Legal and Policy Aspects of Air Transport in Australia

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AUSTRALIAN and indeed world indebtedness to United States technical advances in aviation, both in the airworthiness and operational fields, is a matter of common knowledge. On the other hand the considerable impact of United States experience in the legal and policy formulation fields tends to pass unobserved.

Both Australia and the United States have a federal form of Government and occupy an almost equal area of the Earth's surface. The United States is divided into forty-nine political units with a substantially higher density of population and a higher level of economic development than the six States which comprise the Commonwealth. In essence these six States are connected by a single non-competitive system of State-owned railways, a single arterial road following the coastal belt and a system of ocean navigation based on a clear cut distinction between interstate and intra-state commerce. The channels of interstate commerce in Australia have, therefore, always been more clearly defined than in the United States and this, together with the fact that the average area of the Australian States is eight times the average area of the States in the United States, has led to a greater emphasis of State rights with respect to trade and commerce.

There are approximately 160 aircraft of various types engaged in regular public transport services in Australia (U.S. 1,543 in 1956). The Australian aircraft include Super Constellations (16), Viscounts (13), DC.6's and DC.6B's (6), DC.4's (11), Convair 240's and 340's (8), and DC.3's (59). The estimated financial turnover of the regular air transport industry during 1957/58 was $103,000,000 (U.S. $2,124 million in 1957). The total staff employed by the Australian regular public transport airlines during the same period was approximately 15,000 (U.S. 132,000 in 1956).

Domestic air services in Australia are operated by both Government and privately owned airlines which carried more than 2,200,000 passengers in 1957/58 (U.S. 50 million passengers). The Australian domestic air services cover almost 100,000 unduplicated miles through-

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1 This article is based on an address given to the New South Wales Group of the Royal Institute of Public Administration which has kindly given their permission for reproduction in THE JOURNAL OF AIR LAW AND COMMERCE.

2 Mr. D. G. Anderson, the Australian Director-General of Civil Aviation, has authorized the use of official sources for statistics and factual material quoted in this paper. Expressions of opinion are personal and do not necessarily reflect official policy.
out Australia and the Territory of Papua-New Guinea. Australian international air services operated by Qantas Empire Airways serve 26 countries in 5 continents and have an unduplicated route mileage of approximately 60,000 miles.

The Commonwealth owns and operates 168 Government aerodromes, 50 aeradio stations, 28 air traffic control stations, 52 airport lighting systems and an extensive network of 34 radio ranges, 96 nondirectional beacons and 68 distance measuring stations. The value of the Commonwealth's facilities at cost is approximately $116,000,000 and the annual bill for maintenance and operation exceeds $20,000,000. The staff of the Department of Civil Aviation is approximately 4,900 persons.

In contrast with the position in the United States where local airport authorities own and control many of the major airports the airports at all major Australian centers are designed, maintained and operated by the Department of Civil Aviation.

During the post-war period local authorities have been encouraged to develop airports from their own resources on the understanding that, if an air service makes regular calls at the airport and the traffic statistics over a reasonable period indicate a continuing demand for the air service, the Commonwealth will render financial assistance or consider the take-over of the aerodrome. Under recent policy changes local authorities are given additional encouragement to operate and maintain their own airports. If a local authority wishes to take over control of the smaller Commonwealth-owned airports located in its area, consideration is now given to assigning these airports to the local body free of charge and the making of maintenance and capital grants to assist in upkeep and development. Airline operators and other users of property and buildings within the precincts of aerodromes are now required to provide any facilities which they require for their exclusive use. Until recently the Commonwealth provided airport terminal buildings and facilities and leased them to operators. Common user facilities are, however, still, as a general rule, provided by the Commonwealth.

The Commonwealth is directly or indirectly reimbursed in part for the cost of providing aerodromes and air navigational facilities by revenue of approximately $4.4 from the following sources:

(a) Air route charges imposed under the Air Navigation (Charges) Act 1952-1957, of approximately $1.1m. in 1957/58;
(b) Tax on aviation fuel, of approximately $3.2m. in 1957/58, and
(c) Rentals from airport buildings and airport concessions.

Estimates show that for all Australian air transport services, both domestic and international, the proportion of total costs met directly by the user is 86.5%, leaving a balance of 13.5% met indirectly by the Government. This proportion of public assistance is comparable with the figure of 14.8% of total railway costs which were covered by the action of State Governments in meeting deficits on railway operations.
The Australian air transport industry has grown extremely rapidly. In 1939 less than 44 million passenger miles were performed, while in 1957 passenger miles exceeded 1,300 million. Since the war there has been a fourfold increase in domestic passenger miles and a twenty-twofold increase in domestic freight ton/miles performed.

Although a comparison of the scheduled air traffic performances of Australia and the United States shows that Australia falls far behind in terms of total effort, this also holds true for all other countries of the world. Despite Australia's small population it ranked fourth in the world (excluding U.S.S.R. and Red China) in 1957 in terms of total domestic and international ton-miles performed. On a per capita basis, its performance of 19.17 ton-miles compares with 20.13 ton-miles for the United States, the leading nation, and was substantially higher than the Netherlