 and 47 is that when the Commission obtains a licence

for an inter-State (or a "Territorial") airline service any existing licence which would compete with it is suspended so long as the Commission's service is "adequate", and no new licence is to be issued to a competitor unless the licensing authority is satisfied that the Commission's service is not meeting the needs of the public. Subject to the last-mentioned condition s. 47 is directed to giving the Commission a monopoly so far as inter-State and Territorial air services are concerned. The effect of the Act, therefore, is to create a common carrier by air on (among others) inter-State routes and to give the carrier a guarantee against competition so long as it maintains adequate services. The Act in relation to inter-State airlines is not referable to any legislative power conferred by the Constitution unless to the trade and commerce power in s. 51 (i.). Reference to the preamble to the Act will show that this is so. In this Act there are no ambiguities, no matters of construction, calling for reference to the preamble, but it may be looked to as showing what powers the legislature purported to exercise. For the uses which may be made of a preamble, see *Bourne* v. *Keane* (1); *South Australia* v. *The Commonwealth* (2): Cf., as to objects clauses in regulations, *R.* v. *University of Sydney*; *Ex parte Drummond* (3)—see also *Gratwick* v. *Johnson* (4). Paragraph *a* of the preamble obviously relates to s. 51 (i.) of the Constitution. As to par. *b* of the preamble, there is nothing in the Act requiring the Commission to do anything in relation to defence; the Act does not connect the civil air services in any way with defence. As to par. *c*, the Act cannot be said to be a law for the development of the Territories, in respect of which it does nothing more than provide for air services. As to par. *d*, the only provision of the Act touching the carriage of mail is s. 22, which does not oblige the Commission to carry mail; the carriage of passengers and goods, with which the Act is mainly concerned, cannot be regarded as accessory to the carriage of mail. The Act is not a "transport co-ordination Act", but is a straight-out attempt to create a monopoly. [He referred to *R.* v. *Vizzard*; *Ex parte Hill* (5).] Parts II. (ss. 6 et seq., 19 et seq.) and IV. (ss. 46-49) are inseparable parts of one scheme. As s. 92 of the Constitution binds the Commonwealth (*James* v. *The Commonwealth* (6)), it is imported into s. 51 by the words "subject to this Constitution." Accordingly s. 51 (i.) may be expanded to read as a grant of "power to make laws . . . with respect to . . . trade and commerce . . . among the States but so that trade,

(1) (1919) A.C. 815, at p. 841.
(2) (1942) 65 C.L.R. 373, at p. 432.
(3) (1943) 67 C.L.R. 95, at p. 102.
(4) (1945) 70 C.L.R. 1.
(5) (1933) 50 C.L.R. 30, at pp. 47, 49-52, 59, 77.
(6) (1936) A.C. 578; 55 C.L.R. 1.

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commerce and intercourse among the States shall be absolutely free." It follows that the power conferred by s. 51 (i.) is facultative only; it is merely a power to *regulate* trade and commerce, not to prohibit or restrict. As to the meaning of a power to "regulate," see *Attorney-General (Ontario)* v. *Attorney-General (Canada)* (1); *City of Toronto* v. *Virgo* (2); *Attorney-General (Canada)* v. *Attorney-General (Alberta)* (3). The Act is therefore invalid because it does not merely regulate, but is a prohibition of the business of transportation by air. At all events Part IV. is invalid on this view. Part II., if severable, would not be affected by this view, but a legislative power would have to be found to support it. Again, it could be referable only to s. 51 (i.). If Part IV. were severed, Part II. would be simply a law incorporating the Commission and giving it trading powers as a carrier. Such a law would not be within power, because the Commonwealth has not, under s. 51 (i.) or any other provision of the Constitution, any general trading power or any power to create a corporation except in so far as such a power may be accessory to the legislative powers expressly conferred. As to trading power, see *Commonwealth* v. *Australian Commonwealth Shipping Board* (4); *Attorney-General (Vict.)* v. *The Commonwealth* (5); *Heiner* v. *Scott* (6); *Australian Steamships Ltd.* v. *Malcolm* (7). The last-mentioned case treats the power under s. 51 (i.) as being merely a power to regulate. The idea behind a power to regulate has regard to a regulating authority which stands outside the area regulated. A law creating a trading corporation cannot aptly be described as a law with respect to (or with respect to the regulation of) trade and commerce. The power to incorporate is a special power: See *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (8); *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (9). It is not within the power with respect to trade and commerce. On the grounds on which the Act has been challenged, Part VII. of the *Air Navigation Regulations* is also invalid. Regulation 79 (3), as it now stands, offends against s. 92 of the Constitution. It empowers the Director-General to subject the issue of a licence to "such conditions, in addition to compliance with these regulations," as he considers necessary. It is clear that a condition may be imposed which has no relation to considerations of safety and the like as regards air navigation with which the rest of the regulations is

(1) (1896) A.C. 348.
(2) (1896) A.C. 88.
(3) (1916) 1 A.C. 588, at p. 597.
(4) (1926) 39 C.L.R. 1, at p. 9.
(5) (1935) 52 C.L.R. 533, at pp. 561, 562.
(6) (1914) 19 C.L.R. 381, at p. 402.
(7) (1914) 19 C.L.R. 298, at p. 305.
(8) (1909) 8 C.L.R. 330, at p. 410.
(9) (1908) 6 C.L.R. 309, at pp. 344, 345.

concerned. The present sub-reg. 3 of reg. 79 was introduced by Statutory Rules 1940 No. 25. The sub-regulation in its original form in the regulations of 1937 was not open to the same objections.

Ham K.C. (with him *Dean* K.C. and *Ward*), for Guinea Airways Ltd. This plaintiff is interested in inter-State airlines and also in lines between State and Territory and within a Territory. It adopts the argument of the plaintiff in the first action and submits that the provisions of the Act relating to inter-State airlines are invalid and are not severable, and therefore that the whole Act is invalid. Even apart from s. 92 of the Constitution, the language of s. 51 (i.) is not apt to do more than confer a power to regulate. It is not appropriate to the grant of a power to engage in trade, and it has not been regarded as giving such a power. In *Attorney-General (Vict.)* v. *The Commonwealth* (1) the authority of the Commonwealth to carry on the Commonwealth Clothing Factory was attributed to the defence power. That power need not have been invoked if the Commonwealth had, under s. 51 (i.), the power to carry on a business. The Act now challenged purports, not only to create a monopoly in air transport, but also to expropriate the property of those who otherwise would be competitors. It is not supported either by s. 51 (i.) or s. 51 (xxxi.) of the Constitution. If the creation of the monopoly was a "purpose in respect of which the Parliament has power to make laws," the expropriation would be referable to s. 51 (xxxi.). Express powers of control, acquisition and construction of railways are conferred on the Commonwealth by placita xxxii.-xxxiv. of s. 51. These powers would not have been necessary if the Commonwealth had a general power under s. 51 (i.) to engage in transport as a business and to expropriate property for that purpose. Moreover, it was considered necessary to provide (Constitution, s. 98) that the power to legislate with respect to trade and commerce extended to navigation and shipping and to State railways. The navigation and shipping here referred to must necessarily be qualified by the words of s. 51 (i.), "with other countries, and among the States." This provision was unnecessary if the Commonwealth had power to engage in inter-State (or other) transport as a business. Air navigation is not included in the authority of Parliament over trade and commerce, nor, apart from such provisions as s. 98 and those relating to railways, is any form of transportation. Methods of transportation, the vehicles used in transport and the like, are instruments of trade and commerce, but they are not themselves part of the subject matter, "trade and commerce," with respect

(1) (1935) 52 C.L.R. 533.

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to which laws may be made: See *Australian Steamships Ltd.* v. *Malcolm* (1); *New South Wales* v. *The Commonwealth* (2). If transportation is within the concept "trade and commerce" in s. 51 (i.), it is also within the same concept in s. 92, which will present the defendants with a dilemma. Even if transportation is within s. 51 (i.), the power over it is merely a power to regulate, and not a power to engage in the business of transport. A power to trade, limited to trade "with other countries, and among the States," would be a peculiar one, and there is no reason to suppose that s. 51 (i.) was intended to confer such a power. The provisions of the Act relating to Territorial airlines cannot aptly be described as a law "for the government of any Territory" within s. 122 of the Constitution; they merely extend the monopoly which the Act purports to confer in relation to inter-State airlines. A law with respect to trade and commerce between Territories and States or between Territories is not a law for the government of the Territories within the meaning of s. 122. It is significant that s. 51 (i.) expressly confers power to make laws with respect to trade and commerce among the States, and that there is no similar provision in s. 122 or elsewhere in the Constitution in relation to trade and commerce between States and Territories or between Territories. If such a power was thought to be implicit in s. 122, it is curious that s. 92 was not extended to it. A provision such as s. 49 of the *Airlines Act* is not authorized by s. 122 of the Constitution so far as it relates to Territorial airlines; it is a law for the States as well as for the Territories, and it is not justified by any power to be found in the Constitution. Accordingly, Part IV. (ss. 46 et seq.) of the Act is wholly invalid, and it is not severable by reason of s. 15A of the *Acts Interpretation Act*. If Part IV. goes, the Commission is deprived of its monopoly. The rest of the Act, if it stood, would constitute the Commission as a body conducting air transport in competition with others. It is not sufficient to say that this would be a workable scheme; it is not the legislative scheme contemplated by the Act. The monopoly is the gist of the legislative scheme here. The Act, without Part IV., would be a substantially different Act with a different policy. For the purposes of the test applied by *Dixon* J. in *Fraser Henleins Pty. Ltd.* v. *Cody* (3), the monopoly provisions and the other provisions of the Act are inter-dependent: See also *R.* v. *Burgess*; *Ex parte Henry* (4); *Australian Railways Union* v. *Victorian Railways Commissioners* (5). The position

(1) (1914) 19 C.L.R. 298, at p. 333.
(2) (1915) 20 C.L.R. 54, at p. 100.
(3) (1945) 70 C.L.R. 100, at p. 127.
(4) (1936) 55 C.L.R. 608, particularly at pp. 654-658.
(5) (1930) 44 C.L.R. 319, at pp. 386, 387.

here is that there are two reasons why the Act should be held invalid as a whole ; the inter-State provisions and the Territorial provisions are each invalid and are each part of an inseparable scheme.

Maughan K.C. (with him *Weston* K.C. and *Holmes*), for Mac-Robertson-Miller Aviation Co. Ltd. This plaintiff is interested in the provisions of the Act relating to airlines between a State and a Federal Territory. It adopts the arguments of the other plaintiffs as to the invalidity of the Act. Attention is drawn particularly to s. 49 of the Act, which purports to penalize the doing of certain things which might be done within a Territory or outside a Territory. This section purports to make it an offence for someone outside a Territory, e.g., in a State, to make a contract with regard to a Territorial airline service. This cannot be supported by the power with respect to Territories. The only provision in the Constitution to which legislation with respect to Territories generally can be ascribed is s. 122. It stands apart from the other legislative powers. It makes the Commonwealth Parliament sovereign within a Territory, but the jurisdiction is necessarily limited territorially ; the limits are the boundaries of the Territory. The Commonwealth clearly can establish an airline, or a railway, within a Territory, and so far as things within the Territory are concerned, can legislate as it thinks fit. It could, therefore, construct a railway, for instance, within a Territory, and legislate with regard to it, up to the border of the Territory. But, if it wished to extend the railway beyond the border into a State, it would not get any power from s. 122, because the power under that section is to make laws for the government of the Territory. Likewise as to an air service between Territory and State. The *Statute of Westminster*, s. 3, gives the Commonwealth Parliament power to make laws having extra-territorial operation, but that does not enlarge the power conferred by s. 122 of the Constitution ; it is not directed to altering domestic law. In its application to Australia it is directed to the Commonwealth of Australia *vis-à-vis* countries other than Australia and does not alter the powers of the Commonwealth inside Australia as between Territory and State or State and State. No doubt the Commonwealth could give a corporation capacity within a Territory, but it cannot extend that capacity to a State so as to authorize activities within a State unless it has legislative power to do so in relation to the State. On this account, s. 19 (1) (*b*) of the Act is beyond power. It is true that in form that provision is merely an empowering one, but when it is read with other provisions of the Act, particularly the second sub-section and the third sub-section

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(erroneously numbered 2 in published copies of the Act) of s. 19 and ss. 42 and 46, its purport is mandatory in the sense that it purports to declare the law for Australia. Section 46 (2) goes beyond the control of air services in Territories and purports to control outside a Territory air services that have a stopping place within the Territory; this is beyond power. Section 46 is so much of the essence of the Act that, with that section withdrawn from it, it would be a radically different Act; and the same can be said of either of the two sub-sections. In this view the Act must fail as a whole even if only sub-s. 1 of s. 46 (as to inter-State airlines) is bad; that sub-section is an essential part of the scheme of the Act and cannot be severed. Provisions of the Act which show that it is one indivisible Act are ss. 49 and 56. These sections are expressed in universal terms and must stand or fall *in toto*. They cannot be preserved with a limited operation excluding the effect of s. 46 (1). Likewise par. *b* of s. 19 (1) is inseverable from par. *a*. As to severability, see *Pidoto* v. *Victoria* (1).

Tait K.C. and *P. D. Phillips* (with them *T. W. Smith*), for the defendants in the first action.

Tait K.C. It is proposed to deal first with the relation of s. 92 of the Constitution to the *Air Navigation Regulations*. The decision of this Court in *R.* v. *Vizzard*; *Ex parte Hill* (2), and that of the Privy Council in *James* v. *The Commonwealth* (3), establish that the regulations do not contravene s. 92. Part VII. (reg. 79) is concerned with public transport services, and the purpose of the Regulations in that regard is to promote and facilitate transport by air. The power given by reg. 79 (3) to the Director-General to refuse to issue a licence is not a power that can be exercised arbitrarily; it is not an uncontrolled power to refuse which can amount to a power to prohibit and thus contravene s. 92. The power to issue a licence upon conditions and the power to refuse must be exercised for the purpose for which the power is given, and the purpose is to be ascertained by an examination of the whole of the Regulations, their nature and subject matter (*Shrimpton* v. *The Commonwealth* (4); *Stenhouse* v. *Coleman* (5); *Swan Hill Corporation* v. *Bradbury* (6); *R.* v. *Mahony*; *Ex parte Johnston* (7)). An examination of the

(1) (1943) 68 C.L.R. 87, at pp. 107, 110, 118, 126.
(2) (1933) 50 C.L.R. 30.
(3) (1936) A.C. 578; 55 C.L.R. 1.
(4) (1945) 69 C.L.R. 613, at pp. 619, 626, 628-630.
(5) (1944) 69 C.L.R. 457, at pp. 466, 467, 472.
(6) (1937) 56 C.L.R. 746, at pp. 757, 758.
(7) (1931) 46 C.L.R. 131, at pp. 140, 141.

Regulations and the *Air Navigation Act*, upon which they are based and which is a valid piece of legislation, shows that the Regulations deal with the subject matter of the Act, air navigation. The power to refuse a licence is a necessary and proper incident or step in the system of control and regulation of air navigation (inter-State and otherwise) which is set up by the Regulations and which, as to inter-State services, is not inconsistent with s. 92. Matters that are relevant to the purpose of reg. 79 are not limited to the mere safety of the machines used in the transport. The purpose of the power conferred by reg. 79 (3) is to provide efficient and proper services. The Director-General can properly have regard to considerations material to a co-ordinated system of air transport. He can consider the question of competition between services and may conclude that unlimited competition is not in the public interest. Where there is already an adequate service on a particular route it would not be in the interest of efficiency to grant another licence for the same route; therefore the Director-General could properly refuse to issue more than one licence for that route. In *R.* v. *Vizzard*; *Ex parte Hill* (1) the decision was that the requirement under the New South Wales Act there in question of a licence for a motor vehicle to carry goods by road in New South Wales (including an inter-State journey) was not a hindrance or obstruction of inter-State trade; on the contrary (so it was held), it would make for the facilitation and co-ordination of inter-State transport. The motor truck with which the case was concerned was regarded as being engaged in trade and commerce, as a means of transport, for the purpose of inter-State commerce. The power of the licensing authority under the New South Wales Act to grant or refuse a licence was expressed in general terms; the Act indicated certain matters which should be taken into account, but the authority was not limited to those matters. The Act was expressed in its title to be an Act for the co-ordination of transport: A similar general purpose, though confined to air transport, is indicated in the *Air Navigation Regulations*. The considerations which in that case were found to be conclusive of the validity of a State Act must have the same force in respect of a Commonwealth Act or regulations thereunder: See *Riverina Transport Pty. Ltd.* v. *Victoria* (2). *R.* v. *Vizzard*; *Ex parte Hill* (3), is supported by *Bessell* v. *Dayman* (4); *Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (5): See also

(1) (1933) 50 C.L.R. 30: See pp. 47, 50, 51, 77, 82, 94.
(2) (1937) 57 C.L.R. 327, at p. 340.
(3) (1933) 50 C.L.R. 30.
(4) (1935) 52 C.L.R. 215: See pp. 218, 219.
(5) (1935) 53 C.L.R. 493: See pp. 503, 508, 509.

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James v. *The Commonwealth* (1); *Hartley* v. *Walsh* (2); *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (3); *Willard* v. *Rawson* (4). *Riverina Transport Pty. Ltd.* v. *Victoria* (5) is perhaps closer than the earlier cases to the present case. There the Court upheld the validity of a Victorian Act which, as part of a scheme for limiting uneconomic competition in transport and obtaining a more efficient service, prohibited the carriage of goods by commercial transport vehicles (including inter-State transport) except under licence and conferred an unrestricted power to grant or refuse a licence. An Act which is designed to increase the volume of trade and commerce across the border and for that purpose prevents the passage across the border of individual goods or of persons or limits the means of passage does not on that account contravene s. 92. In *Gratwick* v. *Johnson* (6) it was held that the challenged provision directly interfered with inter-State travel; it did nothing else but stop people from crossing the border; it could not have increased travel. For the purposes of s. 92 it is not sufficient to say that some movement is "prohibited," that therefore the provision challenged does not "regulate." An Act directed to promoting inter-State trade and commerce must exercise some control, and it is the essence of control that there will be some degree of prevention: See *Metropolitan Meat Industry Board* v. *Finlayson* (7), per *Isaacs* and *Rich* JJ. The result of the decisions is that an Act controlling or regulating inter-State transport to provide for co-ordinated services in an orderly trade does not contravene s. 92 even though it may have the effect of preventing or interfering with the passage of individuals across the border. The requirement of a licence is not inconsistent with s. 92, and the power to refuse a licence is a necessary corollary. The *Air Navigation Regulations* in their relation to inter-State air transport are within this principle. They are designed to regulate and control inter-State trade by air; it cannot reasonably be suggested that they are designed to prohibit it. Similar provisions exist in England, Canada and New Zealand, and in Australia some of the States have applied the Commonwealth Regulations to intra-State air navigation; from this it appears that the control by licensing of aviation is widespread and has been considered reasonable and proper. From the reasons which have been advanced for the contention that the Regulations do not

(1) (1936) A.C., at pp. 621, 622, 625, 626, 630, 631; 55 C.L.R., at pp. 50, 51, 54, 55, 58, 59.
(2) (1937) 57 C.L.R. 372.
(3) (1939) 62 C.L.R. 116, at pp. 127, 152.
(4) (1933) 48 C.L.R. 316.
(5) (1937) 57 C.L.R. 327: See pp. 340, 357, 362, 364-366.
(6) (1945) 70 C.L.R. 1.
(7) (1916) 22 C.L.R. 340, at p. 348.

contravene s. 92 and are valid it follows that a licence may validly be refused if an adequate service already exists on the route applied for. The same reasons go to show that the *Airlines Act* does not offend against s. 92 (it being assumed for the purpose of this particular argument that the Commonwealth has power to establish air services). If without contravening s. 92 the Director-General under reg. 79 (3) can refuse a licence on the ground that an adequate service exists, the Commonwealth Parliament can achieve the same result by statute. In this view it is immaterial whether the existing service is that of the Commonwealth itself or of someone else. So far as s. 92 is concerned a monopoly could be granted, in the interest of efficiency, to one of the existing companies, to a Government, to anyone ; therefore the Act is not obnoxious to s. 92 merely because it is designed to give a monopoly to the Commission which it constitutes so long as the Commission provides adequate services. The only question is whether to do so may properly and reasonably be regarded as facilitating air transport, and it is submitted that air transport is especially a matter in respect of which such a view may reasonably be taken, a matter in which competition is not likely to produce satisfactory results. Accordingly, so far as ss. 46 and 47 of the *Airlines Act* in their relation to inter-State airlines are concerned, all that they do is what the Director-General might have done under the Regulations : They say, in effect, that when on a particular route an adequate service is provided by the Commission the licensing system shall apply in such a way that no other licence shall be granted in respect of that route. It is not material to say that the Commonwealth is conferring a monopoly on itself : The decision in the *Riverina Transport Case* (1), for instance, must have been the same, it is submitted, if the Commonwealth (or a State) had been concerned instead of an individual or trading company. As to the impact of s. 92 on the Act, all that has happened is that the Act has recognized the licensing system of the *Air Navigation Regulations* and has superimposed on it something to meet the particular circumstances with which the Act is concerned. That is so as to Part IV., and this view is borne out by reference to ss. 4, 19, 20, 28 and 29. In this view s. 49 presents no difficulty. It is merely incidental to the scheme of ss. 46 and 47 and is a provision of a kind which might well have been incorporated in the Regulations themselves. Section 19 (1) is merely an enabling section, and likewise s. 25. The Act does not impose on the Commission any duty to step in and oust existing services which are adequate.

(1) (1937) 57 C.L.R. 327.

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P. D. Phillips. In relation to s. 51 (i.) the plaintiffs apparently take the view that, if the *Airlines Act* can be called a law with respect to governmental trading or governmental monopoly, it is taken out of the category of laws with respect to trade and commerce. Where the subject matter of a grant of legislative power is expressed in terms of purpose, of course the validity of legislation professing to be made under it may be tested by reference to purpose, but, where the grant simply describes a subject matter (e.g., s. 51 (i.), " trade and commerce " &c.), the only test is whether the legislation operates on that subject: See *Huddart Parker Ltd.* v. *The Commonwealth* (1); *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2); *Stenhouse* v. *Coleman* (3). Here the question is whether the Act operates on the subject of trade and commerce. It is submitted that it does; it is an Act within the category of s. 51 (i.), and it is not to the point to say that it creates a government monopoly. The plaintiffs also contend, in effect, that the power to make laws with respect to inter-State commerce presupposes commerce with respect to which laws are to be made and that a law which is designed to create a new commercial actor in inter-State commerce—the Government or its instrument—is not a law " with respect to " inter-State commerce because it is not a law dealing with some concept or entity outside itself but is a law which itself creates the inter-State commerce. The contention seems to proceed on the assumption that a law with respect to a given subject matter must destroy, limit or condition the subject matter and cannot in a positive way create it or create the actor itself: Such an assumption is unwarranted. A law creating a capacity to engage in commerce is of necessity a law with respect to (a law which relates to, and operates on, the subject of) commerce. In the United States the power to constitute a government instrumentality with capacity to engage in commerce is well recognized as being within the trade and commerce power. [He referred to *California* v. *Central Pacific Railroad Co.* (4); *Luxton* v. *North River Bridge Co.* (5); *Selected Essays*, vol. 3, pp. 214 et seq., " Federal Incorporation," particularly at pp. 222, 225; *Rottschafer* on *Constitutional Law* (1939), pp. 251, 252, 271 and 272; *Ashwander* v. *Tennessee Valley Authority* (6); *United States* v. *Appalachian Electric-Power Co.* (7); *Oklahoma*

(1) (1931) 44 C.L.R. 492, at pp. 514, 515.
(2) (1931) 46 C.L.R. 73, at p. 104.
(3) (1944) 69 C.L.R. 457.
(4) (1887) 127 U.S. 1 [32 Law. Ed. 150].
(5) (1893) 153 U.S. 525 [38 Law. Ed. 808].
(6) (1935) 297 U.S. 288 [80 Law. Ed. 688].
(7) (1940) 311 U.S. 377 [85 Law. Ed. 243].

v. *Atkinson* (1); *Yakus* v. *United States* (2).] A similar view has been taken in Canada: See *King* v. *Eastern Terminal Elevator Co.* (3). The terms in which ss. 98 and 100 of our Constitution are expressed suggest that the bearing of the American doctrines on s. 51 (i.) of our Constitution was recognized: See *Quick and Garran*, Notes to s. 100. In Australia it appears to have been assumed that the power under s. 51 (i.) with regard to overseas trade and commerce extended to the creation of corporations with certain trading functions such as transportation: See *Crowe* v. *The Commonwealth* (4) in which the validity of the *Dairy Produce Export Control Act* 1924-1935 was challenged on a variety of grounds, but there was no suggestion that the Act was beyond the overseas commerce power because it constituted a Board with commercial functions in the matter of overseas carriage. Other similar Acts have been passed by the Commonwealth Parliament.

[DIXON J. referred to the *Commonwealth Shipping Act* 1923; *Commonwealth* v. *Australian Commonwealth Shipping Board* (5).]

In previous cases under s. 51 (i.) and s. 92 the Court has always been faced with transport connected with commerce itself, and the debate has been whether the transport was commerce or was an instrument of commerce. The inter-State road transport cases were all concerned with goods which were objects of commerce; none of them was concerned with the carriage of passengers. The plaintiffs seem disposed to assume that the carriage for reward of persons not engaged in commerce is itself commerce for the purposes of s. 92. It is submitted that it is commerce for the purposes of s. 51 (i.) also.

Sugerman K.C. (with him *Dignam*), for the defendants in the second and third actions. The defendants in these actions adopt the arguments of counsel for the defendants in the first action as to ss. 51 (i.) and 92 of the Constitution. As to the Territories, the relevant constitutional provisions are ss. 51 (xxxix.), 52 and 122 and covering clause 5 of the Constitution Act. Theoretically there are perhaps two questions, (1) of the power to conduct airlines at all under the power to govern the Territories, and (2) of the power to conduct airlines between Territories and States. As the power to govern the Territories is a plenary power, the answer to the first question is clear. That being so, it may be that the second question does not raise any difficulty of substance. The power to govern

(1) (1940) 313 U.S. 508 [85 Law. Ed. 1487].
(2) (1943) 321 U.S. 414 [88 Law. Ed. 834].
(3) (1925) 3 D.L.R. 1.
(4) (1935) 54 C.L.R. 69.
(5) (1926) 39 C.L.R. 1.

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the Territories must be considered in the light of the general considerations as to extra-territoriality which are discussed in *Croft* v. *Dunphy* (1) and *Crowe* v. *The Commonwealth* (2): See also *Ffrost* v. *Stevenson* (3). The *Statute of Westminster* need not be considered. The question of the power of the Commonwealth as to airlines to and from Territories is governed by the same considerations as the question, for instance, of the power of the legislature of New South Wales to undertake an air transport service between Sydney and New Zealand; it is not a question that presents any special difficulties. In this connection three aspects of the *Airlines Act* require consideration, (1) the merely facultative provisions, (2) the penal provisions, and (3) the application of the licensing system. No question arises, in respect of the first or third of these matters, of "government"—or of the "operation" of the legislation—outside the Territories. With the possible exception of the penal provisions, there is nothing in the Territorial provisions of the Act which requires enforcement in or by the States. If an aircraft owned by the Commission flies from a Territory to a State, it can be regarded for the purposes of the present actions as having the same subjection to the law of the State as any aircraft of a private enterprise. If the State passed an Act to prohibit such flights a question of inconsistency might arise under s. 109 of the Constitution, but no such question arises in the present proceedings. Section 19 (1) (*b*) of the Act does not raise such a question; nor does s. 46 (2). Subsection 2 of s. 46 is directed only to the problem of licensing transport into and out of a Territory; it has been carefully limited by the words "stopping places . . . not being places in a State," and s. 46 (1) contains a similar limitation. If the challenge to the Territorial provisions has any substance at all, it is in relation only to the penal provisions. Section 49 refers to "any prescribed inter-State . . . or Territorial airline service." If it is not valid as to inter-State services, it is clearly severable. As to Territorial services, it is supported by s. 122 and covering clause 5 of the Constitution as a law "made by the Parliament of the Commonwealth under the Constitution" and, therefore, "binding on the courts, judges, and people of every State and of every part of the Commonwealth." In any event the only difficulty that can arise under this provision will be one that goes, not to validity, but to enforcement. Regarded purely as a territorial law creating offences which have ingredients consisting in acts committed outside a

(1) (1933) A.C. 156: See p. 167.
(2) (1935) 54 C.L.R. 69: See pp. 85, 90, 93.
(3) (1937) 58 C.L.R. 528, at pp. 556-558, 562, 563.

Territory, s. 49 may present difficulty as to the prosecution of offences if the position is that they are cognizable only within the Territories and by the Courts of the Territories. It may be that the section will not be effective unless in the case of a defendant who is found in a Territory and prosecuted there, but that does not make the section invalid. The plaintiffs have contended that the whole Act must fail if certain of its provisions are found to be invalid. The question of severability presents itself in two main aspects. In the first place it was said that the provisions of Part IV. are inseverable as among themselves; that is to say, if the provisions of Part IV. relating to inter-State airlines are invalid, those as to Territorial airlines cannot stand separately, and vice versa. Then it was contended that Part IV. as a whole is such an essential part of the Act that, if it goes, the whole Act must go. It is submitted that in whichever of these aspects the question arises there is a clear case of severability. The language, framework and arrangement of the Act show clearly that it has been drafted so as to render its various parts severable. This could not be indicated more clearly unless, perhaps, by saying expressly: "The various parts of this Act shall be severable." It has been asserted by the plaintiffs that the Act has one dominant purpose, "monopoly." That this is unfounded is clear from the long title of the Act. Moreover, in the preamble there is a clear separation of objects. In s. 4 "inter-State airline service" and "Territorial airline service" are separately defined and are dealt with in separate paragraphs in the definition of "adequate airline service," and this distinction is carefully preserved in s. 19 (1) by the manner in which the various kinds of services are dealt with in separate paragraphs. Another possible type of service in relation to which the question of severability might arise—overseas services—is dealt with separately in the last sub-section of s. 19. In s. 46 the enactment as to inter-State airlines is in the first sub-section and as to Territorial airlines in the second, and in s. 47 a similar separation is effected by pars. *a* and *b*. Section 49, as already mentioned, expressly distinguishes between inter-State and Territorial airlines, and does so at the expense of multiplying words; if mere brevity had been the object, a general or composite phrase could have been used. Accordingly, the Act presents the problem of severability in its simplest form—the "blue pencil" form—in which all that need be done is to strike out such words as are beyond power. Putting aside for the moment the Territorial services, the Act discloses two distinct purposes, (1) to set up inter-State services, and (2) to render them exclusive by force of the licensing provisions in ss. 46 (1) and 47 (*a*).

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If the second purpose fails, Part II. of the Act, which does no more than give power to set up services, will operate in precisely the same way as it would have operated if the second purpose had not failed; the only result of the failure is that the services do not get the benefit of the monopoly. Similarly as to Part III., the provisions as to compulsory acquisition of property. This Part and Part IV. cannot be read together so as to enable one to say that the power of acquisition is conferred solely for the purpose of acquiring aircraft for use in an exclusive service. In s. 42 the phrase "purposes of this Act" means the purposes defined in Part II. No purposes are defined in Part IV. Accordingly, if Part IV. fails, whether wholly or in part, Parts II. and III. will not be affected, and it follows that the compensation provisions of Part V. will stand with Part III. Under s. 15A of the *Acts Interpretation Act* 1901-1941 the onus is on the plaintiffs to displace the presumption of severability, which requires them to show a single purpose as the basis of the Act. They have failed to discharge the onus. The Act discloses a combination of purposes, such that the failure of any one will leave the remainder intact. As to Parts III. and V., the failure of any of the purposes will not call for any striking out or reading down of words; it will limit the purposes to which those Parts will extend, but no alteration of words is required to give them operation in the more limited field. [As to the application of s. 15A of the *Acts Interpretation Act*, he referred to *Newcastle and Hunter River Steamship Co. Ltd.* v. *Attorney-General for the Commonwealth* (1); *R.* v. *Poole*; *Ex parte Henry* [*No.* 2] (2); *Pidoto* v. *Victoria* (3); *Fraser Henleins Pty. Ltd.* v. *Cody* (4).]

Barwick K.C., in reply. The Road Transport Cases decided in relation to s. 92 of the Constitution cannot be used as the defendants seek to use them. All those decisions were decisions on State Acts. The basis of the decisions was that the Acts in question were not directed against inter-State trade; they were Acts passed under the residual legislative powers of the States, not—as a Commonwealth Act must be—under a specific power; any effect they had on inter-State trade was merely incidental to an intra-State purpose which was legitimate in itself, and therefore there was no conflict with s. 92. In effect, the Acts were valid because they were non-discriminatory as regards inter-State trade. [He referred to *R.* v. *Vizzard*; *Ex parte*

(1) (1921) 29 C.L.R. 357, at p. 369.
(2) (1939) 61 C.L.R. 634, at pp. 651-653.
(3) (1943) 68 C.L.R. 87.
(4) (1945) 70 C.L.R. 100, per *Latham* C.J., at p. 117; per *Starke* J., at p. 123; per *Dixon* J., at p. 126; per *McTiernan* J., at p. 131; per *Williams* J., at p. 137

Hill (1); *Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard*; (2); *Peanut Board* v. *Rockhampton Harbour Board* (3); *James* v. *Cowan* (4); *James* v. *The Commonwealth* (5).] The Road Transport Cases do not help the Commonwealth. Its legislation, if it is to have the support of s. 51 (i.), must have inter-State trade as its subject matter, and it cannot be said that a restriction imposed by it is merely incidental to the exercise of some other power, to some purpose not related to inter-State trade. The tests applied to State legislation in the Road Transport Cases could be applied to Commonwealth legislation under powers other than that in s. 51 (i.), but where s. 51 (i.) is concerned there is no room for such tests.

[STARKE J. referred to *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (6), per *Dixon* J.]

[DIXON J. referred to *Schenck* v. *United States* (7).]

The only question so far as the Commonwealth is concerned is what laws can it make under s. 51 (i.) in respect to inter-State trade which will not conflict with s. 92. The Privy Council has said in substance that it can make laws which regulate in a facultative way. The suggestion that the *Airlines Act* is within that description, that it facilitates inter-State trade, is quite unreal. As to severability, Part IV. of the Act is inseparably linked with Part II. It is apparent from s. 19 (2) that the Act is based on the supposition that the Commission will occupy the whole field, and it follows from this that the provisions of Part IV. are themselves inseparable. The provisions as to Territorial airlines, if within power, cannot stand by themselves as laws relating solely to the Territories: That is not the scheme of the Act, which shows a clear intention that those provisions shall be directed as a command to the whole of Australia and that they are not merely territorial provisions. The Commission is clearly set up to perform a national service, and, if it cannot do that in the manner which the Act contemplates, the "blue-pencilling" of a part, or of parts, of the Act must result in a substantially different scheme from that of the Act as a whole. Accordingly, even if the inter-State provisions of the Act, minus the monopoly provisions, could in themselves be supported by s. 51 (i.), the failure of the monopoly provisions by reason of s. 92 would be sufficient to bring down the whole Act. The American authorities on the trade and commerce power do not go as far as has been suggested by the defendants; they certainly do not go far enough to

(1) (1933) 50 C.L.R. 30.
(2) (1935) 53 C.L.R. 493.
(3) (1933) 48 C.L.R. 266.
(4) (1930) 43 C.L.R. 386; (1932) A.C. 542; 47 C.L.R. 386.
(5) (1936) A.C. 578, at p. 621; 55 C.L.R. 1, at p. 50.
(6) (1935) 52 C.L.R. 189, at p. 206.
(7) (1918) 249 U.S. 47 [63 Law. Ed. 470].

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justify the inter-State provisions of the *Airlines Act*. They do not assume that there is a general trading power as a substantive activity; they suggest that there is not such a power and are at pains to find that the commercial activities in question in those cases are incidental to some permitted activity.

Dean K.C., in reply. In s. 51 (i.) of the Constitution the phrase "other countries" means countries other than the Commonwealth and its Territories; therefore this provision cannot add anything to s. 122 so far as power to legislate for the Territories is concerned. The incidental power under s. 51 (xxxix.), so far as it is relevant, is subject to the same territorial limitations as s. 122 itself. Section 19 of the *Airlines Act* goes beyond what is merely facultative. It obviously contemplates power to do things as of right. When this section is read with s. 69, which provides for the making of by-laws, it is clear that the Commonwealth is purporting to take power to deal as a Government with matters outside the Territories in a manner not authorized by s. 122. Section 42 of the Act, if valid, would empower the Commission compulsorily to acquire property outside the Territories; this is not authorized by s. 122, and therefore the section is, to that extent at least, invalid. Moreover, the section is not severable. Parts II. and III. of the Act, so far as they relate to Territories, must fail because they exceed the authority of s. 122 of the Constitution; the provisions as to the Territories are inseverable, and the operation of Part IV. is dependent on Part II. so that it must fail with Part II.

Cur. adv. vult.

Dec. 14.

The following written judgments were delivered:—

LATHAM C.J. Demurrers to statements of claim in three actions instituted by air transport companies against the Commonwealth of Australia, the Treasurer of the Commonwealth, the Minister of State for Air and the Director-General of Civil Aviation of the Commonwealth. Australian National Airways Pty. Ltd. is a company which is engaged in the business of providing air services between stopping places in two or more States, and it also conducts entirely intra-State services. Guinea Airways Ltd. conducts a service between a State of the Commonwealth and a Territory of the Commonwealth, another service with stopping places in two or more States, and also intra-State services. This company also proposes to re-establish air services wholly within the Territories of Papua and New Guinea, which were suspended during the war with Japan. MacRobertson-Miller Aviation Co. Ltd. conducts a service between Perth in the

State of Western Australia and Katherine in the Northern Territory, with intermediate stopping places both in the State of Western Australia and in the Northern Territory.

The plaintiffs conduct their various services under licences issued under the *Air Navigation Regulations* (Statutory Rules 1937 No. 81, as amended), reg. 79, which assumed its present form in 1940. Regulation 79, sub-reg. (1), provides that no aircraft shall be used in a regular public transport service except under the authority of and in accordance with a licence issued by the Director-General, and sub-reg. (3) provides that the Director-General may issue a licence upon such conditions, in addition to compliance with the Regulations (which relate to airworthiness of craft, training and licensing of pilots, safety rules for flying &c.), as the Director-General considers necessary, or he may refuse to issue a licence. All the plaintiff companies hold licences which expire on 31st December 1945.

Regulation 6 provides that the provisions of the Regulations, other than those contained in the First Schedule (which are made in pursuance of an International Air Convention—cf. *R.* v. *Burgess*; *Ex parte Henry* (1)) shall apply to—

"(*a*) international air navigation within Australian territory,

(*b*) air navigation in relation to trade and commerce with other countries and among the States,

(*c*) air navigation within the Territories,

and to aircraft engaged in such navigation and aerodromes open to public use by such aircraft."

The plaintiffs claim a declaration that the *Australian National Airlines Act* 1945 and reg. 79 are invalid, together with appropriate injunctions. The defendants have demurred to the whole of each statement of claim upon the grounds that the facts alleged do not disclose any cause of action, that the relevant provisions of the *Air Navigation Regulations* are valid, and that the *Australian National Airlines Act* is valid.

The Act, s. 6, provides for the establishment of a commission to be known as the Australian National Airlines Commission which (s. 6 (2)) is to be a body corporate. The function of the Commission (s. 19) is to provide "airline services for the transport for reward, of passengers and goods by air—

(*a*) between any place in a State and any place in another State;

(*b*) between any place in any Territory of the Commonwealth and any place in Australia outside that Territory; and

(*c*) between any place in any Territory of the Commonwealth and any other place in that Territory."

(1) (1936) 55 C.L.R. 608.

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Section 19 (1) provides that these services are to be provided "with full regard to safety, efficiency and economy of operation." Section 19 (2) is as follows:—

> "It shall be the duty of the Commission to exercise the powers conferred by the last preceding sub-section, as fully and adequately as may be necessary to satisfy the need for the services specified in that sub-section, and to carry out the purposes of this Act."

The plaintiffs founded an argument on this provision to the effect that it showed an intention that it should be the duty of the Commission to satisfy completely by its own services the need for all the services specified, and therefore to establish a monopoly in those services. For the defendants it was contended that this provision meant no more than that it should be the duty of the Commission to supplement existing services in so far as they did not satisfy existing needs from time to time, and not necessarily to insist upon providing the whole of the services. Section 19 (3) (misprinted 19 (2)) provides that the Commission, with the approval of the Minister, may exercise in relation to airline services between any place in Australia and any place outside Australia the like powers as it has in relation to the other airline services referred to in the section.

The Commission is given power to lease or purchase property (s. 21) and is empowered (s. 22) to enter into agreements with the Minister for the transport of mails by air. Section 24 makes the Commission a common carrier, and under s. 25 the Minister may, if he is satisfied that it is in the interests of the development of Australia to do so, direct the Commission to establish, alter or continue to maintain any inter-State or Territorial airline service. There is a provision in s. 25 (2) intended to protect the Commission against financial loss in certain cases where it suffers a loss by reason of carrying out any such direction.

Section 29 applies the provisions of the *Air Navigation Regulations* to the Commission in the same manner as they apply to any other persons. The Treasurer may provide £3,000,000 for the purposes of the Commission (s. 30). Section 37 provides that the Commission shall pay all rates, taxes and charges (other than income tax) imposed by or under any law of the Commonwealth and such other rates, taxes or charges as the Minister specifies. Apparently under this provision the Commission will not be liable to pay income tax, and will only pay such other Commonwealth and State taxes as the Minister may elect to specify.

Section 39 provides for the disposition of any profits derived by the Commission. Such profits may be applied after payment of interest

and repayment of advances in the establishment and development of airline services. Any balance of profits is to be applied in such manner as the Minister, with the concurrence of the Treasurer, directs.

Under Part III. the Commission is given powers of compulsory acquisition of any aircraft or other property required for the purposes of the Commission. No question as to this part of the Act has been raised in these proceedings.

Part IV., containing ss. 46-49, has been the subject of special attention in the arguments submitted to the Court. Section 46, sub-s. (1), refers to inter-State airline services, and sub-s. (2) refers to Territorial airline services. These terms are defined in s. 4. The definitions show that an inter-State airline service is a service which has scheduled stopping places in two or more States, and that a Territorial airline service is one which (not being an inter-State service) has a scheduled stopping place in a Territory of the Commonwealth. Section 4 also contains a definition of " adequate airline service " in the following terms :—

" ' adequate airline service ' means—

(*a*) an inter-State airline service which is adequate to meet the needs of the public for inter-State transport by air between scheduled stopping places of the service ; or

(*b*) a Territorial airline service which is adequate to meet the needs of the public for transport by air between scheduled stopping places of the service of which at least one is within a Territory of the Commonwealth."

Section 46 (1) provides that where an airline licence is issued to the Commission in respect of an inter-State airline service and the Commission has established that service, any airline licence held by any person (other than the Commission or a contractor with the Commission) in respect of any service providing inter-State transport by air between any of the scheduled stopping places of the service established by the Commission shall (with an exception in respect of international airline services) and insofar as it authorizes inter-State transport by air between any of those stopping places of passengers or goods embarked or loaded for transport solely between those stopping places, be inoperative " so long as there is an adequate airline service between those stopping places by reason only of the services operated by the Commission and the services operated by contractors." Section 46 (2) is a corresponding provision relating to Territorial airline services, the precise terms of which will be considered later.

Under these provisions the Commission will obtain a monopoly of inter-State and Territorial services in all cases in which, and so long as, the Commission provides an " adequate airline service."

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Section 47 provides that the licensing authority (that is, the licensing authority under the *Air Navigation Regulations*) shall not issue to any person other than the Commission or a contractor with the Commission, any airline licence (*a*) which would authorize inter-State transport between any scheduled stopping places of any airline service operated by the Commission, or by a contractor with the Commission, or (*b*) which would authorize transport between any scheduled stopping places, not being places in a State, of any airline service so operated, unless and except to the extent to which the licensing authority is satisfied that, having regard to the airline service operated by the Commission or any contractor, the issue of the licence is necessary to meet the needs of the public with respect to inter-State or Territorial airline services.

Section 49 provides that a person shall not enter into a contract to transport by air for reward any person or goods, to be transported by air for reward, or to have any other person or any goods transported by air for reward in the course of the operation of any prescribed inter-State airline service or Territorial airline service operated by any person other than a person holding an airline licence in respect of that service, not being a licence which is inoperative by virtue of s. 46.

Part V. of the Act contains provisions with respect to compensation for property compulsorily taken and for loss or damage suffered by reason of the application of s. 46.

Section 69 authorizes the Commission to make by-laws with respect to various matters relating to the operation of air services.

The Act is introduced by a preamble which recites that it is expedient to provide for the fostering and encouragement of trade and commerce with other countries and among the States, the maintenance and development of the Defence Force, the development of the Territories and the carriage of mail by air. There are no provisions in the Act which relate to defence and the Act has no more relation to defence than any legislation which deals with any means of transport in general terms. The Act provides that the Commission may make contracts for the carriage of mail, but otherwise has no relation to the power to make laws with respect to postal and telegraphic services. The arguments in support of the Act were based upon the trade and commerce power contained in s. 51 (i.) of the Constitution and the power to legislate with respect to the Territories of the Commonwealth: See s. 122 of the Constitution.

The Act provides for the establishment by the Commission of both inter-State airline services and Territorial airline services. Different considerations affect the constitutional validity of these

respective provisions. I propose first to refer to the provisions dealing with inter-State airline services. The relevant provisions of the Constitution are s. 51 (i.), which provides that the Commonwealth Parliament shall have power to make laws for the peace, order and good government of the Commonwealth with respect to " (i.) trade and commerce with other countries and among the States," and s. 92, which provides 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."

It is argued for the plaintiffs that the power to make laws with respect to inter-State trade and commerce does not enable the Commonwealth Parliament to pass legislation creating a corporation and authorizing it to take part in such trade and commerce. This legislative power, it is contended, is limited to regulating such trade and commerce conducted by persons other than the Commonwealth or authorities created by the Commonwealth. The Act does not purport to permit or authorize or require the Commonwealth Government itself to take part in such trade and commerce. The Commission created by the Act, however, is subject in various matters to ministerial control: See, for example, ss. 19 (3), 21 (2) and (3), 25, 31, 32, 33, 35, 37, 38, 39.

It is next contended for the plaintiffs that the Act is directed towards setting up a monopoly for the Commonwealth in all the services to which the Act relates, including inter-State services. The establishment of such a monopoly is said not to be authorized by s. 51 (i.) or any other provision of the Constitution, and to constitute an infringement of s. 92. This argument is based upon the contention that s. 92 protects inter-State transportation as being in itself inter-State trade and commerce, and therefore must concede that under s. 51 (i.) there is power to legislate with respect to inter-State transportation.

It is also argued in relation to services from and to the Territories that the Commonwealth Parliament has no power to make laws with respect to trade and commerce between the States and the Territories. Section 51 of the Constitution gives power only to make laws with respect to trade and commerce among the States and with foreign countries, and contains no reference to the Territories. Section 122, it is conceded, gives full power to make laws for the Territories, but not, it is contended, to project (as it were) Territorial laws into the States so as to give Federal legislative control in any State of any part of a service with any Territory.

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It is contended for the plaintiffs that if any of the provisions to which reference has been made are invalid the whole Act is invalid, because the invalid provisions cannot be severed from the other provisions of the Act.

Further, the operation of the Act depends upon the grant of a licence to the Commission under the *Air Navigation Regulations*. It provides (s. 46) that if the Commission provides an adequate service any licence to competitors with the Commission in respect of that service shall be inoperative. It is contended for the plaintiffs that reg. 79 gives to the licensing authority an uncontrolled discretion not limited by any matters relative to the exercise of any Federal power, and therefore creating an arbitrary power of prohibiting inter-State trade and commerce, and that such a provision is an infringement of s. 92.

For the defendants it is contended that the Act is a law with respect to trade and commerce with other countries and among the States and for the government of the Territories. It is argued that the monopoly of air services which the Act seeks to establish is conditioned upon the provision of adequate services by the Commission, so that the operation of the Act cannot bring about any diminution or restriction of inter-State trade and commerce by air, with the result that the Act does not constitute an infringement of s. 92. It is argued that even if Part IV. of the Act, which contains what have been called the monopoly provisions, is invalid, these provisions are severable from the rest of the Act and that the rest of the Act is valid. It is further contended that the Territorial provisions are valid and are all severable from any provisions relating to inter-State trade and commerce. Regulation 79 of the *Air Navigation Regulations* is said to be valid because it should be regarded as authorizing the granting and refusal of licences only upon grounds which are associated with the legitimate exercise of Federal power in relation to inter-State trade and commerce and to the Territories.

The first question which I consider relates to the power of the Commonwealth Parliament to legislate with respect to air transportation under the trade and commerce power contained in s. 51 (i.) of the Constitution. The Act is an Act which deals entirely with transportation. It does not deal with trade and commerce between the States in the sense of commercial transactions by way of the purchase, sale and exchange of commodities between a person in one State and another person in another State. It has been argued for the plaintiffs that transportation of passengers or goods between States for profit is necessarily trade and commerce among the States.

The plaintiffs must contend that transportation is trade and commerce in order to obtain protection from s. 92. On the other hand, the defendants claim that legislation with respect to transportation is legislation with respect to trade and commerce under s. 51 (i.) so as to justify the Act, but when s. 92 is approached they are willing to draw distinctions between trade and commerce itself and instruments used in trade and commerce, such as aircraft, motor cars or other means of carriage, thus endeavouring to prevent or limit the application to the Act of any considerations arising from s. 92. For the defendants much reliance was placed upon *Willard* v. *Rawson* (1); *R.* v. *Vizzard*; *Ex parte Hill* (2); and *Riverina Transport Pty. Ltd.* v. *Victoria* (3). It was contended that these cases show that a distinction should be drawn between transportation as a subject and trade and commerce as a subject. It is true that in these cases certain statutes were construed as relating to motor cars regarded as integers of traffic and instruments of commerce rather than as relating to the transportation of goods and persons by motor cars. But I think that it is a mistake to regard these cases as establishing the proposition that inter-State transportation is not itself included within the category of inter-State trade and commerce. In *Willard* v. *Rawson* (4), *Rich* J. based his view with respect to the Act there in question (which was a motor car Act requiring registration of motor cars) upon the opinion that the statute was not concerned with trade, commerce or intercourse as such, but only with motor vehicles considered as machines, integers of traffic, users of the highway and potential sources of danger and annoyance to the public; that is, as I understand the distinction, a law with respect to motor cars does not become a law with respect to trade and commerce simply because motor cars can be used in trade and commerce. In *R.* v. *Vizzard* (2), *Rich* J. took the same view of the statute there in question (5). But his Honour, in referring to *McArthur's Case* (6), pointed out that *McArthur's Case* "denied that trade between the States was *limited*" (my italics) "to mere inter-State movement of persons or things" (7), it plainly being conceded that trade between the States *included* such movement. So also his Honour was at pains to point out that the transactions to which the Act related did not include "the actual transfer of goods from one place to another and the actual movement of individuals" (5). *Starke* and *Dixon* JJ., who dissented, each took the view that inter-State transportation was inter-State trade and commerce: See the

(1) (1933) 48 C.L.R. 316.
(2) (1933) 50 C.L.R. 30.
(3) (1937) 57 C.L.R. 327.
(4) (1933) 48 C.L.R., at p. 324.
(5) (1933) 50 C.L.R., at p. 51.
(6) (1920) 28 C.L.R. 530.
(7) (1933) 50 C.L.R., at p. 50.

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report (1). The difference of opinion between the learned judges was based upon the different view taken of the character of the Act in question: See, e.g., per *Dixon* J. (2) as to motor vehicles being regarded as machines, integers of traffic, &c. *Evatt* J. drew a distinction between trade and commerce and instruments of trade and commerce, but referred to s. 92 as postulating "the free flow of goods inter-State" and said that that produced the result that, "consignment and delivery, being part of commercial intercourse," could not be prevented or obstructed by State legislation (3). *McTiernan* J. said "trade, commerce and intercourse includes the carriage of passengers or goods for hire or in the course of any trade or business" (4). Accordingly I am of opinion that *Willard's Case* (5) and *Vizzard's Case* (6) do not prevent the Court from holding that inter-State transportation, certainly when conducted for profit, is itself inter-State trade and commerce.

In construing both s. 51 (i.) and s. 92 it should be remembered that the words to be considered are not only "trade and commerce," but "trade and commerce among the States." The conception of trade and commerce among the States is in my opinion quite inseparable from movement of goods and persons. Commerce in itself does not necessarily involve transportation or movement of goods. There may be a sale of goods on the spot by a vendor to a purchaser, the commercial transaction being concluded without any movement of the goods. But when the trade or commerce is inter-State there must be either actual or contemplated movement of goods or persons.

In my opinion this view is strongly supported by the words of s. 92. Section 92 does not merely refer to trade, commerce and intercourse among the States, but it refers to such trade, commerce and intercourse "whether by means of internal carriage or ocean navigation." Internal carriage and ocean navigation are not only means by which trade and commerce may incidentally be conducted or effectuated. They are means without which *inter-State* trade and commerce cannot possibly take place.

In the United States of America, where the Congress has power to regulate commerce among the States, it is well settled that inter-State transportation is inter-State commerce. Such transportation includes the transportation of persons as well as of goods, of telegrams, of gas, of electric current. All this is trade and commerce: See *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (7);

(1) (1933) 50 C.L.R., at pp. 56, 59.
(2) (1933) 50 C.L.R., at p. 68.
(3) (1933) 50 C.L.R., at p. 87.
(4) (1933) 50 C.L.R., at p. 98.
(5) (1933) 48 C.L.R. 316.
(6) (1933) 50 C.L.R. 30.
(7) (1878) 96 U.S. 1 [24 Law. Ed. 708].

Gloucester Ferry Co. v. *Pennsylvania* (1); *United States* v. *Hill* (2). In the leading case of *Gibbons* v. *Ogden* (3) it was held that navigation itself was commerce, and this case has been followed and applied on very many occasions: See *County of Mobile* v. *Kimball* (4). In *Caminetti* v. *United States* (5) the *Mann Act*, prohibiting the transportation of women over State lines for immoral purposes, was upheld and it was again decided that the Congress had power to legislate under the commerce power with respect to the transportation of passengers.

The Act is essentially a transport Act. It deals with airline services which are conducted for profit. They are, in the ordinary sense of the word, commercial enterprises and are inter-State in character. By these services passengers may be carried who are not on commerce bent, e.g. holiday-makers and school children. So also goods may be carried which are not being conveyed for the purpose of being bought and sold. But those who provide the services carry on the business of providing air transport between the States. In my opinion the providers of these services, irrespective of the relation to trade and commerce of the persons whom or the goods which they carry, are themselves engaged in inter-State trade and commerce. The Act, being a law with respect to inter-State transportation, is, in my opinion, a law with respect to trade and commerce among the States.

It is further argued, however, that the power to make laws with respect to trade and commerce does not include a power to prescribe the persons who may engage in trade and commerce, and, more particularly, does not include a power to create a corporation for the purpose of engaging in trade and commerce. It is pointed out that s. 51 (xx.) entitles the Commonwealth Parliament to make laws with respect to "foreign corporations and trading or financial corporations formed within the limits of the Commonwealth." These words assume that the corporations in respect of which this legislative power is exercised are corporations which exist by reason of some law other than a Federal law enacted under this power (*Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (6)).

In the case of some of the subjects with respect to which the Commonwealth Parliament is given power to legislate under s. 51, it is plain that the power is a power to make laws with respect to the conduct of persons other than the Commonwealth or any agency of

(1) (1885) 114 U.S. 196 [29 Law. Ed. 158].
(2) (1919) 248 U.S. 420 [63 Law. Ed. 337].
(3) (1824) 22 U.S. 1 [6 Law. Ed. 23].
(4) (1881) 102 U.S. 691 [26 Law. Ed. 238].
(5) (1917) 242 U.S. 470 [61 Law. Ed. 442].
(6) (1909) 8 C.L.R. 330.

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the Commonwealth. Placita (xvii.) bankruptcy and insolvency, (xxi.) marriage, (xxii.) divorce and matrimonial causes, (xxiii.) invalid and old-age pensions, (xxvii.) immigration and emigration, (xxviii.) the influx of criminals, and others, are matters in which the Commonwealth does not take part, but in respect of which the Commonwealth Parliament may legislate. In the case of other subjects, however, it appears to me to be quite plain that the nature of the subject is such as to entitle the Commonwealth to make laws with respect to the Commonwealth (by itself, or by a Commonwealth agency) taking part in the very subject matter itself. For example, placita (ii.) " taxation " is plainly taxation by the Commonwealth; (iii.) " bounties " are bounties to be granted by the Commonwealth; (iv.) " borrowing money " relates to borrowing money by the Commonwealth; (v.) " postal &c. services " include such services provided by the Commonwealth; (vi.) " the naval and military defence of the Commonwealth " includes defence by the Commonwealth. Under the power to legislate with respect to " (vii.) lighthouses, lightships, beacons and buoys " Parliament may authorize the Commonwealth to establish lighthouses &c. So also under (viii.) " astronomical and meteorological observations " the Commonwealth Parliament may legislate, as in fact it has done, for the actual making and control of such observations. Similarly, under (xi.) " census and statistics " the Commonwealth itself can take a census. Under (xiii.) " banking other than State banking " the Commonwealth Parliament can create a bank, as in fact it has done in the case of the Commonwealth Bank. It is unnecessary to extend the illustrations beyond those already given. There can be no reason in law why the power to make laws with respect to trade and commerce with other countries and among the States should not include a power to make laws enabling the Commonwealth itself, or a body established by the Commonwealth, to take part in such trade and commerce.

It is true that the Commonwealth has no general power to create corporations, but when the Commonwealth Parliament exercises a legislative power it is for the Parliament, subject to any constitutional prohibition, to determine the means of securing an object which it is legitimate under the power for the Parliament to pursue. Thus the establishment of the Commonwealth Bank was a means of giving effect to an approved policy with respect to banking. In the well-known case of *McCulloch* v. *Maryland* (1) it was held that if Congress can exercise a power it can create a corporation to carry that power into effect: See *Jumbunna Coal Mine No Liability* v.

(1) (1819) 17 U.S. 316 [4 Law. Ed. 579].

Victorian Coal Miners' Association (1), relating to the creation of corporations for the purpose of giving effect to the industrial arbitration power.

In the United States of America it has been held that Congress can, under the commerce power, provide for the incorporation of a bridge company to build a bridge between two States (*Luxton* v. *North River Bridge Co.* (2)); or to construct railways across States (*California* v. *Central Pacific Railroad Co.* (3)). Such decisions were doubtless responsible for the grant of power to the Commonwealth Parliament to make laws with respect to the acquisition and construction of railways by the Commonwealth but subject to an express limitation requiring the consent of the State concerned: See Constitution, s. 51 (xxxiii.) and (xxxiv.). If this limitation had not been introduced, the Commonwealth Parliament would have been able to create corporations to construct and operate inter-State railways in Australia as it thought proper.

For these reasons in my opinion the fact that the Act authorizes the establishment by the Commonwealth of a corporation to carry on inter-State trade and commerce does not constitute any objection to the validity of the Act.

If s. 51 (i.) of the Constitution were the only relevant constitutional provision it may be that the Commonwealth Parliament could create any monopoly of which it approved in any form of inter-State transportation. But the inter-State trade and commerce power of the Commonwealth Parliament is limited by s. 92. Can such trade and commerce, including as it does inter-State transportation, be said to be absolutely free if a Federal law can confer an exclusive right to provide such transportation upon a single approved Federal agency? If this can be done in the case of air transport it can also be done in the case of land and sea transport.

The next question for consideration, therefore, is whether the Act, in so far as it deals with inter-State transport, infringes s. 92. In the first place, for reasons already stated, inter-State transportation is protected by s. 92, which specially provides for the freedom of inter-State movement of persons and goods whether by internal carriage or ocean navigation. Inter-State air transport is plainly a form of internal carriage.

The mere giving of authority to any person, whether a natural person or a corporation, to enter into inter-State trade and commerce cannot be any infringement of s. 92. But the Act is plainly designed,

(1) (1908) 6 C.L.R. 309.
(2) (1894) 153 U.S. 525 [38 Law. Ed. 808].
(3) (1888) 127 U.S. 1 [32 Law. Ed 150].

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in some of its provisions, to give a monopoly of inter-State air transport to the Commission, and therefore to exclude all other persons from providing such transportation. Reference has already been made to ss. 19 (2), 46, 47 and 49.

The Act is very different from the statutes which were considered in *Willard's Case* (1) and *Vizzard's Case* (2). It cannot be described as an Act for the purpose of co-ordinating and regulating transport. These provisions of the Act (ss. 46, 47, 49) will (as the Commission establishes adequate services) absolutely prevent any person or company other than the Commission or a contractor with it providing inter-State air transport, however efficient and safe and satisfactory that transport might be.

It is true that the establishment and continuance of the monopoly of the Commission is conditioned upon the provision of adequate services by the Commission. It may be doubted whether this provision can be taken at its face value. Theoretically, as soon as the Commission failed to provide an "adequate service," other persons could obtain licences and establish services, and existing licences, if any, would cease to be inoperative. But an airline service cannot be organized overnight, and it cannot be maintained in operation if at any moment the Commission could by using more aeroplanes or otherwise improving facilities, provide an adequate service, and so make the licence of any competitor inoperative. Thus the statutory provision that, if the Commission does not provide adequate services, it will be open to other persons to do so may well be an illusory guarantee of adequate services for the users of airlines. But I deal with the question apart from these considerations, which may be said to depend upon opinion or anticipation rather than upon actual existing fact.

The Act has been drafted upon the basis that if adequate services are provided for the users of airlines, there can be no infringement of s. 92. But if, as I have said, s. 92 protects inter-State carriers as well as persons who use the services of carriers for the transport of goods or passengers, the fact that the Act will secure adequate services (if that can be taken to be the case) does not exclude the application of s. 92. I consider the operation of the Act, therefore, not only in relation to members of the public using inter-State air services, but also in relation to persons who are engaged, or who may desire to engage, in the business of providing inter-State air services.

In *James* v. *The Commonwealth* (3) the Privy Council expounded the meaning of s. 92. I have endeavoured to apply the principles

(1) (1933) 48 C.L.R. 316.
(2) (1933) 50 C.L.R. 30.
(3) (1936) A.C. 578; 55 C.L.R. 1.

of this decision in a number of cases, and I refer particularly to *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (1) and *Gratwick* v. *Johnson* (2). I venture to repeat what I said in the former case: " One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further, a law which is ' directed against ' inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade, notwithstanding s. 92 " (3).

In the present case the Act is directed against all competition with the inter-State services of the Commission. The exclusion of other services is based simply upon the fact that the competing services are themselves inter-State services. The Act is a prohibition, with a single exception, of such services, and that prohibition is quite independent of any considerations relating to safety, efficiency, air-worthiness, &c., which otherwise might have been relied upon as the basis of an argument that the statute regulated such services in the sense of introducing regular and orderly control into what otherwise might be unregulated, disorderly, possibly foolishly competitive, and therefore inefficient services. The exclusion of competition with the Commission is not a system of regulation and is, in my opinion, a violation of s. 92. If a provision of this character does not infringe s. 92 when applied to carriers, I can see no answer to the contention that a similar provision might be applied to all inter-State traders without any breach of s. 92. If that were the case, the Commonwealth Parliament could create a corporation and give it an exclusive right to engage in every form of inter-State trade and commerce, or, without creating a corporation, could give an exclusive licence to a particular person to engage in such trade and commerce. Such a result would reduce s. 92 to almost complete insignificance. In my opinion Part IV. of the Act, so far as it relates to limitations in respect of inter-State airline services, is invalid because it offends against s. 92 of the Constitution.

It is now necessary to consider the provisions of the Act relating to Territorial airlines. In this case no difficulty arises from s. 92, which applies only to trade and commerce among the States, and not to trade and commerce as between the States and any Territory or as between the Territories themselves. As already stated, s. 51 (i.) is

(1) (1939) 62 C.L.R. 116. (2) (1945) 70 C.L.R. 1.
(3) (1939) 62 C.L.R., at p. 127.

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irrelevant as a source of power. A Territory cannot be held to be "another country" within the meaning of that provision. Section 122 provides that the Parliament may make laws for the government of any Territory. Under this provision the Parliament has full power to make such laws for the government of a Territory as it thinks fit.

Thus the Commonwealth Parliament in the case of a Commonwealth Territory has the same power as a colony of Australia had before Federation. The Commonwealth legislative power in respect of a Territory to-day includes all the power of a State Parliament in respect of a State, but includes that power as if it were not limited by the co-existence of the Commonwealth with certain paramount powers. The Commonwealth Parliament may make laws which completely control all matters within a Territory, and therefore can provide for a monopoly of air services and exclude all competition within a Territory. It can, as between Territory and Territory, establish complete control over air services because it can in each Territory control all landings and all departures and all other activities in relation to the services. But a law for the government of a Territory cannot operate as law in a State. For example, a law for the government of the Northern Territory can control any matter in the Northern Territory and therefore can prevent aircraft from Western Australia landing in the Territory. So also under a Territorial law aircraft could be prevented from leaving the Territory for Western Australia or for any other place. But no law passed under a power to make laws for the government of the Northern Territory can operate as law in Western Australia or in any other State. The position is exactly the same as between, for example, Western Australia and South Australia. A Western Australian law does not operate in South Australia and vice versa. A Western Australian law cannot control the conduct of persons in South Australia so as to make them amenable to any punishment in South Australia—or elsewhere than in Western Australia. So a Territorial law, though fully effective in relation to the Territory, cannot be enforced outside the Territory in respect of which it is made.

Thus the Commonwealth Parliament can legislate under s. 122 with respect to what may be called the Territorial end of a service between a Territory and a State, even though a Territorial law cannot deal with the State end of such a service. In this sense, but in this sense only, the Commonwealth Parliament can provide for the establishment of an air service between a Territory and a State—in just the same way and to the same extent as the Commonwealth Parliament can authorize the establishment of an air service between

Australia and India. Such legislation would be effective in Australia, but it could not change the law or operate as law in India, and the effective establishment of the service would depend upon Indian co-operation. Thus provisions with respect to services between the Territories and the States are not effective, in my opinion, otherwise than as Territorial law, that is, as controlling the services by law in the Territory and not elsewhere. There cannot, however, in my opinion, be any objection to the enactment of an Act so far as it authorizes the establishment in a Territory of a service between the Territory and the State. Whether the service can be established in fact depends, however, not only upon the Commonwealth, but also upon the State concerned, as in the case of the illustration which I have given with respect to India.

These limitations upon the possible scope of Territorial law are, I think, recognized in the Act. Section 46 (2) is in the following terms :—

" Where an airline licence is issued to the Commission in respect of a Territorial airline service and the Commission has established that service, any airline licence held by any person, other than the Commission or a contractor, in respect of any airline service which provides transport by air between any of the scheduled stopping places of the service established by the Commission, not being places in a State, shall, by virtue of this section (unless it has been issued in respect of a section of an international airline service authorized by the Commonwealth) and insofar as it authorizes transport by air between any of those stopping places of passengers or goods embarked or loaded for transport solely between those stopping places, be inoperative so long as there is an adequate airline service between those stopping places by reason only of the services operated by the Commission and the services operated by contractors."

This provision must be read with the following definitions contained in s. 4 :—

" ' Australia ' includes the Territories of the Commonwealth."

" ' inter-State airline service ' means a service providing for the transport by air, for reward, of passengers or goods and operating from one place in Australia to another place in Australia and having scheduled stopping places in two or more States."

" ' Territorial airline service ' means a service (not being an inter-State airline service) providing for the transport by air, for reward, of passengers or goods and having a scheduled stopping place in a Territory of the Commonwealth."

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Thus a Territorial airline service is either a service with all its stopping places in a Territory or Territories, or with stopping places in a Territory or Territories and also in a single State. If it had stopping places in two or more States, it would be an inter-State service and would therefore be excluded from the category of Territorial airline services by reason of the words in the definition of such services " not being an inter-State airline service."

The definitions which I have mentioned produce the result that services which provide inter-State transport are not affected by ss. 46 (2) and 47 (*b*). In those sections the words " not being places in a State " are important. They show that intra-State transport in not affected by these provisions. Thus first, ss. 46 (2) and 47 (*b*) cannot infringe s. 92, and, secondly, they do not purport to give any operation within a State to laws enacted under s. 122 for the government of a Territory. In my opinion there is no valid objection to s. 46 (2) or s. 47 (*b*) upon constitutional grounds.

Section 49 creates offences in relation to inter-State airline services as well as in relation to Territorial airline services. These offences consist in certain dealings with persons operating airline services without a licence or with a licence rendered inoperative by s. 46. If the licensing provisions are invalid with respect to inter-State services (a matter with which I still have to deal), s. 49 is invalid in relation to inter-State services. Further, if the provisions of s. 46 as to inter-State licences becoming inoperative are invalid (as in my opinion they are) s. 49 is invalid on that ground in relation to inter-State licences.

I am therefore of opinion (1) that the provisions authorizing the establishment of the Commission and its entry into the service of inter-State air transportation which are contained in Part II. of the Act are not invalid upon any of the grounds relied upon by the plaintiffs. (I express no opinion with respect to s. 37, authorizing the Minister to exempt the Commission from the payment of State taxes) ; (2) that Part IV., Limitations in respect of Airline Services, is invalid in its application to inter-State services by reason of infringement of s. 92 ; that is, ss. 46 (1) and 47 (*a*) are invalid and s. 49 is invalid in so far as it applies to inter-State services.

The next question which arises is whether the invalid provisions contained in Part IV. can be severed from the rest of the Act so as to allow the rest of the Act to stand.

It was contended for the plaintiffs that the provisions of the Act show a clear intention of Parliament which could be described in the words " monopoly or nothing," and that if the monopoly provisions, that is Part IV., fail, the whole Act must fail. It was argued in a

general way that the Commonwealth Parliament would not think of entering into air services at all upon a competitive basis, but this argument, unless founded upon the actual terms of the Act, is only speculation upon policy, as to which varying views may be entertained with equal propriety. A court cannot merely assume that monopoly is of the essence of the Act. The intention of Parliament must be ascertained by an examination of the terms of the Act, and not otherwise.

I do not agree with the contention on this point of the plaintiffs. In my opinion the Act has been carefully drafted so as to avoid difficulties in the application of s. 15A of the *Acts Interpretation Act* 1901-1941. I regard this provision as a direction to the Court to treat all statutes as being valid as far as possible, and to assume, as the general intention of Parliament, that as much of an Act shall operate as can operate, even if other parts may fail. In the present case special pains have been taken, it appears to me, to make the different provisions of the Act severable. For example " adequate airline service " is defined separately in relation to inter-State and Territorial services ; the powers of the Commission to establish services in s. 19 are described under separate heads ; the provisions relating to monopoly of services are separated completely from the other parts of the Act. I agree with the contention of the plaintiffs that s. 19 (2) means that it shall be the duty of the Commission to establish adequate (i.e. full) services as defined. This provision doubtless " looks towards " ss. 46 and 47. But it is not inseparably bound up with these provisions—that is, in other words, it cannot be said that s. 19 (2) would not have been enacted apart from ss. 46 and 47. It is possible for s. 19 (2) to operate even if the monopoly provisions fail. Section 15A of the *Acts Interpretation Act* is a direction that it shall be held to be valid so as to operate as far as possible.

The invalidity of the inter-State provisions in Part IV. does not, in my opinion, affect the Territorial provisions. The two sets of provisions are separately expressed and can operate quite independently of each other. The definitions of the two classes of services in s. 4 are carefully expressed so as to be mutually exclusive. If the inter-State provisions are struck out of Part IV. the rest of the Act can operate according to its terms. Thus I am of opinion that the invalid provisions are severable and that the Act as a whole is not invalid by reason of the invalidity of portion of Part IV.

The other question which arises relates to reg. 79 (3) of the *Air Navigation Regulations*, constituting Part VII. of the Regulations.

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This regulation, before the making of Statutory Rules 1940 No. 25, was in the following form :—

" (1) Aircraft shall not be used by any person in the operation of a regular public transport service except under the authority of, and in accordance with, a licence issued to that person by the Board.

(2) An applicant for any such licence shall furnish such information in relation to the proposed service as the Board requires.

(3) The Board shall, if satisfied as to the safety of the proposed service, issue a licence (in these Regulations referred to as ' an airline licence ') subject to such conditions, in addition to compliance with these Regulations, as the Board considers necessary to ensure the safety of the aircraft and of the persons to be carried by the aircraft.

(4) Subject to Part XIII. of these Regulations, an airline licence shall remain in force for a period of one year from the date of issue, and may, from time to time, be renewed by the Board for a further period not exceeding one year."

I see no reason to question the validity of the regulation in this form.

Statutory Rules 1940 No. 25 provided as follows :—

" Regulation 79 of the *Air Navigation Regulations* is amended by omitting sub-regulation (3) and inserting in its stead the following sub-regulation :—

> ' (3) The Director-General may issue a licence (in these Regulations referred to as " an air-line licence ") upon such conditions, in addition to compliance with these Regulations, as the Director-General considers necessary or he may refuse to issue the licence.' "

The question which arises is whether this provision is valid.

Other Parts of the Regulations relate to many matters affecting the safety and efficiency of air services. Thus Part III. relates to the conditions of flight within Australian territory and includes many conditions as to safety. Part IV. deals with registration and marking of Australian aircraft. Part V. allows certificates of airworthiness to be given only after the Director-General of Civil Aviation is satisfied that aircraft comply with a satisfactory standard. Regulation 58 provides that a person shall not act as a pilot, navigator, or radio operator of an Australian aircraft unless he holds a licence under the Regulations, and there are provisions for the examination and qualifications of such persons. Other Parts of the Act relate to log books, inquiries into air accidents, aerodromes and air beacons, international airways and the suspension or cancellation of licences and certificates.

Unless a person who is proposing to provide an air transport service is in a position to show that he has complied with all the

various regulations to which I have referred, he cannot (apart altogether from any considerations depending upon reg. 79) use his aircraft or employ his personnel in such a service. Regulation 79 (3) reinforces the other regulations by expressly requiring compliance with those regulations as a condition of obtaining a licence. The provision in reg. 79 that the Director-General may issue a licence upon such conditions " in addition to compliance with these Regulations " as he considers necessary shows (1) that compliance with the regulations is necessary, and (2) that, before he issues a licence, the Director-General may require compliance with some conditions which are not specified in or ascertainable by reference to any of the regulations. Thus reg. 79 (3) as enacted by Statutory Rules 1940 No. 25 gives to the Director-General in this respect a quite general and uncontrolled discretion. The defendants relied upon *Shrimpton* v. *The Commonwealth* (1), where what was called an absolute discretion was entrusted by a regulation to the Treasurer. The Court held that the discretion was not absolute, but was to be limited by reference to the purposes disclosed by other provisions in the Regulations. In the present case, however, it is impossible to apply such a principle for the purpose of limiting the discretion of the Director-General under reg. 79 (3). The purposes of the Regulations in all their other provisions are completely provided for by those provisions and in the requirement of reg. 79 (3) that all other regulations must be complied with. Accordingly the effect of reg. 79 (3) is to set the Director-General absolutely at large, with the result that he could exercise his discretion upon any grounds whatever.

I consider this provision in the first place in its application to inter-State air services, when s. 92 is relevant to its validity. The vesting of such a discretion to control inter-State transportation is, in my opinion, inconsistent with s. 92 of the Constitution. I am unable to distinguish reg. 79 (3) from the provision which the Court held to be invalid in *Gratwick* v. *Johnson* (2). In that case I was of opinion that there were no provisions " which can be relied upon for the purpose of preventing the Director-General of Land Transport from exercising his powers in a completely arbitrary manner. No indication is given of the matters which he is to take into account in determining whether to grant or refuse a permit " (3). The position is the same in the present case as to the conditions " in addition to compliance with these Regulations " which the Director-General can impose upon applicants for licences. Accordingly reg.

(1) (1945) 69 C.L.R. 613. (2) (1945) 70 C.L.R. 1.
(3) (1945) 70 C.L.R., at p. 15.

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79 (3) is seen to be a provision that persons cannot take part in providing air transport services in relation to trade and commerce among the States (see reg. 6) unless they are permitted to do so by the Director-General of Civil Aviation. Such a provision is "directed against" inter-State transportation in the sense condemned by the Privy Council in *James* v. *The Commonwealth* (1). Accordingly, in my opinion, reg. 79 (3) is invalid in its application to inter-State services.

But, as far as air services within the Territories are concerned, the Commonwealth Parliament can legislate as it pleases. It can, if it thinks proper, make the right to engage in any activity within a Territory dependent upon the arbitrary discretion of an official.

Regulation 79 does not purport to apply to intra-State services: See reg. 6. Intra-State services are not included in any of the categories (*a*), (*b*) and (*c*) of reg. 6. Thus reg. 79, as a Commonwealth regulation, is invalid only in so far as it applies to inter-State services.

All the States, except Tasmania, have passed Air Navigation Acts adopting the *Commonwealth Air Navigation Regulations* as amended from time to time. See the *Air Navigation Acts* of New South Wales of 1938, and of Victoria, Queensland, South Australia and Western Australia of 1937. The effect of this State legislation is to enact reg. 79 as State law and as applying in the same manner in the State as the regulation applies, as a piece of Territorial legislation, in the Territories. These provisions can validly operate, however, only within the respective States and only in relation to other than inter-State services. The objections to reg. 79 as Commonwealth legislation are based upon s. 92, and those objections are equally applicable to reg. 79 as State legislation, for s. 92 binds both the States and the Commonwealth (*James* v. *The Commonwealth* (1)). Thus the State Acts do not affect in any way the conclusion that reg. 79 is invalid in relation to inter-State services. They do give effect to reg. 79 in the States in which they are in force in respect of intra-State services and "the State end" of Territory-single State services. But Commonwealth and State legislation combined cannot overcome s. 92 of the Constitution in relation to inter-State services.

If then reg. 79 is invalid in relation to inter-State air services, is it invalid altogether?

I am of opinion that reg. 79, which applies to international, inter-State and Territorial services (see reg. 6), can be held to be invalid as to inter-State services, and to be valid in relation to other services. I base this view upon the separation of categories of air navigation made by reg. 6, which specifies in (*a*), (*b*) and (*c*) the scope

(1) (1936) A.C. 578; 55 C.L.R. 1.

of application of the Part of the Regulations which contains reg. 79. Air navigation between the States is comprehended within category (*b*). Even if the application of the regulation to such air navigation is prevented by reason of s. 92, there is nothing to prevent the full operation of the regulation in relation to categories (*a*) and (*c*) and the rest of (*b*)—air navigation in relation to trade and commerce with other countries. In *Newcastle and Hunter River Steamship Co. Ltd.* v. *Attorney-General for the Commonwealth* (1) a single collective expression applied to both inter-State and intra-State trade and commerce. If limited to the former subject it would have been valid. If limited to, or as applied to, the latter subject it was invalid. The court held that the provision in question was valid as applied to inter-State commerce. It is much easier in the present case, where categories are separately expressed (*Pidoto* v. *Victoria* (2)), to apply the doctrine of severability, so as to preserve the validity of reg. 79 as applied to other than inter-State air services.

I add that I agree with my brother *Dixon* that the legislative intention of Statutory Rules 1940 No. 25 was to repeal par. 3 of reg. 79 altogether and to substitute for it a provision intended to be comprehensive and applying to all cases within its terms. I agree that it cannot validly so apply. But I do not conclude that the repeal was intended to be effective only if the whole of the substituted provision was valid. The provisions of the *Acts Interpretation Act* as to severance are general expressions of legislative intention. Section 46 (*b*), which deals with regulations, requires the Court to hold regulations to be valid to the extent to which they are not in excess of power. I do that by holding that though the regulation fails in relation to inter-State services, it operates in relation to Territorial services.

The MacRobertson-Miller Aviation Co. Ltd. conducts no inter-State services and is not affected by the invalidity of the Act or of reg. 79 so far as those provisions apply to inter-State services. In the opinion of my brethren reg. 79 (3) as introduced by Statutory Rules 1940 No. 25 is entirely invalid, and therefore, in their opinion, the demurrer should be overruled in the action brought by this company. In my opinion reg. 79 (3) is not completely invalid, but is invalid only in respect of inter-State services, and therefore, in my opinion, is applicable to the plaintiff company. In this case, therefore, I would allow the demurrer.

In the other cases I am of opinion that the demurrers should be overruled. The plaintiffs are entitled to a declaration that s. 46 (1) of the Act and so much of ss. 47 and 49 and of reg. 79 of the *Air*

(1) (1921) 29 C.L.R. 357. (2) (1943) 68 C.L.R. 87.

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Navigation Regulations as apply to inter-State airline services are void. In my opinion they are not entitled to any other relief upon the case made in their statements of claim.

RICH J. Some of the arguments addressed to the Court in the cases now before us lead me to preface my reasons by observations which I should otherwise have thought so trite as to be superfluous. The questions at issue go to the validity of one Commonwealth statute, and of a regulation made under another, providing for, or relating to, the setting up of airline services to be conducted by a Commission on behalf of the Commonwealth. Now, it cannot be too clearly understood that this Court is not in the smallest degree concerned to consider whether such a project is politically, economically, or socially desirable or undesirable. It is concerned only with the questions whether it is within the constitutional powers of the Commonwealth Parliament to pass an Act, or for the regulation-making authority to make a regulation, of the type which has been called in question, and if so whether the Act or the regulation is, in whole or part, a valid exercise of power. The solution of the questions turns upon the proper construction of the Constitution. Under the Australian Federal system, the Commonwealth Parliament can make laws only upon subjects on which it is specially invested with power to make laws by the Constitution. Upon all other subjects, laws can validly be made, if they can validly be made at all, not by the Commonwealth but by the States. Hence, our task is purely legal. It is to examine those provisions of the Constitution which confer legislative power upon the Commonwealth Parliament and to see whether the legislation which has been challenged is wholly, or if not wholly to some extent, within one or more of the powers which the framers of the Constitution thought fit to confer upon it.

If the legislation is to be upheld, it must be, in the main, by virtue of clause 51 (i.) of the Constitution, which empowers the Parliament, but subject to the Constitution, to make laws with respect to "trade and commerce with other countries, and among the States." By the *Australian National Airlines Act* 1945 provision is made for setting up a Commission to establish and operate airline services for the transport, for reward, of passengers and goods by air (*a*) between State and State, (*b*) between a Commonwealth Territory and any other part of Australia, (*c*) within a Commonwealth Territory, and (*d*) between Australia and places outside Australia.

The first question is whether such a provision is within the trade and commerce power conferred by clause 51 (i.), assuming that power not to be restricted in any relevant respect by any other

part of the Constitution. "'Trade' is a very wide term: it is one of the oldest and commonest words in the English language. Its great width of meaning and application can be seen by referring to the heading in the *Oxford English Dictionary*. But it must always be read in its context. That gives it the special connotation appropriate to the particular case" (per Lord *Wright* in *Aristoc Ltd.* v. *Rysta Ltd.* (1)). In a particular context, it may be seen to be intended to be restricted to selling or otherwise trading in goods; but here we find it in a Constitution, and "a Constitution must not be construed in any narrow and pedantic sense" (*James* v. *The Commonwealth* (2)). I have no doubt that, as here found, the phrase "trade and commerce" is wide enough to include not only the sale and disposition of goods but the transport of goods and persons, and not only the transport of goods and persons incidentally to the disposition of goods, but such transport as an end in itself.

I am of opinion also that the Commonwealth Parliament's trade and commerce power is not restricted to the regulation of trade and commerce carried on by private persons, but is wide enough to authorize provision for the carrying on of trade and commerce by the Commonwealth itself. It was pointed out in *Reg.* v. *Burah* (3) that when a question arises in regard to a Constitution whether the prescribed limits have been exceeded, the only way in which a court of justice can properly determine the question is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and it violates no express condition or restriction by which the power is limited, it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions. The Constitution contains no express provision against trading by the Commonwealth, and no necessary implication of a prohibition of such trading is involved in any of the express provisions.

I am of opinion, therefore, that the attack which has been made on the Act, as being legislation on a matter which lies outside the trade and commerce power altogether, cannot be supported; and I am of opinion, also, that the combined operation of clauses 51 (i.) and 122 is sufficient to authorize legislation for the provision of airline services between a Commonwealth Territory and any other part of Australia, or within a Commonwealth Territory, although,

(1) (1945) A.C. 68, at p. 102.
(2) (1936) A.C. 578, at p. 614; 55 C.L.R. 1, at p. 43.
(3) (1878) 3 App. Cas. 889, at pp. 904, 905.

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to the extent to which any such service may also be inter-State, it is subject to clause 92.

The next question is concerned with the validity of Part IV. of the Act, which provides for conferring upon the Commission a monopoly in respect of the airline services which it is to establish and operate. Section 46 (1) provides that, when the Commission has established a service, any airline licence held by anyone else in respect of any service which provides inter-State transport by air between any of the Commission's stopping-places (unless it is for an authorized international service) shall, so far as it authorizes transport between those stopping-places of passengers or goods embarked for transport solely between them, be inoperative so long as the Commission itself supplies an adequate airline service between them. Section 47 prevents, among other things, the issue of a licence which would interfere with the Commission's inter-State monopoly so long as it is maintaining an adequate service. The fact that the Parliament is here seeking to enable the establishment of a trading monopoly for the Commonwealth does not, of itself, affect the validity of Part IV. There is nothing in the Constitution which prevents the setting-up of monopolies as such. It has been urged, however, that the vesting in the Commonwealth of a monopoly of a particular class of inter-State trade infringes the express provision of clause 92 of the Constitution that trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. How, it is said, can trade, commerce and intercourse among the States by air transport be said to be free if the Commonwealth arrogates to itself the right not merely to engage in this class of trade but to exclude everyone else from it? Authorities on the meaning and operation of clause 92 are numerous and not altogether consistent. The leading case is *James* v. *The Commonwealth* (1), but even this does not, and could not be expected to, provide a ready solution for every question that arises in practice. Their Lordships put the matter in a nutshell by saying that, "The true criterion seems to be that what is meant is freedom as at the frontier." They went on to elaborate this by saying that it means freedom from customs duties, imposts, border prohibitions, and restrictions of every kind. "Freedom in s. 92 must be somehow limited, and the only limitation which emerges from the context, and which can logically and realistically be applied, is freedom at what is the crucial point in inter-State trade, that is at the State barrier" (2). Their Lordships point

(1) (1936) A.C. 578; 55 C.L.R. 1.

(2) (1936) A.C., at pp. 630, 631; 55 C.L.R., at pp. 58, 59.

out, however, that it is not necessary, in order to be obnoxious to clause 92, that an Act should discriminate against inter-State trade; it may contravene it though it operates in restriction both of intra-State and inter-State trade (1); and burdens and hindrances on inter-State trade may take diverse forms and appear under various disguises. "In every case it must be a question of fact whether there is an interference with this freedom of passage" (2). It would appear from their Lordships' comments on s. 98 of the *Post and Telegraphs Act* 1901-1923 that they took the view that the monopolization by the Commonwealth of some forms of intercourse is not necessarily repugnant to clause 92 to the extent to which it may affect inter-State intercourse; but I do not regard their Lordships as meaning that no form of monopolization of a particular class of inter-State trade should be regarded as impeding it if it can be described as "canalization." They appear to have been influenced in their remarks by the consideration that letter-carrying is a very specialized form of intercourse, as to which, at the establishment of the Commonwealth, the limitation notoriously existed in ordinary usage in all modern civilized communities (3). The question in every case being one of fact, I am unable to feel any doubt that, on the facts of the present case, the monopoly provisions of ss. 46 (1) and 47 (*a*) do constitute a direct infringement of the express provision of clause 92 for freedom of trade, commerce and intercourse among the States, and are therefore invalid. Since, however, clause 92 is applicable only inter-State, it does not invalidate the non-inter-State provisions of ss. 46 (2) or 47 (*b*) or 49 of Part IV.

I pass now to the question whether, the monopoly provisions of the Act being in part bad, the Act is wholly invalidated or invalidated only to the extent to which it is unconstitutional. Having regard to s. 15A of the *Acts Interpretation Act* 1901 as amended, it must be treated as a valid enactment to the extent to which it is not in excess of power, unless it is expressly provided, or appears by necessary implication from what is expressly provided, that it is intended by Parliament that the Act, or some part of it, is to be inoperative as a whole or not at all. There is, in the present cases, no such express provision, and, in my opinion, no such necessary implication. Hence, the general provisions of the Act are valid.

As regards reg. 79, I agree with my brother *Dixon*, whose reasons on all points I have had the advantage of reading, and with which I am in general agreement, that this stands good in the form which

(1) (1936) A.C., at p. 628; 55 C.L.R., at p. 56.
(2) (1936) A.C., at pp. 630, 631; 55 C.L.R., at pp. 58, 59.
(3) (1936) A.C., at pp. 625, 626; 55 C.L.R., at pp. 54, 55.

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it had before the purported amendment made by Statutory Rules 1940 No. 25, the purported amendment being invalid and inoperative.

For the reasons I have given I am of opinion that the three demurrers should be overruled and judgment given in the respective suits for the plaintiffs. In the suits of the Australian National Airways Pty. Ltd. and of Guinea Airways Ltd. there should be a declaration that in Part IV. of the *Australian National Airlines Act* 1945 sub-s. (1) of s. 46, so much of s. 47 (including par. (*a*)), and so much of s. 49 as refer to an inter-State airline service or services are invalid and that the purported adoption of Statutory Rules 1940 No. 25 of the amendment to sub-reg. (3) of reg. 79 of the *Air Navigation Regulations* 1937-1939 is void.

In the suit of MacRobertson-Miller Aviation Co. Ltd. the declaration of right should be limited to the invalidity of Statutory Rules 1940 No. 25, because the plaintiff is interested only in a Territorial line.

STARKE J. These actions raise by demurrer the question whether the *Australian National Airlines Act* 1945 is wholly or in part beyond the constitutional power of the Commonwealth and also whether Part VII. of the *Air Navigation Regulations* as amended is within the powers conferred upon the Governor-in-Council by the *Air Navigation Act* 1920-1936.

The *Airlines Act* is an Act to provide for the establishment and operation of national airline services by the Commonwealth and for other purposes. It sets up a Commission which it incorporates, and, subject to the provisions of the Act and the *Air Navigation Regulations*, requires it to " do all that is necessary or convenient to be done for, or as incidental to, or in relation to, or in connexion with, the establishment, maintenance or operation by the Commission of Airline Services for the transport, for reward, of passengers and goods by air—

(*a*) between any place in a State and any place in another State ;

(*b*) between any place in any Territory of the Commonwealth and any place in Australia outside that Territory ; and

(*c*) between any place in any Territory of the Commonwealth and any other place in that Territory."

And the Commission with the approval of the Minister may exercise in relation to airline services between any place in Australia and any place outside Australia the like powers: See ss. 6 and 19. The Commission is empowered to acquire real and personal property and also to acquire compulsorily aircraft or other property (not being land) for the purposes of the Commission (ss. 21, 42-45). Moneys are

appropriated by the Act to meet expenditure necessary for the purposes of the Act (s. 30). The provisions of the *Air Navigation Regulations* apply so far as applicable to and in relation to the Commission in like manner as they apply to and in relation to other persons (s. 29). These Regulations set up a licensing authority in respect of public transport services (Regulations, Part VII., Public Transport Service). And Part IV. of the *Airlines Act* imposes limitations in respect of airline services the purpose of which is to give the Commission the right to operate the airline services mentioned in s. 19 and to exclude all other corporations or persons therefrom. Where an airline licence is issued to the Commission in respect of an inter-State airline service and the Commission has established that service, any airline licence held by any person other than the Commission or its contractors, in respect of any inter-State airline service, which provides inter-State transport by air between any scheduled stopping places of the service established by the Commission, is inoperative so long as there is an adequate airline service between those stopping places by reason only of the services operated by the Commission and its contractors. A similar provision is enacted in respect of Territorial airline services (s. 46 (2)). The licensing authority is prohibited from issuing to any person other than the Commission or its contractors in respect of an inter-State airline service, an airline licence which would authorize inter-State transport by air between any scheduled stopping places of any airline service operated by the Commission or its contractors and similarly in respect of Territorial airline services unless and except to the extent to which the licensing authority is satisfied that having regard to the airline services operated by the Commission and its contractors the issue of the licence is necessary to meet the needs of the public with respect to inter-State and Territorial airline services (s. 47). And s. 49 imposes sanctions upon persons operating inter-State or Territorial airline services without a licence which is operative.

The constitutional powers relied upon in support of the *Airlines Act* and the licensing regulations are the postal power (Constitution, s. 51 (v.)), the defence power (Constitution, s. 51 (vi.)), the trade and commerce power (Constitution, s. 51 (i.)), and the power in relation to the Territories (Constitution, s. 122). But the Act cannot be sustained under either the postal or the defence power ; its provisions afford no reasonable or substantial basis for the conclusion that the Act is one with respect to postal services or defence and that, if I am not mistaken, was in the end conceded in argument. The object of the Act is to establish national and commercial airline services to the exclusion of other airline services. The Act must find

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its constitutional basis in the trade and commerce power and in the power relating to the Territories, for there is no other that can support it. The Parliament has, subject to the Constitution, power to make laws for the peace, order and good government of the Commonwealth with respect to trade and commerce with other countries and among the States and this power extends to navigation and shipping and to the railways of the State (Constitution, s. 51 (i.), s. 98; *Australian Steamships Ltd.* v. *Malcolm* (1)). In the Constitution of the United States the power is to regulate commerce with foreign nations and among the several States and with the Indian tribes. In the Constitution of Canada, *British North America Act* 1867 (30 & 31 Vict. c. 3), it is the regulation of trade and commerce. But there is little if any difference, I think, between the power to make laws with respect to trade and commerce and the power to make laws to regulate, or for the regulation of, trade and commerce. And since the decision, *Huddart Parker Ltd.* v. *The Commonwealth* (2), in this Court the view can no longer be maintained that the constitutional power in the Australian Constitution to make laws with respect to trade and commerce with other countries and among the States is limited to general rules of conduct to be observed by those engaged in the operation of commerce with respect to those operations (*Australian Steamships Ltd.* v. *Malcolm* (3)), and does not enable the Commonwealth itself or its instrumentalities to engage in or carry on commerce. In *Gibbons* v. *Ogden* (4) *Marshall* C.J. said: " Commerce, undoubtedly, is traffic, but it is something more; it is intercourse ", and *Griffith* C.J. in *Australian Steamships Ltd.* v. *Malcolm* (5) accepted that description. Trade and commerce among the States is not an isolated journey across a State boundary line (See *Willis* on *Constitutional Law*, p. 288), but the flow of business among the States. It includes the movement of goods or persons from one State to another, transportation by land, sea or air, and it also includes something more such as sales of goods tangible or intangible by persons in one State to persons in another. Or as was said in this Court in *W. & A. McArthur Ltd.* v. *Queensland* (6): " ' 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 arrange-

(1) (1914) 19 C.L.R. 298, at pp. 307, 314, 327, 335.
(2) (1931) 44 C.L.R. 492.
(3) (1914) 19 C.L.R. 298, at pp. 305, 306.
(4) (1824) 22 U.S. 1, at p. 189 [6 Law. Ed. 23, at p. 68].
(5) (1914) 19 C.L.R., at p. 305.
(6) (1920) 28 C.L.R. 530, at p. 546.

ments of which transportation is the direct and necessary result form part of 'trade and commerce'." The power to regulate commerce or to make laws with respect to commerce is " 'to prescribe the rule by which commerce is governed.' It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it " (*United States* v. *Darby* (1)). The power " is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution " (*Gibbons* v. *Ogden* (2)). Accordingly there is no reason for denying that the Parliament can under the trade and commerce power exclude all persons from the field and grant the Commonwealth itself and its instrumentalities an exclusive right or monopoly in that field: Cf. *Wilson* v. *Shaw* (3).

But the power to make laws with respect to trade and commerce in the Australian Constitution is subject to the provisions contained in s. 92: " Trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

The object and effect of the *Airlines Act* is to exclude every person but the Commission established by the Commonwealth and its contractors from traffic and intercourse among the States by air so long as there is an adequate airline service established by the Commission or its contractors. It is contended that the Transport Cases in this Court established the validity of the *Airlines Act* and that it does not contravene the provisions of s. 92 (*R.* v. *Vizzard*; *Ex parte Hill* (4); *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (5); *Bessell* v. *Dayman* (6); *Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (7); *Riverina Transport Pty. Ltd.* v. *Victoria* (8)). " A law," it has been said, " prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade notwithstanding s. 92 " (*Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (9)). But why this is so is by no means clear. It is said that the provisions which operated in restriction of the free movement of goods in the Transport Cases were no invasion upon the freedom of inter-State trade, but a mere co-ordination and rationalizing of services (*Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (10)), which, I suppose, means that as a matter of fact there

(1) (1941) 312 U.S. 100, at p. 113 [85 Law. Ed. 616].
(2) (1824) 22 U.S. 1, at p. 196 [6 Law. Ed. 23, at p. 70].
(3) (1907) 204 U.S. 24, at pp. 33-35 [51 Law. Ed. 351, at pp. 356-357].
(4) (1933) 50 C.L.R. 30.
(5) (1935) 52 C.L.R. 189.
(6) (1935) 52 C.L.R. 215.
(7) (1935) 53 C.L.R. 493.
(8) (1937) 57 C.L.R. 327.
(9) (1939) 62 C.L.R. 116, at p. 127.
(10) (1935) 53 C.L.R. 493, at p. 503.

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was no interference with the freedom of the passage of goods passing into or out of a State (*James* v. *The Commonwealth* (1)), and that even though the restriction operated upon the movement of goods in inter-State trade. But the *Airlines Act* cannot be justified as a mere co-ordination and rationalizing of services.

Willard v. *Rawson* (2) was also relied upon, but that was an Act to regulate the use of motor cars on the highways, and a majority of the Court denied that it operated so as to interfere with the absolute freedom of inter-State trade. The case has no application to the *Airlines Act*.

A more difficult case to my mind is that of the *Milk Board* (*N.S.W.*) v. *Metropolitan Cream Pty. Ltd.* (3). There are expressions in that case repeating similar expressions in the case of *Peanut Board* v. *Rockhampton Harbour Board* (4), asserting that s. 92 does not preclude the nationalization or socialization of industries although some effect upon inter-State commerce may be caused thereby. The Court expressed no opinion upon the matter, but what it held was that the *Milk Act* 1931-1936 of New South Wales, which established a system of control of production, transport and marketing, wholesale and retail, of milk and cream in every milk distributing district established by the Act and compulsory marketing, was not obnoxious to the provisions of s. 92. It was conceded, I think, that the decision was contrary to prior decisions of the Court, but it was said that the view of the Judicial Committee in *James* v. *The Commonwealth* (5) was that legislation might be enacted for the administration of a compulsory marketing scheme so long as it was not directed against inter-State trade without contravening the provisions of s. 92. In my opinion, that decision conflicts with the decision of this Court in the *Peanut Board Case* (6) which, I think, was approved by the Judicial Committee in *James* v. *The Commonwealth* (5) and I prefer the decision in the *Peanut Board Case* (6).

The object of s. 92 is to maintain freedom of inter-State competition—the open and not the closed door—absolute freedom of inter-State trade and commerce. An Act which is entirely restrictive of any freedom of action on the part of traders and which operates to prevent them engaging their commodities in any trade, inter- or intra-State, is, in my opinion, necessarily obnoxious to s. 92.

The *Airlines Act* is not a compulsory marketing Act but it does operate to control air transport among the States and is pointed

(1) (1936) A.C. 578, at p. 631 ; 55 C.L.R. 1, at p. 59.
(2) (1933) 48 C.L.R. 316.
(3) (1939) 62 C.L.R. 116.
(4) (1933) 48 C.L.R. 266, at pp. 302, 303.
(5) (1936) A.C. 578 ; 55 C.L.R. 1
(6) (1933) 48 C.L.R. 266.

directly at that trade or business. It operates to preclude everyone engaging in that trade and business other than the Commission and its contractors so long as adequate service is provided. In my opinion such an enactment is obnoxious to the provisions of s. 92.

The legislative power of the Commonwealth with respect to trade and commerce with other countries is not limited by s. 92 and subject to other provisions of the Constitution, e.g. s. 98, may be exercised to its full extent. Likewise the authority of the Parliament to make laws for the Government of the Territories is undoubted (Constitution, s. 122) and that power is not limited by the provisions of s. 92. It is a plenary power complete in itself, and acknowledges no limitations other than are prescribed by the Constitution (*Gibbons* v. *Ogden* (1)). Cf. *Dorr* v. *United States* (2) ; *Rassmussen* v. *United States* (3). But I would add that the Territories are not independent political bodies separated and detached from the Commonwealth. They are under the authority of the Commonwealth which might, I should think, assist them financially and establish and maintain communication with them in such manner as Parliament thinks fit subject to any limitations prescribed by the Constitution. This authority flows from the relationship of the Commonwealth and the Territories if not from the incidental power contained in the Constitution (s. 51 (xxxix.)).

It has also been contended that the *Airlines Act* is wholly bad and cannot be severed from the provisions relating to inter-State trade which are obnoxious to s. 92. That contention is untenable both because of the provisions of the *Acts Interpretation Act* 1901-1941, s. 15A, and because there is left intact in the *Airlines Act*, dealing with matters within the power of the Commonwealth, a body of provisions, namely, air transport with other countries and in the Territories, consistent, workable and effective (*Deputy Federal Commissioner of Taxation* (*N.S.W.*) v. *W. R. Moran Pty. Ltd.* (4)). It may be that these provisions will be ineffective commercially, but that is not a matter for the consideration of this or any Court.

Lastly, Part VII. of the *Air Navigation Regulations* (Statutory Rules 1937 No. 81 as amended by Statutory Rules 1940 No. 25) has been attacked. Regulation 79 provides that the Director-General of Civil Aviation may issue an airline licence upon such conditions, in addition to compliance with the Regulations, as the Director-General considers necessary or he may refuse to issue a licence. In my opinion that regulation is bad because it contravenes s. 92 of the

(1) (1824) 22 U.S. 1, at p. 196 [6 Law. Ed. 23, at p. 70].
(2) (1904) 195 U.S. 138 [49 Law. Ed. 128].
(3) (1905) 197 U.S. 516 [49 Law. Ed. 862].
(4) (1939) 61 C.L.R. 735, at p. 772.

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Constitution. It so operates that no-one may engage in inter-State trade without the licence of the Director-General.

The result is that the demurrers which go to the whole of the causes of action alleged by the plaintiffs should be overruled.

DIXON J. The determination of these three cases turns upon the question whether the *Australian National Airlines Act* 1945 is to any and what extent *ultra vires* and upon a further question concerning the validity of a regulation made under the *Air Navigation Act* 1920-1936. The regulation relates to the licensing of aircraft for a public transport service and some of the provisions of the *Airlines Act* assume the existence and validity of such a regulation.

The general character of the Act can be briefly described under five heads. It sets up a Commission, a corporate body, with powers necessary and appropriate for establishing, maintaining and carrying on airline services for the transport of passengers and goods between States, to and from Territories and within Territories. It provides for the compulsory acquisition of aircraft and other property, except land, required for the purposes of the Commission. It provides for compensation. It gives the Commission a monopoly of any route for which it provides an adequate service. It makes it incumbent upon the Commission to obtain a licence under the *Air Navigation Regulations*, but, in some degree, it rests the Commission's monopoly on those Regulations, because, when the Commission provides an adequate service, the licence of any person in respect of the route becomes inoperative and no such licence is again to be issued so long as the Commission maintains an adequate service. Though the preamble of the statute refers to defence and to the carriage of mail by air in reciting why it is expedient to make the provisions contained in the enactment, it is apparent that primarily the legislative power upon which the Act must be supported is that with respect to trade and commerce with other countries and among the States. But so much of it as deals with airline services in connection with Territories cannot easily be referred to that power, and some other legislative power must be found to support those provisions.

It is convenient, however, to consider first whether, putting on one side the effect of s. 92, the leading provisions of the *Airlines Act* can be regarded as an exercise of the commerce power. It is objected that they cannot be supported under that power because it contemplates the legislative regulation of overseas and inter-State trade and commerce and not the entry of the Government itself into that field of activity. The argument places upon the words of the

constitutional power an interpretation according to which it would fall far short of authorizing the Parliament to establish a government monopoly or government undertaking in trade and commerce. The interpretation conceives of trade and commerce with other countries and among the States as a description of a section of the economic life of the community made up of countless forms of activity on the part of individuals, inter-related and organized and sustaining a flow of goods and services. The subject of the power is, therefore, treated as a recognized phenomenon of national life existing independently of the Commonwealth. The power, it is said, on its bare reading is but a power to make laws for the regulation of these activities, not to undertake them. Only because it was fitter that Federal legislation should deal with inter-State and foreign transactions were trade and commerce divided notionally into two sections. What was inter-State and overseas was assigned to the Commonwealth and what was intra-State was reserved for the States. But that, according to the view contended for, was as subjects of legislative regulation and not of government participation.

I am of opinion that this argument ought not to be accepted. It plainly ignores the fact that it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances. It confuses the unexpressed assumptions upon which the framers of the instrument supposedly proceeded with the expressed meaning of the power. A law authorizing the government to conduct a transport service for inter-State trade, whether as a monopoly or not, appears to me to answer the description, a law with respect to trade and commerce amongst the States. It is only by importing a limitation into the descriptive words of the power that such a law can be excluded.

There is, however, a further difficulty in the application of the commerce power to the transport services which the Commission is authorized to conduct. So far I have spoken advisedly of a transport service for inter-State commerce. But the airline services contemplated are for passengers or goods and many of the passengers carried may not be engaged in any matter of commerce.

If an inter-State transportation service is regarded, not as itself constituting commerce among the States, but only as a means by which such commerce is or may be conducted and at the same time the inter-State movement of people is considered not of itself to form commerce among the States, it would seem to follow that the purpose of the airline services to be established under the Act is not confined

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to inter-State trade and commerce and exceeds the power. In *R.* v. *Smithers*; *Ex parte Benson* (1) *Higgins* J. draws a contrast, in reference to the movement of persons from one State to another, between, on the one hand, school children returning from holidays and friends visiting friends, and, on the other hand, commercial travellers returning to their warehouses. Notwithstanding the addition, in s. 92, of the word " intercourse " to the words " trade " and " commerce," I am not disposed to think that there is much covered by the word " intercourse " that falls outside the commerce power. Actual movement of persons or goods among the States will, I should imagine, be regarded as enough here as it is in America. See *Covington & Cincinnati Bridge Co.* v. *Kentucky* (2); *Caminetti* v. *United States* (3); *United States* v. *Hill* (4). Probably, too, it will be taken to extend to acts and transactions involving such movement. But this view is part and parcel of a more general interpretation or understanding of the conception of inter-State commerce under which the place given to the carriage of goods and persons, transportation, is anything but subsidiary. That is to say, as it is inseparable from the movement of things and people, it cannot be regarded as something which falls within the power only because it is ancillary or auxiliary, incidental or conducive to the essential object of the power, as perhaps might be the case if the inter-State buying and selling of commodities were regarded as the exclusive object. From the beginning, the doctrine prevailing in the United States has been that transportation occupied a central place in the conception of commerce as a subject of the power. In the concurring opinion which *Johnson* J. added to that of *Marshall* C.J. in *Gibbons* v. *Ogden* (5), an opinion relying more than did that of the Chief Justice on the exclusive characteristics of the commerce power, there occurs the following passage: " When speaking of the power of Congress over navigation, I do not regard it as a power incidental to that of regulating commerce; I consider it as the thing itself; inseparable from it as vital motion is from vital existence." In *Hannibal & St. Joseph R.R. Co.* v. *Husen* (6) *Strong* J. for the court said: " Transportation is essential to commerce, or rather it is commerce itself." How far the reasoning in the Transport Cases in this Court (7) accommodates itself with this doctrine is a matter for

(1) (1912) 16 C.L.R. 99, at p. 118.
(2) (1893) 154 U.S. 204 [38 Law. Ed. 962].
(3) (1917) 242 U.S. 470 [61 Law. Ed. 442].
(4) (1919) 248 U.S. 420, 423 [63 Law. Ed. 337, 339].
(5) (1824) 22 U.S. 1, at p. 229 [6 Law. Ed. 23, at p. 78].
(6) (1877) 95 U.S. 465, at p 470 [24 Law. Ed. 527, at p. 530].
(7) (1933) 50 C.L.R. 30; (1935) 52 C.L.R. 189, 215; (1935) 53 C.L.R. 493; (1937) 57 C.L.R. 327.

consideration. There is, I think, some logical force in the view that, if inter-State transportation is relegated to the position of an operation that is merely ancillary or incidental to the commercial interchange of goods among the States and is not of itself commerce, then it follows that the *Airlines Act* is wider than the power. For it provides an air service, and an exclusive air service, for passengers independently of the commercial or non-commercial character of their journey. But I am not prepared to accept the hypothesis and to give effect to it as restrictive of the trade and commerce power. On the contrary, I shall act upon the opinion that, if not all inter-State transportation, at all events all carriage for reward of goods or persons between States is within the legislative power, whatever may be the reason or purpose for which the goods or persons are in transit.

I am, therefore, of opinion that so much of the *Airlines Act* as relates to inter-State air services is within the commerce power and that, apart, of course, from the effect of s. 92, which must be separately considered, its validity so far may be supported as an exercise of that power.

It is contended, however, that so much of the *Airlines Act* as affects to govern and authorize the establishment by the Commission of air services with the Territories of the Commonwealth is *ultra vires*. The argument begins with the thesis that a Territory, excepting possibly a Mandated Territory, cannot be described as " another country " within the meaning of the expression, trade and commerce with other countries and among the States. Of course it is not a State. It is then said that s. 122 is the only other relevant legislative power in relation to Territories, apart from the Seat of Government, which is, of course, governed by s. 52 (i.). The power conferred by s. 122, it is contended, is insufficient to support the provisions relating to airline services with the Territories. It is said that it is power to make laws only for the government of the Territory and enables no more to be done within the federally organized parts of the Commonwealth, or on the routes connecting the territory with them, than, for example, a legislature established within a Territory for its government might do within those parts or on those routes.

The provisions of the *Airlines Act* expressly dealing with the Territories are s. 4 (definitions of " Territorial airline service " and " adequate airline service "); s. 19 (1) (*b*) and (*c*); s. 46 (2); s. 47 (*b*); s. 49, and par. (*c*) of the preamble. It must be conceded that these clauses considered in combination with the general provisions of the Act, amount to laws operating in Australia and elsewhere with respect to air communication with the Territories. To support such legislation some power seems to be needed to

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make laws in that connection which will have an operation in Australia. It was contended that even although the power given by s. 122 might be regarded as an independent legislative power restricted in its geographical operation to the Territories, at the same time it could be used to justify the establishment of services radiating out, so to speak, from each Territory. The analogy is that of a State which in virtue of its power to make laws in and for the State might establish a shipping service with any place outside its boundaries, whether within or beyond Australia. The law passed by the State would not in such a case operate coercively outside the State but would nevertheless authorize the carrying on of the service and the use of such port facilities and the like as were made available in other jurisdictions. This appears to me to be an artificial and narrow justification of the legislation and, moreover, does not recognize that the *Airlines Act* is meant to operate on the same basis throughout Australia and its Territories as a law of the Parliament. I should see no difficulty myself in treating s. 122 as aided by s. 51 (xxxix.) and in interpreting the Constitution as a whole as meaning that the Commonwealth Parliament could make laws concerning the Territories including communications and all other matters arising from the connection between the Commonwealth and the Territory or dependency. However, it is said that such cases as *Buchanan* v. *Commonwealth* (1), *R.* v. *Bernasconi* (2) and *Porter* v. *The King*; *Ex parte Chin Man Yee* (3) make it necessary to treat s. 122 as an independent power complete in itself and outside the general system of government. I admit that it is difficult to reconcile the Australian cases on the subject, but I think that the decision in *Porter's Case* (3) tends in the contrary direction and that so does some of the reasoning in *Mainka* v. *Custodian of Expropriated Property* (4), and also that of some of the judgments in *Ffrost* v. *Stevenson* (5), where antecedent steps of the reasoning in *Mainka's Case* (6) were criticized. As to the commerce power, it is not easy to see how such a Territory as the Northern Territory could be described either as another country or a State; but it is to be noted that, under the analogous American power, *Holmes* J. appears to have been prepared to adopt the assumption that trade with the Territories could be covered (*Hanley* v. *Kansas City Southern Railway Co.* (7)), giving the power no doubt a wide general interpretation implying some extension beyond its exact text.

(1) (1913) 16 C.L.R. 315.
(2) (1915) 19 C.L.R. 629.
(3) (1926) 37 C.L.R. 432.
(4) (1924) 34 C.L.R. 297.
(5) (1937) 58 C.L.R. 528.
(6) (1924) 34 C.L.R. 297.
(7) (1903) 187 U.S. 617, at p. 619 [47 Law. Ed. 333, at p. 335].

Moreover, Congress has included the Territories in many laws otherwise referable to the commerce power. One such law is dealt with in *Cincinnati Soap Co.* v. *United States* (1). Clearly the commerce power is treated as embodying a principle. But, however that may be, it seems to me that, by placing a territory under the authority of a government with full power to govern it by direct legislation and otherwise, it is necessarily implied that it may control communications, including transport between the two countries, if they are separated by sea, or, if not, across the common boundary by inland means.

We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications. It is absurd to contemplate a central government with authority over a territory and yet without power to make laws, wherever its jurisdiction may run, for the establishment, maintenance and control of communications with the territory governed. The form or language of s. 122 may not be particularly felicitous but, when it is read with the entire document, the conclusion that the legislative power is extensive enough to cover such a matter seems inevitable. For my part, I have always found it hard to see why s. 122 should be disjoined from the rest of the Constitution and I do not think that *Buchanan's Case* (2) and *Bernasconi's Case* (3) really meant such a disjunction. I think the provisions I have mentioned affecting the territory are valid.

For the foregoing reasons, I am of opinion that the objections to the validity of the provisions of the *Airlines Act* on the ground that they are outside the enumerated legislative powers of the Parliament affirmatively granted are not well founded.

There remains to be considered the formidable objection that, except in relation to Territories, Part IV. of the Act, which provides that, upon routes adequately served by the government service, it shall have a monopoly, violates the restraint imposed upon Federal power by s. 92 and that Part IV. is an inseparable part of the statute, which, therefore, fails as an entirety.

It is, I think, important to see exactly what Part IV. does. The first of the four sections of which it consists, s. 46, has two subsections, one dealing with what is called an inter-State airline service and the second with a Territorial airline service. Of the latter it is unnecessary to say more in connection with s. 92 than that, although

(1) (1937) 301 U.S. 308, 322 [81 Law. Ed. 1122, 1133].

(2) (1913) 16 C.L.R. 315.

(3) (1915) 19 C.L.R. 629.

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s. 92 does not affect trade, commerce or intercourse with the Territories, yet, on the definition of a Territorial airline service, it is possible that it will include some inter-State carriage of goods or persons. It is with the former, the inter-State airline services, that we are immediately concerned. Sub-s. (1), which deals with them, proceeds upon the assumption that, for any inter-State airline service existing at the time when the Commission establishes a service covering any of the stopping places of the existing service, a valid licence under the *Air Navigation Regulations* will be needed and will be held. It provides that, when certain conditions are fulfilled, the licence, in so far as it authorizes inter-State air transport, shall become inoperative, which means, of course, that for the licensee to continue the service would contravene the *Air Navigation Act* and Regulations. The conditions are, in effect, (1) that an airline licence for a particular inter-State service has been issued under the Regulations to the Commission specifying the terminal and intermediate stopping places of the service; (2) that the Commission has established the service; (3) that the existing service provides inter-State transport by air between some of the scheduled stopping places; and (4) that the service of the Commission, or its contractors, by itself provides an adequate airline service between those stopping places. In those conditions the existing licence becomes inoperative and remains inoperative as long as the Commission maintains an adequate airline service between such stopping places. Under the *Air Navigation Regulations* airline licences may not be granted or renewed for a longer period than a year, so that it may be assumed a licence rendered inoperative is unlikely during its currency to revive owing to the Commission's service becoming inadequate. But the next section of the *Airlines Act*, s. 47, contains a prohibition, subject to a condition by way of exception, against the licensing authority issuing to anybody but the Commission or, at its request, to a contractor with the Commission, an airline licence for an inter-State service authorizing transport by air between any of the Commission's scheduled stopping places, or those of such a contractor. The condition by way of exception is expressed in the following words, "unless, and except to the extent to which, the licensing authority is satisfied that, having regard to the airline services operated by the Commission and contractors, the issue of the licence is necessary to meet the needs of the public with respect to inter-State airline services."

Nothing turns on s. 48, but s. 49 completes Part IV. by making it penal to enter into a contract for the transportation by air of persons or goods in the course of the operation of an inter-State airline,

unless operated by a person holding an airline licence that has not become inoperative. The provision covers the consignor or intending traveller as well as the carrier. With these provisions must be read s. 19, particularly sub-s. (2). Sub-s. (1) empowers the Commission "with full regard to safety, efficiency and economy of operation" to establish, maintain and operate airline services for the transport for reward of passengers and goods by air, between States, with Territories and within Territories, and to do all that is incidental thereto. Sub-s. (2) then says that it shall be the duty of the Commission to exercise the powers conferred by sub-s. (1) as fully and as adequately as may be necessary to satisfy the need for services specified in that sub-section and to carry out the purposes of the Act.

The short effect of these provisions when read together appears to me to be, so far as material, to require the Commission, on obtaining a licence, to supply an adequate service for the route licensed and then, when and so long as that is done, to exclude any other inter-State air carrier from the same stopping places by preventing his holding a licence effective for any of them. The principle upon which they proceed evidently is that facilities for the carriage by air for reward of persons and things should be assured, so far as may be, but that, so long as that is done, they should be an exclusively governmental function.

It is not material to inquire why this principle was adopted. It may have been adopted as a matter of policy. On the other hand, it may have been adopted because it was thought that it would involve less inconsistency with the constitutional freedom of trade, commerce and intercourse among the States by internal carriage than if the exclusion from inter-State air routes of all but government airlines were absolute. Some ground for such a view might be found if two assumptions were justified. The first is that trade, commerce and intercourse among the States is nothing but the interchange of goods and the movement of people. The second is that s. 92 may be confined by interpretation to a denial to the various governments only of legislative or executive authority to obstruct the flow or reduce the volume in which the people move or the traffic in goods proceeds. If these assumptions were made out, it is, perhaps, not difficult to see in them a basis for a contention that a law establishing a monopoly of a form of transport might be compatible with s. 92, provided that it contained sure stipulations for the furnishing of transport or of that form of transport, adequate to the flow or volume. It is interesting to find in the opinion of *Johnson* J. in

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Gibbons v. *Ogden* (1), already cited, an emphatic statement of the opposite view of the effect of a monopoly in a form of transport. As is well known, that great case turned upon the monopoly which the State of New York had granted to Fulton and Livingston at the end of the eighteenth century upon condition that they constructed a steamboat that would navigate against the current of the Hudson. They fulfilled the condition and, as a result, enjoyed for some years an exclusive franchise for navigating New York waters by steam. The decision in *Gibbons* v. *Ogden* (1) was that it was inoperative against Federal law. *Johnson* J. placed his judgment upon the quasi-exclusiveness of the commerce power, a doctrine which though not part of the *ratio decidendi* of the Court was expounded by *Marshall* C.J. in such a way as to establish it. *Johnson* J. treated the matter as evident and used some of the very words of s. 92. He said: "The grant to Livingston and Fulton interferes with the freedom of intercourse among the States; and on this principle its constitutionality is contested" (2). His Honour, in effect, took the view that the principle did form part of the constitutional law of the United States and for that, among other reasons, the monopoly did not avail. It is, however, better not to pursue the analogy presented in the United States, if for no other reason, because in America it is always invasive action by a State that is in question. Here I think that we should apply s. 92 in the light of the general guidance given by the two decisions of the Privy Council and of the authority of the Transport Cases (3). The Transport Cases formed the foundation of the argument in support of Part IV. and to my mind our decision must in a great measure depend upon a proper interpretation of those authorities. There is an extensive passage in the judgment of *Rich* J. in *Vizzard's Case* (4), set out in the judgment of *Evatt* and *McTiernan* JJ. in *Gilpin's Case* (5), a judgment in which *Rich* J. himself agreed. Having set it out, *Evatt* and *McTiernan* JJ. say that, in their opinion, it truly describes the legislation under consideration in that case, and they proceed to say: "Absolute freedom of trade, commerce and intercourse among the States does not mean that a resident of one State possesses the right to transport goods or travel to a place in another State in whatever vehicle or by whatever route or at whatever time or at whatever speed he may choose. And a law which imposes a limitation upon his choice is not necessarily inconsistent with s. 92 of the Constitution."

(1) (1824) 22 U.S. 1 [6 Law. Ed. 23].
(2) (1824) 22 U.S., at p. 229 [6 Law. Ed., at p. 78].
(3) (1933) 50 C.L.R. 30; (1935) 52 C.L.R. 189, 215; (1935) 53 C.L.R. 493; (1937) 57 C.L.R. 327.
(4) (1933) 50 C.L.R., at pp. 50, 51.
(5) (1935) 52 C.L.R., at pp. 212, 213.

In the case of *Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (1), *Evatt* J. recurs to the same idea in expressing the effect of the Transport Cases : " Those cases determine that the imposition of non-discriminatory limitations of choice as to the means and routes of land transport is not necessarily inconsistent with s. 92, and that the New South Wales *State Transport* (*Co-ordination*) *Act* 1931 is valid."

It is, I think, unnecessary to transcribe once more the passage from the judgment of *Rich* J. But it makes the following points : (1) The State legislation then in question was directed at (*a*) an ordered system of transportation (*b*) without irrational competition tending to its mutual destruction. (2) The operation of the legislation in no way depended upon the inter-State character of the traffic, but applied uniformly to intra-State and inter-State traffic. (3) " A law of that character which did differentiate between the two kinds of traffic might well be held directly to restrain inter-State trade." (4) The legislation regulated and did not suppress transport and it regulated it with a view in the long run to facilitate it by ensuring that a superabundance of transport at one time did not lead to a deficiency at another. (5) It did not affect actual commercial dealings, the transfer of goods from one place to another, and the actual movement of individuals. (6) It dealt with motor vehicles as a means to trade, commerce and intercourse inter-State and intra-State, " but they are aids or implements to effect the thing, they are not the thing itself."

The last two of these reasons or observations, which I take to be adopted by the majority of the Court as explaining the decisions, have in the past appeared to me to mean that the use of motor vehicles in the carriage of goods from one State to another is an incident of trade, commerce and intercourse, but is not itself protected by s. 92. The actual decisions in and the full reasoning of the Transport Cases are plainly shown to be inapplicable by the emphasis placed on the first four of the foregoing points. They have no analogy in the statute now under consideration. But to my mind the feature of the Transport Cases which is material is the sharp differentiation between commercial dealings, or perhaps commercial and other intercourse, on the one hand, and, on the other hand, motor vehicles as means or implements used for that purpose and no more.

We are here concerned with the trade or business of carrying men and goods over inter-State air routes, a thing which I should have thought intrinsically as much inter-State commerce as the sale and delivery of goods from one State to another and, therefore, necessarily

(1) (1935) 53 C.L.R., at p. 508.

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within the protection of s. 92. But does the contrast made in the passage to which I have referred in the judgment of *Rich* J. amount to a decision that the trade or business of providing inter-State carriage of men and things does not itself lie within the concept of trade, commerce and intercourse among the States; that it forms no part of the denotation of commerce because it has not the attributes required by the definition though, because it is conducive to commerce, it may in some respects be regulated under the commerce power? After a full study of the Transport Cases I have come to the conclusion that they do not decide this proposition. In the pragmatical solution which those cases gave to a problem which they approach as a complex the essential features of the legislation were examined for the purpose determining its practical operation upon inter-State commerce and intercourse regarded as a sum of activities: to see whether it obstructed, restricted, retarded or impaired, not some operations of commerce considered separately or in isolation, but the commerce between New South Wales and Victoria considered as a whole. The legislation was, in effect, treated as part of an attempt to make the internal transport of the State a planned structure, a framework within which the freedom guaranteed by s. 92 subsisted and even by which that freedom was secured. The reasons given for the solution necessarily comprised much that was really directed to denying that in the character and operation of the legislation factors or features could be found to which s. 92 was inimical. It is, I think, in the course of this demonstration that, among other things, any adverse effect upon the flow of trade is excluded and the relation in fact which transport has to trade in goods is emphasized. It is to be noticed that it is not the business of inter-State carrying but motor trucks themselves which *Rich* J. describes as aids or implements to commerce and intercourse but not the thing itself. The decision was, I think, based upon a combination of all the considerations mentioned in the passage, negative and positive, particularly the fact that it was the undifferentiated road transport of the State that was regulated on a non-discriminatory basis.

The *Airlines Act*, however, appears to me to raise quite a different question. It is whether the elimination by governmental action, legislative and executive, of the business of inter-State transportation as such in favour of a State undertaking is consistent with s. 92. If the test laid down by Lord *Wright* in *James* v. *The Commonwealth* (1), freedom at the frontier, be applied, it is plain that it is because the business involves crossing the frontier that it is eliminated. It is

(1) (1936) A.C. 578, at p. 630; 55 C.L.R. 1, at p. 58.

not like the post office, something which undertakes an exclusive function independently of State boundaries. Nor, may it be added, does it resemble the post office in being a traditional function of government, dealt with as such in the Constitution, and nowhere forming a business. It is no answer to the application of Lord *Wright's* test to say that, because the general exclusion in time and place of the business of air transport in favour of a government undertaking could only be accomplished under the commerce power, the freedom infringed must necessarily be related to State boundaries. If, on the other hand, the answer is offered that the transmutation of the business into a government undertaking means that the function is still freely carried on, it is met by the proposition, so often enunciated by *Isaacs* J., that in s. 92 "free" means free from governmental restriction or obstruction, whether legislative or executive, a proposition for which the judgment of Lord *Atkin* in *James* v. *Cowan* (1) is authority. It comes back, in my opinion, to the position of the business of inter-State transportation as part of commerce and intercourse. If it is part of the denotation of that expression in s. 92, as I think it clearly must be, then I see no escape from the conclusion that Part IV. is inconsistent with that constitutional restraint. If, on the other hand, carrying on inter-State transportation were held to be outside the protection of s. 92, it would be hard indeed to bring it directly under s. 51 (i.). In that case the legislative power could affect it only as an incident of the subject matter of the power. There would then arise the difficulty to which I have already referred, that to provide for the carriage of passengers not concerned in commerce might be considered outside the power. My opinion, however, is that inter-State transportation falls directly under s. 51 (i), but is also within the protection of s. 92. For the reasons I have given, I think that s. 92 invalidates so much of Part IV. as is not concerned with the Territories.

Upon this view the question arises whether the consequence is to bring the whole Act down or, on the contrary, the void provisions are to be severed from those which otherwise might be validly enacted. The validity of the general provisions of the Act has not been attacked on other grounds and is assumed.

The question of severability really falls into two. One of them arises within Part IV. itself. For it deals alike with Territorial airlines and with inter-State airlines and the invalidity of the attempt to make the inter-State airline service a monopoly may conceivably be regarded as leaving the monopoly of the Territorial airlines unaffected.

(1) (1932) A.C. 542, at pp. 558, 561 ; 47 C.L.R. 386, at pp. 396, 398.

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The other and more important question is whether Part IV., as a whole, can be severed from the rest of the *Airlines Act*. It is said on the part of the plaintiffs that it contains provisions indispensable to the conception upon which the statute is based. To authorize the establishment of an airline service to operate as a monopoly is one thing, to authorize one to compete in air transport is another. Accordingly, it is said, the invalidity of Part IV. changes the character of the measure. Further, it is pointed out that sub-s. (2) of s. 19, to which reference was made in the earlier part of this judgment, is linked with Part IV. It imposes upon the Commission the duty of exercising its powers of establishing, maintaining and operating airline services as fully and adequately as may be necessary to satisfy the need for such services: compare the definition in s. 4 of "adequate airline service." Reliance is placed upon this provision as itself contemplating an exclusive service and as measuring the Commission's duty on that assumption. These considerations are, no doubt, important and, prior to the enactment of s. 15A of the *Acts Interpretation Act* 1901-1941, they might have proved decisive. But that provision has, in effect, introduced a rule of construction whereby unless an intention affirmatively appears to the contrary, the provisions of a statute are to be taken as independent of one another and not interdependent. The application of the provision is seldom easy, but it is illustrated by a number of decisions of this Court, a collection of which will be found in *Fraser, Henleins Pty. Ltd.* v. *Cody* (1), and it is further elucidated by the industry expended in the United States upon the exposition of similar clauses. But I think little help is to be gained from abstract discussions of the effect of severability provisions. As a practical conclusion, it comes back to the manner in which the intention of the legislature is to be ascertained, that is to say, the presumptions to be made. My view, which I repeat, is that such severability clauses "establish a presumption in favour of the independence, one from another, of the various provisions of an enactment, to which effect should be given unless some positive indication of interdependence appears from the text, context, content or subject matter of the provisions" (2).

Now the general considerations upon which the argument against severability is founded may be conceded. But the difference, great as it is between the establishment of an exclusive and a non-exclusive government airline service, does not control the answer to the question what did Parliament intend. To say that Parliament intended that the service in the conditions prescribed by s. 46 and s. 47 should be exclusive is to throw little or no light on the question

(1) (1945) 70 C.L.R. 100.

(2) (1945) 70 C.L.R., at p. 127.

whether the intention that they should be exclusive was paramount, so that the intention that there should be a government service was completely dependent upon it. In many departments of the law we are faced with the problem of deciding what is essential and what is not essential for the purpose of carrying out *sub modo* an intention which is expressed on the assumption that it will be entirely effective: See *Attorney-General (N.S.W.)* v. *Perpetual Trustee Co. (Ltd.)* (1). The solution often depends on an intuitive understanding of the underlying purpose of the plan of the framer of the instrument. But it is precisely that uncertain and undesirable mode of solution that s. 15A supersedes.

In the present case the arrangement and text of the enactment appear to me to support, rather than weaken, the presumption that the main provisions are, so to speak, to stand upon their own feet in a question of *ultra vires*. No doubt if Division 2 of Part II, dealing as it does with the powers, functions and duties of the Commission, were void the whole Act would collapse. But it by no means follows that provisions separated in the arrangement of the Act and logically consequential in operation upon Part II. are indispensable to Part II. itself. Part II. is entitled "Limitations in respect of Airline Services" and is drafted as belonging to a distinct subject matter. It is a gratuitous assumption that Parliament would not have a governmental airline unless it were a monopoly. The basis for such an assumption is found rather in the business inferences favoured in active and practical pursuits than in the considerations affecting the adjustment of policies to constitutional exigencies. The draftsman of the *Airlines Act*, whatever may have been in the minds of the authors, seems to have been at pains in the formal structure of the Act to give it the appearance of separability. The argument from s. 19 (2) is, I think, fallacious. Doubtless it imposes a duty upon the Commission to provide a service adequate to all the traffic. The performance of the duty would at the same time operate to fulfil the conditions of s. 46 or s. 47. But no inference can be drawn that, but for ss. 46 and 47, s. 19 (2) would not have been adopted. There is in my opinion no sufficient ground for saying that Part IV. is inseverable.

There is greater difficulty in the minor question whether within Part IV. the provisions relating to the Territories can be severed from those invalidated by s. 92. In s. 46 there is a formal separation; in s. 47 there is an incomplete formal separation, and in s. 49 there is a formal combination of the provisions relating

(1) (1940) 63 C.L.R. 209, at pp. 226, 227.

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to the inter-State and Territorial services. The inferences to be drawn from arrangement and those from probabilities are not, perhaps, conclusive. But neither s. 46 (2) nor s. 47 (*b*) can affect inter-State transportation. By definition (s. 4) an inter-State airline service is excluded from the application of the expression "Territorial airline service." And also by definition "inter-State airline service" covers services which pass through two or more States into a Territory or by way of a Territory from one State to another. For "Australia" is defined to include the Territories and "inter-State airline service" is defined to mean "a service providing for the transport by air, for reward, of passengers or goods and operating from one place in Australia to another place in Australia and having scheduled stopping places in two or more States."

It follows that s. 46 (2) and s. 47 (*b*) are capable of full operation without touching traffic protected by s. 92. I think, therefore, that they should be regarded as unaffected by the invalidity of s. 46 (1) and s. 47 (*a*). I am, therefore, of opinion that Part IV. is to this extent internally severable. But, even if it were wholly invalid, it would not, in my opinion, bring down the rest of the Act.

This conclusion makes it necessary to consider the validity of reg. 79 of the *Air Navigation Regulations* consisting of Statutory Rules 1939 No. 2 and Statutory Rules 1940 No. 25. Regulation 79 forms Part VII., which is entitled "Public Transport Service." The other parts of the Regulations are in the main concerned with the control of aviation and air navigation in the interests of safety, organization, order and the like. But this Part deals with air transport services. As reg. 79 stood in 1937, it was as follows:—

"79. (1) Aircraft shall not be used by any person in the operation of a regular public transport service except under the authority of, and in accordance with, a licence issued to that person by the Board.

(2) An applicant for any such licence shall furnish such information in relation to the proposed service as the Board requires.

(3) The Board shall, if satisfied as to the safety of the proposed service, issue a licence (in these Regulations referred to as 'an airline licence') subject to such conditions in addition to compliance with these Regulations, as the Board considers necessary to ensure the safety of the aircraft and of the persons to be carried by the aircraft.

(4) Subject to Part XIII. of these Regulations, an airline licence shall remain in force for a period of one year from the date of issue, and may, from time to time, be renewed by the Board for a further period not exceeding one year."

The Board referred to was the Civil Aviation Board. In 1939 the Director-General of Civil Aviation was substituted for it.

In the form in which reg. 79 stood at that stage, I should think it would have been upheld. The matter was not argued and I do not express a concluded opinion about it. But, having regard to the duty of the Board under sub-reg. (3), there appears to be no basis for an argument against the then regulation under s. 92.

By Statutory Rules 1940 No. 25, however, a new sub-regulation was substituted for sub-reg. (3). Statutory Rules 1940 No. 25 is as follows :—

" Regulation 79 of the *Air Navigation Regulations* is amended by omitting sub-regulation (3) and inserting in its stead the following sub-regulation :—

' (3) The Director-General may issue a licence (in these Regulations referred to as " an air-line licence ") upon such conditions, in addition to compliance with these Regulations, as the Director-General considers necessary or he may refuse to issue the licence '."

This, if valid, effected a change in the character of reg. 79. It became, so far as its natural meaning goes, a prohibition subject to licence, with power to grant or refuse the licence and impose conditions upon the licensee without any express restriction as to the grounds. Unless restrained by interpretation or by the operation of s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941, I should think that a regulation of that nature would be bad as contrary to s. 92, in its operation on inter-State transport. It is enough, I think, to refer to *Gratwick* v. *Johnson* (1). But the question is whether it ought to be read down in some way so as to be valid. It is suggested that with the help of s. 46 (*b*) and upon a survey of the other purposes of the Regulations, the exercise of the discretion might be confined by interpretation so as to avoid inconsistency with s. 92. An analogy was sought in the course taken in *Shrimpton* v. *The Commonwealth* (2). But there we were dealing with the ambit of a constitutional power and with regulations affording some guidance as to purpose. The difficulty here lies in the fact that Part VII. deals with a subject standing apart from the field covered or the general purpose served by the rest of the Regulations and by the further fact that the object of the amendment of 1940 appears to have been to enlarge the discretion ; while we are invited to confine it almost within its former limits.

In my opinion we cannot read into sub-reg. (3) a limitation in respect of the ground of refusal drastic enough to save its validity. But it is, in my opinion, the validity of the amendment made by

(1) (1945) 70 C.L.R. 1. (2) (1945) 69 C.L.R. 613.

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Statutory Rules 1940 No. 25 that is involved. That was a distinct act of subordinate legislation and its validity must be considered by what it affected to do. It affected to substitute a new sub-reg. (3) which, if effective, would make the restraint in sub-reg. (1) conflict with s. 92. That seems to me to mean that *pro tanto* the adoption of Statutory Rules 1940 No. 25 was invalid and reg. 79 stands in its orginal form ; that is as it was in 1939. There was no intention to repeal former sub-reg. (3) independently of the adoption of the new sub-reg. (3). The invalidity of the new sub-regulation, therefore, involves the consequence that the old sub-reg. (3) stands.

I am, therefore, of opinion that the purported amendment of sub-reg. (3) of reg. 79 by Statutory Rules 1940 No. 25 is void and that it should be so declared.

I think that the three demurrers should be overruled and judgment pronounced in the respective suits for the plaintiffs. In the suits of Australian National Airways Pty. Ltd. and of Guinea Airways Ltd. there should be a declaration that in Part IV. of the *Australian National Airlines Act* 1945, sub-s. (1) of s. 46, so much of s. 47 (including par. (*a*)), and so much of s. 49, as refer to an inter-State airline service or services, are invalid and that the purported adoption by Statutory Rules 1940 No. 25 of the amendment to sub-reg. (3) of reg. 79 of the *Air Navigation Regulations* 1937-1939 is void.

In the suit of MacRobertson-Miller Aviation Co. Ltd. the declaration of right should be limited to the invalidity of Statutory Rules 1940 No. 25, because that plaintiff is not interested in inter-State airlines, but in a Territorial airline.

WILLIAMS J. These are demurrers by the defendants to three actions brought for the purpose of impeaching the validity of Part VII. of the *Air Navigation Regulations*, and of the whole of the *Australian National Airlines Act* 1945, or alternatively ss. 46, 47 and 49 of that Act and for consequential relief.

The defendants to each action are the same, namely the Commonwealth of Australia, the Treasurer of the Commonwealth, the Minister of State for Air and Civil Aviation for the Commonwealth, and the Director-General of Civil Aviation of the Commonwealth.

The plaintiff in the first action, Australian National Airways Pty. Ltd., is a company incorporated under the laws of the State of Victoria which carries on regular public transport services by air for reward of passengers and goods operating from one place in Australia to other places in Australia. Some of the services have scheduled stopping places in two or more States and some are wholly intra-State. Such services are carried on in accordance with and on

routes specified in airline licences purporting to have been issued to the plaintiff by the defendant the Director-General of Civil Aviation under Part VII. of the *Air Navigation Regulations*.

The plaintiff in the second action, Guinea Airways Ltd., is a company duly incorporated under the laws in force in the State of South Australia which carries on regular public transport services by air for reward of passengers and goods operating from one place in Australia to other places in Australia. One of such services has scheduled stopping places in one State and a Territory of the Commonwealth, one has scheduled stopping places in two or more States and some are wholly intra-State. Such services are carried on in accordance with and on routes specified in airline licences purporting to have been issued to the plaintiff by the Director-General of Civil Aviation under Part VII. of the *Air Navigation Regulations*.

The plaintiff in the third action, MacRobertson-Miller Aviation Co. Ltd., is a company duly incorporated under the laws of the State of Western Australia which carries on a regular public transport service providing for the transport by air for reward of passengers and goods operating from Perth in the State of Western Australia to Katherine in the Northern Territory with numerous scheduled intermediate stopping places both in the State of Western Australia and in the Northern Territory. Such service is carried on in accordance with and on the routes specified in airline licences purporting to have been issued to the plaintiff by the Director-General of Civil Aviation under Part VII. of the *Air Navigation Regulations*.

Prior to 8th February 1940, reg. 79, contained in Part VII. of the *Air Navigation Regulations*, which is headed Public Transport Service, provided that (1) aircraft should not be used by any person in the operation of a regular public transport service except under the authority of, and in accordance with, a licence issued to that person by the Board, and (3) the Board should, if satisfied as to the safety of the proposed service, issue a licence (referred to as an airline licence) subject to such conditions, in addition to compliance with the Regulations, as the Board considered necessary to ensure the safety of the aircraft and of the persons to be carried by the aircraft. On 8th February 1940 this regulation was amended by omitting sub-reg. (3) and inserting in its stead the following sub-reg. (3) : The Director-General may issue a licence (in these Regulations referred to as an airline licence) upon such conditions, in addition to compliance with these Regulations, as the Director-General considers necessary or he may refuse to issue the licence.

The *Air Navigation Regulations* (including Part VII.) purport to have been made by the Governor-General, that is by the Federal

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Executive Council, under the power to make regulations conferred upon the Governor-General by the *Air Navigation Act* 1920 as amended by the *Air Navigation Act* 1936. This Act gives the Governor-General power, *inter alia*, to make regulations for the purpose of providing for the control of air navigation (*a*) in relation to trade and commerce with other countries and among the States, and (*b*) within any Territory of the Commonwealth. The plaintiffs each claim declarations that Part VII. of these Regulations is not authorized by the Act, and is beyond the powers of the Governor-General in Council and void, or alternatively a declaration that if this part, upon its true construction, confers upon the defendant, the Director-General of Civil Aviation, an absolute and uncontrolled discretion to refuse to issue, to refuse to renew, or to refuse to cancel, any airline licence or licences, it is unauthorized, *ultra vires*, and void.

Part VII. applies to inter-State trade and commerce and to the Territories by virtue of reg. 6 of the *Air Navigation Regulations* which provides that they shall apply, *inter alia*, to air navigation in relation to trade and commerce with other countries and among the States, and to air navigation within the Territories, and to aircraft engaged in such navigation, and aerodromes open to public use by such aircraft.

The effect of the Act is to delegate to the Governor-General for the purpose stated the powers of legislation conferred upon the Parliament with respect to trade and commerce with other countries and among the States by s. 51 (i.) and with respect to Territories by s. 122, of the Constitution. This delegated power to legislate under s. 51 (i.) would, of course, be as much subject to the prohibition contained in s. 92 as an Act of the Parliament itself. To cover the case of flying intra-State, the *Air Navigation Regulations* are brought into force in each State by Acts of the Parliaments of each State, passed in or about the year 1937, providing that the *Air Navigation Regulations* in force from time to time under the *Commonwealth Air Navigation Act* 1920-1936 or any Act amending that Act shall be in force in the State.

The *Australian National Airlines Act* 1945 is intituled an Act to provide for the Establishment and Operation of National Airline Services by the Commonwealth and for other purposes. The plaintiffs in each action claim a declaration that the Act is beyond the powers of the Parliament of the Commonwealth, contrary to the provisions of the Constitution of the Commonwealth and void, or alternatively a declaration that ss. 46, 47 and 49 of the Act are beyond the powers of the Parliament, contrary to the Constitution and void. The Act contains a preamble that, in order to ensure,

among other things, that (*a*) trade and commerce with other countries and among the States are fostered and encouraged to the greatest possible extent; (*b*) the maintenance and development of the Defence Force of the Commonwealth in relation to the defence of Australia by air and the establishment of plant and equipment necessary for that Force are assured; (*c*) the development of the Territories is promoted with the utmost expedition; and (*d*) the carriage of mail by air within Australia is promoted to meet the needs of the people of Australia, it is expedient to provide for the matters hereinafter set out. But no attempt has been made by the defendants to support the validity of the Act except as an exercise of the powers conferred upon the Parliament of the Commonwealth by ss. 51 (i.) and 122 of the Constitution.

The Act consists of seven parts. In Part I., headed "Preliminary" it is only necessary to refer to the definitions in s. 4 of "adequate airline service," "inter-State airline service" and "Territorial airline service." These definitions are as follows:—

"adequate airline service" means—

(*a*) an inter-state airline service which is adequate to meet the needs of the public for inter-state transport by air between scheduled stopping places of the service; or

(*b*) a Territorial airline service which is adequate to meet the needs of the public for transport by air between scheduled stopping places of the service of which at least one is within a Territory of the Commonwealth.

"inter-State airline service" means a service providing for the transport by air, for reward, of passengers or goods and operating from one place in Australia to another place in Australia and having scheduled stopping places in two or more States.

"Territorial airline service" means a service (not being an inter-state airline service) providing for the transport by air, for reward, of passengers or goods and having a scheduled stopping place in a Territory of the Commonwealth.

Part II. is headed "The National Airline Services" and consists of four Divisions, of which it is only necessary to refer to Div. 1, headed "Establishment and Constitution of the Australian National Airlines Commission"; Div. 2, headed "Powers Functions and Duties of the Commission", and Div. 3, headed "Finances of the Commission." Division 1 incorporates an authority of the Commonwealth, to be known as the Australian Airlines Commission, which shall have and may exercise the rights, powers, authorities and functions conferred, and shall be charged with and perform the duties and obligations imposed, upon it by the Act.

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Division 2 contains s. 19, which, so far as is material, provides :— sub-s. (1), that for the purposes of this Act and subject to the provisions of this Act and subject to the *Air Navigation Regulations* and with full regard to safety, efficiency, and economy of operation the Commission may do all that is necessary or convenient to be done for, or as incidental to, in relation to, or in connection with, the establishment, maintenance or operation by the Commission of airline services for the transport, for reward, of passengers and goods by air (*a*) between any place in a State and any place in another State ; (*b*) between any place in any Territory of the Commonwealth and any place in Australia outside that Territory ; and (*c*) between any place in any Territory of the Commonwealth and any other place in that Territory ; sub-s. (2), that it shall be the duty of the Commission to exercise the powers conferred by the last preceding subsection as fully and adequately as may be necessary to satisfy the need for the services specified in that sub-section and to carry out the purposes of this Act.

Division 3 is headed " Finances of the Commission ", and provides for an advance by the Treasurer out of the Consolidated Fund of such amount not exceeding in all the sum of £3,000,000 and such further amounts as are from time to time appropriated by the Parliament for the purpose, as are, in the opinion of the Minister, required by the Commission ; and that the moneys of the Commission shall be applied in discharging the obligations of the Commission as therein mentioned, and the profits derived from the operations of the Commission shall be applied as therein mentioned.

Part III. is headed " Compulsory Acquisition of Aircraft and Other Property ", and contains s. 42, which provides that the Commission may for the purposes of this Act, by notice served on the owner or published in the *Gazette*, acquire any aircraft or other property (not being land) required for the purposes of the Commission.

Part IV. is headed " Limitations in respect of Airline Services ", and contains ss. 46 to 49. Section 46 (1) provides that where an airline licence is issued to the Commission in respect of an inter-State airline service and the Commission has established that service, any airline licence held by any person, other than the Commission or a contractor, in respect of any inter-State airline service which provides inter-State transport by air between any of the scheduled stopping places of the service established by the Commission shall, by virtue of this section, . . . and in so far as it authorizes inter-State transport by air between any of those stopping places of passengers or goods embarked or loaded for transport solely between those stopping places, be inoperative so long as there is an adequate airline

service between those stopping places by reason only of the services operated by the Commission and the services operated by the contractors. Section 46 (2) contains similar provisions where an airline licence is issued to the Commission in respect of a Territorial airline service and the Commission has established that service. Section 47 provides that the licensing authority shall not issue to any person, other than the Commission or a contractor to whom the Commission has requested the licensing authority to issue a licence (*a*) in respect of an inter-State airline service an airline licence which would authorize inter-State transport by air between any scheduled stopping places of any airline service operated by the Commission or any contractor; or (*b*) in respect of a Territorial airline service, an airline licence which would authorize transport by air between any scheduled stopping places not being places in a State of any airline operated by the Commission or any contractor, unless, and except to the extent to which the licensing authority is satisfied that, having regard to the airline services operated by the Commission and contractors, the issue of the licence is necessary to meet the needs of the public with respect to inter-State airline services or Territorial airline services. Section 49 provides that:—A person shall not enter into a contract—(*a*) to transport by air for reward any person or goods; (*b*) to be transported by air for reward; or (*c*) to have any other person or goods transported by air for reward, in the course of the operation of any prescribed inter-State airline service or Territorial airline service operated by any person, other than a person holding an airline licence in respect of that service, not being a licence which is inoperative by virtue of s. 46 of this Act.

The plaintiffs in the first and second actions, in respect of their inter-State airline services, contend that reg. 79 of the *Air Navigation Regulations* and ss. 46, 47 and 49 of the *National Airlines Act* are void because they contravene s. 92 of the Constitution. They also contend that the invalidity of these sections avoids the whole Act because they cannot be severed from the rest of the Act under s. 15A of the *Acts Interpretation Act* 1901-1941.

They also contend that the Act is not a valid exercise of the powers conferred upon the Parliament by s. 51 (i.) of the Constitution on the ground that this placitum does not authorize legislation setting up an authority of the Commonwealth to engage in trade and commerce among the States and with other countries, but only authorizes the Parliament to regulate such trade.

The plaintiff in the second action in respect of its service between a State and a Territory, and the plaintiff in the third action in respect of its service between a State and a Territory, are in a

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different position to the plaintiff in the first action, because s. 92 only applies to trade and commerce and intercourse among the States. The plaintiffs in respect of these services can, therefore, only benefit from the attack upon the validity of ss. 46, 47 and 49 of the Act on the ground that they contravene s. 92 of the Constitution if that attack succeeds, and the effect of that success is to destroy the validity of the whole Act.

Assuming, therefore, the rest of the Act, and particularly s. 19 (1) (*b*), survives, these plaintiffs also contend that the power of the Parliament to make laws for the Territories under s. 122 does not give it power to make extra-territorial laws, and that it can only legislate under this section in respect of intra-Territorial airline services.

I agree with the submission that the Statute of Westminster, adopted by the *Statute of Westminster Adoption Act* 1942, does not operate to give legislation passed under s. 122 any extra-territorial operation against a State that it would not have had prior to the adoption. But the Parliament can make laws under s. 122 with respect to any airline services that have a stopping place in the Territory which provide that no person shall operate such a service in the Territory except a person licensed to do so by the Commonwealth, or provide that the Commonwealth shall have a monopoly of such services.

Section 19 (1) (*b*) refers to an airline service between any place in any Territory of the Commonwealth and any place in Australia outside that Territory. Since Australia is defined by s. 4 of the Act to include the Territories of the Commonwealth, such a service could exist between a Territory and another Territory, or between a Territory and a State, or between one or more Territories and one or more States. But if the service had scheduled stopping places in more than one State it would be an inter-State airline service and not a Territorial airline service. The operation of s. 19 (1) (*b*) is, therefore, confined to airline services operating in two or more Territories, or in one or more Territories and in one State. The Parliament of the Commonwealth would have power to provide what services should operate in one or more Territories. But in the case of a service between one or more Territories and a State, I am unable to find any power in the Constitution which would enable the Parliament to legislate so as to bind the State. The words " other countries " in s. 51 (i.) do not, in my opinion, include Territories. Section 51 (xxxix.) empowers the Parliament to make laws for the peace, order and good government of the Commonwealth with respect to matters incidental to the execution of any powers vested by the Constitution in the Parliament. Assuming that this placitum

applies to legislation under s. 122, it would not, I think, be incidental to laws for the government of a Territory to make a law affecting the sovereignty of a State. If the Parliament has power under this placitum to make a law binding a State in respect to communications between a Territory and a State the strange result follows that it possesses as a legislative power incidental to s. 122 a power analogous to s. 51 (i.), but without the limitation imposed by s. 92. I can find nothing in *Buchanan* v. *The Commonwealth* (1), *R.* v. *Bernasconi* (2), *Mainka* v. *Custodian of Expropriated Property* (3), *Porter* v. *The King*; *Ex parte Chin Man Yee* (4), or *Ffrost* v. *Stevenson* (5) to support the existence of such a power, and there is a great deal in the reasoning of these cases to the contrary. The Commonwealth is not helpless in the matter. It can, if it wishes, admit the Territories to the Commonwealth as States under s. 121 of the Constitution, and the new and previous States would then all be subject to Commonwealth legislation under s. 51 (i.) and entitled to the protection of s. 92. If, therefore, a State would not agree to co-operate with the Commission the result would be that there would be no services between that State and the Territory, but this would not affect the validity of s. 19 (1) (*b*), if severable, as a valid exercise of the powers conferred upon the Parliament by s. 122.

The plaintiff in the second action also alleges that prior to 1942 it carried on a regular public transport service wholly within the Territories of the Commonwealth of Papua and New Guinea, that such services were suspended owing to the war with the Japanese, and it is desirous of re-opening such services. But the Parliament would plainly be entitled to enact s. 19 (1) (*c*) as an independent enactment, so that this sub-section would only be invalid if the whole Act is invalid.

The plaintiffs who operate inter-State services do not contend that the carriage of passengers and goods by air for reward is not part of trade and commerce within the meaning of s. 51 (i.), or that Parliament cannot regulate this carriage so as to provide for the safety of navigation by air among the States. They do not therefore object to reg. 79 in the form in which it appeared prior to 8th February 1940, but they do object to the new sub-reg. (3) added to reg. 79 on that date on the ground that it contravenes s. 92 of the Constitution. The new sub-regulation gives the Director-General express authority to impose such conditions, in addition to compliance with the Regulations, as he considers necessary upon the

(1) (1913) 16 C.L.R. 315.
(2) (1915) 19 C.L.R. 629.
(3) (1924) 34 C.L.R. 297.
(4) (1926) 37 C.L.R. 432.
(5) (1937) 58 C.L.R. 528.

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issue of a licence, and to refuse to issue a licence, so that he now has an absolute discretion to grant or refuse a licence, and, therefore, a discretion to prohibit, or to prohibit except on certain conditions, a person from operating a regular public inter-State transport service.

The most important sections in the Act are ss. 19, 46 and 47. Section 19 (2), in my opinion, imposes upon the Commission the duty of providing airline services which are completely capable of carrying all the passengers and goods requiring carriage by air for reward between any place in a State and any place in another State; between any place in any Territory of the Commonwealth and any place in Australia outside that Territory; and between any place in any Territory of the Commonwealth and any other place in that Territory. In other words the Act is intended to create a complete Government monopoly in the transport of passengers and goods by air for reward throughout Australia and its Territories except in respect of intra-State services. An argument was submitted on behalf of the defendants that the words in s. 19 (2) "as may be necessary to satisfy the needs for the services" specified in s. 19 (1) mean adequate to satisfy any insufficiency in these services that may exist and which is not met by the existing services, or in other words that the duty of the Commission is to supplement existing services so far as it may be necessary to do so in order to give fully adequate services. But the definition of "adequate airline service" in s. 4 indicates that adequate service in the Act means a service adequate in itself to satisfy the public needs, and in s. 19 (2) this meaning is reinforced and placed beyond the possibility of doubt by the addition to "adequately" of the word "fully." Sections 46 and 47 prescribe the manner in which this duty is to be fulfilled. Sub-section (1) of s. 46 refers to inter-State airline services, while sub-s. (2) refers to Territorial airline services. The sub-sections provide that when a licence has been issued to the Commission and the Commission has provided an adequate service, licences issued to other persons to operate competing airlines will be inoperative so long as the Commission provides an adequate service. Section 47 prohibits the licensing authority from issuing a licence to any person other than the Commission or its contractors unless and except to the extent to which the licensing authority is satisfied the airline services provided by the Commission are inadequate to meet the needs of the public with respect to inter-State airline services and Territorial airline services. So far, therefore, from the duty of the Commission being to satisfy the needs not satisfied by the existing services, it is the duty of the Commission fully to satisfy the public needs, and for that

purpose to provide services which supersede all existing services, and it is only to the extent to which the Commission fails to fulfil this duty that the licensing authority is authorized to issue a licence to some person other than the Commission or one of its contractors. The purpose of the Act is, therefore, absolutely to prohibit persons other than the Commission or its contractors engaging in the business of transporting passengers and goods by air for reward between the places mentioned in s. 19, so long as the Commission gives an adequate service, and to permit such persons to engage in such business only to the extent to which the licensing authority is satisfied that the services provided by the Commission are insufficient to meet the needs of the public.

Section 92 of the Constitution provides 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. The meaning of the section, which is binding upon the legislatures of both the Commonwealth and the States, has been discussed in many cases. Section 51 (i.) of the Constitution provides that the Parliament of the Commonwealth shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth, with respect to trade and commerce with other countries, and among the States. The Parliaments of the States also have a concurrent power, preserved to them by s. 107 of the Constitution, subject to territorial limitations, to make laws with respect to trade and commerce with other States and countries. If a law of a State is inconsistent with a law of the Commonwealth, s. 109 provides that the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The Constitution must be construed as a whole, and so as to reconcile, as far as possible, the existence of these legislative powers with the prohibition upon their exercise imposed by s. 92. In performing this task the Court must be guided by the views expressed by Lord *Wright* upon the meaning, scope, and operation of the section when delivering the judgment of the Privy Council in *James* v. *The Commonwealth* (1). In the judgment his Lordship discussed a number of the previous decisions of this Court. He pointed out that, in the cases preceding *McArthur's Case* (2), this Court was concerned with the question of freedom in passing the State borders. These cases all proceeded on the basis that s. 92 bound the Commonwealth as well as the States. In *McArthur's Case* (2) it was held that the section did not bind the Commonwealth and this opinion

(1) (1936) A.C. 578; 55 C.L.R. 1. (2) (1920) 28 C.L.R. 530.

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prevailed until it was overruled by the Privy Council in *James* v. *The Commonwealth* (1). It is evident that Lord *Wright* considered that *McArthur's Case* (2) was wrongly decided, not only in holding that s. 92 did not bind the Commonwealth, but also in holding that the Queensland Act, there in question, infringed the section. He said: "There was no prevention or hindrance under the Act in respect of the passage of goods from State to State; the law applied equally to all goods sold in the State whether or not they came across the border . . . in truth the decision deprived Queensland of its sovereign right to regulate its internal prices" (3). It is also evident that his Lordship considered that *Vizzard's Case* (4) was correctly decided, that he accepted the general approach to s. 92 and reasoning of *Evatt* J. in that case, and that he gave his express approval to the particular passage in the judgment of *Evatt* J. cited (5). Lord *Wright* concluded by saying that "the true criterion seems to be that what is meant is freedom as at the frontier or, to use the words of s. 112, in respect of 'goods passing into or out of the State'," that "in every case it must be a question of fact whether there is an interference with this freedom of passage," and that "as a matter of actual language, freedom in s. 92 must be somehow limited, and the only limitation which emerges from the contest and which can logically and realistically be applied, is freedom at what is the crucial point in inter-State trade, that is at the State barrier" (6).

It is to be noted that Lord *Wright* only referred to the restriction on the passage of goods from State to State, and that he did not mention restrictions on the means by which these goods were being conveyed when they passed from State to State. But the *Dried Fruits Act* 1928-1935 which was held by the Privy Council to contravene s. 92 was an Act which provided, *inter alia*, that, except as provided by the Regulations, the owner or person having possession or custody of dried fruits should not carry any dried fruits from a place in one State into or through another State to a place in Australia beyond the State in which the carriage began, unless he was the holder of a licence authorizing him to carry such dried fruits, and the carriage was in accordance with the terms and conditions of the licence.

In the United States the business of carrying passengers and goods for reward from one State to another has been held on many occasions to be of the essence of inter-State commerce (*Chicago and Northwestern Railway Co.* v. *Fuller* (7); *Philadelphia Mail Steam-*

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1920) 28 C.L.R. 530.
(3) (1936) A.C., at p. 620.
(4) (1933) 50 C.L.R. 30.
(5) (1936) A.C., at pp. 621, 622.
(6) (1936) A.C., at pp. 630, 631.
(7) (1873) 84 U.S. 560, at p. 568 [21 Law. Ed. 710, at p. 714].

ship Co. v. *Pennsylvania* (1); *Hoke* v. *United States* (2); *Dahnke-Walker Milling Co.* v. *Bondurant* (3); *Caskey Baking Co.* v. *Virginia* (4); *Edwards* v. *California* (5); *Northwest Airlines* v. *Minnesota* (6)). I shall cite a few short passages from these cases. In *Chicago and Northwestern Railway Co.* v. *Fuller* (7) it is said: "Commerce is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on." In *Philadelphia Mail Steamship Co.* v. *Pennsylvania* (1) it is said: "This transportation was an act of inter-State and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else." In *Hoke* v. *United States* (2) it is said: "Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in inter-State commerce." In *James* v. *Cowan* (8) *Isaacs* J., in a judgment which Lord *Atkin* referred to in the Privy Council on appeal as "a convincing judgment" (9), pointed out that the right of inter-State trade and commerce protected by s. 92 is a personal right attaching to the individual, and that is a right of passing from one State to another, of transporting goods from one State to another, and dealing with them in another State. There can be no doubt, in my opinion, that to engage in the business of transporting passengers and goods by air for reward from one State to another is to engage in inter-State commerce. If it is not, then the provisions of the *Air Navigation Regulations* and of the *National Airlines Act* relating to air navigation among the States must fall to the ground, because they derive their entire validity from s. 51 (i.) of the Constitution. In order, therefore, that reg. 79 (3) and the *National Airlines Act* in their relation to commerce among the States should be valid, they must be, in the former case a delegated exercise, and in the latter case an exercise, of s. 51 (i.) which does not contravene s. 92. As ss. 51 (i.) and 92 appear in the same Constitution, there must be a field of legislation open to the Parliament of the Commonwealth under s. 51 (i.), just as there must be a field of legislation preserved to the Parliaments of the States by s. 107, which does not coincide with the area fenced off by s. 92.

(1) (1887) 122 U.S. 326, at p. 336 [30 Law. Ed. 1200, at p. 1201].
(2) (1913) 227 U.S. 308, at p. 320 [57 Law. Ed. 523, at p. 526].
(3) (1921) 257 U.S. 282, at pp. 290, 291 [66 Law. Ed. 239, at pp. 243, 244].
(4) (1941) 313 U.S. 117, at p. 119 [85 Law. Ed. 1223, at p. 1226].
(5) (1941) 314 U.S. 160, at p. 172 [86 Law. Ed. 119, at p. 124].
(6) (1944) 322 U.S. 292 [88 Law. Ed. 1283].
(7) (1873) 84 U.S. 560, at p. 568 [21 Law. Ed. 710, at p. 714].
(8) (1930) 43 C.L.R. 386, at pp. 418, 419.
(9) (1932) A.C., at p. 561.

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It was contended on behalf of the defendants that the reasoning of the majority of this Court in *Vizzard's Case* (1) (and the analogous cases of *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (2); *Duncan & Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (3); *Riverina Transport Pty. Ltd.* v. *Victoria* (4)) should be followed, and that, if this is done, reg. 79 (3) and the Act, in their relation to inter-State commerce, must be held to be valid. But Lord *Wright* has said that the question whether an Act contravenes s. 92 is in every case one of fact, and these decisions must, therefore, in my opinion, all be regarded as decisions upon their particular facts. The question in each case is, does the legislation in fact interfere with the freedom of passage from one State to another. In answering this question, the considerations adverted to as material in the judgments in *Vizzard's Case* (1) and the analogous cases must be given careful attention, but they all appear to be based fundamentally on the right of a State to make laws of a general non-discriminatory character for regulating the care and upkeep and preserving the financial stability of public utilities, particularly railways and roads, established and maintained at the expense of the State. So in the United States, where the power to regulate commerce among the States has been held to be an exclusive power, it has also been held that the laws of a State may validly provide for such matters as the licensing of drivers, the registration of motor vehicles, and the exaction of a licence fee as a contribution to the upkeep of the roads; and for a licensing system which limits the number or the weight and size of vehicles using the roads in the interests of the public safety (*Bradley* v. *Public Utilities Commission* (5))—and see the cases in the Supreme Court of the United States cited in the Constitution of the United States (annotated by the Senate to 1st January 1938, pp. 187-189) and in the judgment of *McTiernan* J. in *Vizzard's Case* (6). In *Vizzard's Case* (6) and the analogous cases this Court has perhaps gone further in upholding State legislation of this nature than the Supreme Court of the United States. But this would appear to be because the railways in Australia are all owned by the States, so that, in establishing and maintaining roads, the States are creating means of competition with their own instrumentalities.

It is a matter of public notoriety that a few years after the end of the last war there was a tremendous increase in the amount of motor traffic in Australia and that about this time great improvements were made to the main roads of many of the States. Thus in New South

(1) (1933) 50 C.L.R. 30.
(2) (1935) 52 C.L.R. 189.
(3) (1935) 53 C.L.R. 493.
(4) (1937) 57 C.L.R. 327.
(5) (1933) 289 U.S. 92, at pp. 95, 96 [77 Law. Ed. 1053, at p. 1056].
(6) (1933) 50 C.L.R. 30, at pp. 104-107.

Wales the Main Roads Board was constituted by the *Main Roads Act* 1924, and in 1926 the *Federal Aids Roads Act* was the first of a number of Commonwealth Acts which authorized the expenditure, under agreements between the Commonwealth and the States, of Commonwealth revenue upon the establishment and maintenance of the main roads of the States. This increase in motor traffic caused competition between carriage by road and rail, and this led to the passing in New South Wales of the *Transport Co-ordination Act*, which was held to be valid in *Vizzard's Case* (1), restricting the carriage of passengers and goods in New South Wales by road to vehicles licensed under the Act. In *Vizzard's Case* (2) *Evatt* J. said that " the Act proceeds upon the broad principle that the interests of the State call for the regulation of the whole service of land transport wherever it is conducted upon the roads of the State of New South Wales." There is no obligation imposed upon the States to facilitate trade and commerce by building roads, so that, if they choose to do so and thereby provide means for competition with their own railways, it is simply an exercise of their own sovereign rights to co-ordinate traffic by rail or road, and to confine the use of the roads to particular persons and vehicles. If the choice of these persons and vehicles has no relation to their passage across the border, but the legislation operates without discrimination with respect to all persons and vehicles desirous of using the roads, such legislation is not aimed or directed at inter-State commerce but at regulating, maintaining, and co-ordinating a number of utilities for trade, commerce, and intercourse, State and inter-State, provided by the State. So a State could, I should think, build a number of aerodromes, and provide that only aeroplanes which fulfilled certain conditions could use such aerodromes, or it could confine their use to aeroplanes owned by itself. Provided the conditions of use were non-discriminatory and were unrelated to flying across the border, the legislation would not infringe s. 92. It would be legislation regulating the use of a further facility for all trade and commerce provided by the State. And it would seem to follow that if the Commonwealth built aerodromes it could also pass non-discriminatory legislation regulating the use of such aerodromes, or confining their use to its own purposes: Cf. reg. 110A of the *Air Navigation Regulations*. But it would be a different matter if a carrier or carriers of persons or goods by land were able to persuade the owners of private land on each side of the border to build a road on which to carry on their business, and one of the border States passed a law preventing such carriers crossing the border by such a road. Such a law would not be made

(1) (1933) 50 C.L.R. 30.

(2) (1933) 50 C.L.R., at p. 76.

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to regulate, preserve and co-ordinate facilities provided by the State, but would be aimed at inter-State commerce and would contravene s. 92. In the same way legislation by a State or the Commonwealth simply to prevent aeroplanes flying from one State to another, and from using suitable aerodromes built in the States by private enterprise, would be an infringement of this section. Such legislation would be an interference with the freedom of passage of persons and goods from one State to another. And it would not matter, in my opinion, that the Commonwealth was providing a service which was fully adequate to transport all business offering in persons and goods from one State to another.

References in *Vizzard's Case* (1) and the analogous cases, to Acts, such as the New South Wales *Transport Co-ordination Act*, providing a more orderly system of land transport, and to their having the effect of facilitating and increasing the passage of persons and the flow of commodities to and from the States concerned, must be read in the light of the particular facts of those cases, and particularly in the light of the fundamental fact that the flow was facilitated and increased along routes provided by the State itself. But in the case of air routes the only facilities which the Commonwealth can provide are aerodromes and aids to navigation. *Vizzard's Case* (2) and the analogous cases are, as I have said, authorities that the Commonwealth can exercise very wide powers of control over the use of such facilities provided by itself. But private enterprises can also provide suitable aerodromes and aids to navigation. These cases fall far short of establishing that it is not a contravention of s. 92 for the Commonwealth to attempt to monopolize the business of transporting persons and goods by air, although adequate facilities can be provided for this purpose by private enterprise, and persons engaged in the business do not need to use aerodromes and aids to navigation provided by the Commonwealth. *Isaacs* J., in the judgment already cited, said the freedom guaranteed by s. 92 is a personal right attaching to the individual. To say to an individual that he may not engage in the business of inter-State air carriage is a direct negation of that right. No doubt that right can be regulated so far as may be necessary to make air navigation safe. But reg. 79 (3) and ss. 46 (1) and 47 (*a*) of the Act go far beyond anything that is required to regulate safety in the air, or to give the Commonwealth reasonable control over those facilities which it can itself provide to increase the flow of inter-State traffic by air. The only limit that can be imposed upon the discretion conferred upon the Director-General of Civil Aviation by reg. 79 (3) to refuse a licence is that the discretion must be

(1) (1933) 50 C.L.R. 30.

exercised bona fide in furtherance of the purpose for which it was given (*Weinberger* v. *Inglis* (1); *Liversidge* v. *Sir John Anderson* (2); *Point of Ayr Collieries Ltd.* v. *Lloyd-George* (3); *Yoxford and Darsham Farmers' Association Ltd.* v. *Llewellin* (4); *Swan Hill Corporation* v. *Bradbury* (5)). It is impossible to limit his discretion to matters related to safety in navigation by air, because the amending regulation expressly extends his discretion beyond these matters and provides that he may refuse to issue a licence. No guide can, therefore, be found in the purpose and scope of the regulations which would enable reg. 79 (3) to be read down by construction in accordance with s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941 so as to confine the discretion to refuse a licence to matters which would not contravene the right of the individual to engage in the particular phase of inter-State commerce in question. It could be argued, however, that reg. 6 would save the sub-regulation in its application to air navigation within the Territories, and that it has an independent validity under the State Acts in relation to intra-State air navigation. But its operation under the State Acts could affect inter-State commerce, and it is probable that it is as invalid under these Acts as it is invalid as part of the law of the Commonwealth. In *Pidoto's Case* (6) I expressed my opinion upon the manner in which ss. 15A and 46 (*b*) of the *Acts Interpretation Act* operate. It appears to me that reg. 79 (3) was intended to have a complete and inseverable operation under the laws of the Commonwealth, of the Territories, and of the States at the same time, and that to construe it as valid in relation to the Territories, or even to the Territories and States, would cause it to have a partial operation in these respects which would be altogether different to that which it would have had if it had been completely operative. Sub-regulation 79 (3) is, in my opinion, as great a contravention of s. 92 as the legislation held to be invalid in *Gratwick* v. *Johnson* (7), and is inseverable and therefore wholly void.

Sections 46 (1) and 47 (*a*) of the Act are more obnoxious to s. 92 than reg. 79 (3). Section 46 (1) renders inoperative existing licences for inter-State airlines and s. 47 (*a*) positively prevents the Director-General issuing such licences except under the conditions therein specified, so that these sub-sections operate to give a complete monopoly of the business of inter-State air transport in Australia to the Commonwealth, and to prohibit any person other than the

(1) (1919) A.C. 606, at p. 626.
(2) (1942) A.C. 206.
(3) (1943) 2 All E.R. 546.
(4) (1945) 173 L.T. 103, at p. 107.
(5) (1937) 56 C.L.R. 746, at pp. 757, 758.
(6) (1943) 68 C.L.R. 87, at pp. 130, 131.
(7) (1945) 70 C.L.R. 1.

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Commission or its contractors engaging in this phase of trade and commerce among the States.

But I am of opinion that the contention that s. 51 (i.) of the Constitution does not authorize the Commonwealth to incorporate an authority to engage in trade and commerce on its behalf must fail. The power of legislation conferred by the placitum is plenary in its fullest sense, and must be given a wide and liberal interpretation. It is not, like the commerce power in the Constitution of the United States, a power to regulate trade and commerce. It is a power to make laws with respect to trade and commerce. Even under the more limited power, the Supreme Court of the United States has held that Congress can incorporate authorities to carry on businesses ancillary to facilities which it has provided to promote the flow of commerce, such as the business of generating and selling electricity as ancillary to the construction of reservoirs to control the flow of navigable rivers (*Oklahoma Ex Rel. Phillips* v. *Guy F. Atkinson Co.* (1)). A law incorporating an authority to carry on trade and commerce on behalf of the Commonwealth is, I think, a law with respect to trade and commerce. Under s. 122 the Commonwealth can incorporate an authority to engage in trade and commerce on its behalf in the Territories. The position is, therefore, that, except so far as prohibited by s. 92, the Parliament of the Commonwealth can under s. 51 (i.) set up an authority to engage in the business of carrying persons and goods by air for reward amongst the States, and can under s. 122 do so in respect of such carriage in, into, and out of the Territories. Section 92 does not prevent the Commonwealth creating a monopoly in such a business except in the case of trade and commerce and intercourse among the States. Sections 46 (1) and 47 (*a*) of the Act, like reg. 79 (3), contravene s. 92. But s. 46 (2) is carefully limited to rendering inoperative existing Territorial airlines licences in respect of scheduled stopping places other than stopping places in a State, and s. 47 (*b*) is carefully limited to prohibiting the licensing authority issuing a licence in respect of a Territorial airline service which would authorize the transport by air between any scheduled stopping places, not being stopping places in a State. I can see no reason, therefore, why these sub-sections, to which s. 92 does not apply, should not be valid.

The result is that, of the legislation attacked, the only provisions which are in my opinion invalid in themselves are reg. 79 (3) and ss. 46 (1), 47 (*a*) and s. 49 in relation to inter-State airline services.

(1) (1941) 313 U.S. 508 [85 Law. Ed. 1487].

The final question is whether the invalidity of these provisions of the Act invalidates the whole Act. The provisions which are intended to create the monopoly are contained in Part IV. of the Act. If they are all struck out, the rest of the Act is still capable of effective operation. The most difficult provision in the rest of the Act is s. 19 (2). This section, as I have said, places upon the Commission the duty to provide services fully adequate to carry the whole of the transportation by air of passengers and goods for reward between the places mentioned in s. 19 (1) (*a*), (*b*) and (*c*). But there is no legal impediment to the Commonwealth imposing such a duty upon its authority, even if there are practical difficulties in performing the duties, arising in the case of s. 19 (1) (*a*) from having to perform the duty in the face of competition, and in the case of s. 19 (1) (*b*) from having to obtain the concurrence of the States concerned.

The power of expropriation conferred by Part III. of the Act would have to be construed, in accordance with s. 15A of the *Acts Interpretation Act*, as subject to s. 92. But the Act as a whole appears to have been carefully arranged, both in language and general structure, so as to contain in its various Parts, Divisions and sections, provisions which are on their own face independent and severable from each other. Even if the whole of Part IV. is struck out, the rest of the Act still consists of Parts, Divisions and sections which would continue to have the same legal operation as they would have had if the whole of the Act had been valid. Even in s. 19 itself, the powers and duties of the Commission are carefully separated, so that if s. 19 (2) cannot operate independently of Part IV. of the Act, there is no reason that I can see why s. 19 (1) should not have an independent validity. The invalidity of ss. 46 (1), 47 (*a*) and part of s. 49 does not, therefore, invalidate the rest of the Act.

For these reasons I am of the opinion that the demurrers should be overruled; that the plaintiffs in all three actions are entitled to declarations that reg. 79 (3) of the *Air Navigation Regulations* is invalid; and that the plaintiffs in the first and second actions are also entitled to declarations that ss. 46 (1) and 47 (*a*), and s. 49 in relation to inter-State airline services, of the *Australian National Airlines Act*, are void.

Australian National Airways Pty. Ltd. v. *The Commonwealth and others.—Demurrer overruled. Judgment for plaintiff with costs for a declaration that in Part IV. of the Australian National Airlines Act* 1945 *sub-s.* (1) *of s.* 46, *so much of s.* 47 (*including par.* (*a*)) *and so much*

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of s. 49 *as refer to inter-State airline services are invalid, and that Statutory Rules* 1940 *No.* 25 *is invalid.*

Guinea Airways Ltd. v. *The Commonwealth and others.—Demurrer overruled. Judgment for plaintiff with costs for a declaration that in Part IV. of the Australian National Airlines Act* 1945 *sub-s.* (1) *of s.* 46, *so much of s.* 47 (*including par.* (*a*)) *and so much of s.* 49 *as refer to inter-State airline services are invalid, and that Statutory Rules* 1940 *No.* 25 *is invalid.*

MacRobertson-Miller Aviation Co. Ltd. v. *The Commonwealth and others.—Demurrer overruled. Judgment for plaintiff with costs for a declaration that Statutory Rules* 1940 *No.* 25 *is invalid.*

Solicitors for the plaintiff in each action, *Malleson, Stewart & Co.*
Solicitor for the defendants, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

E. F. H.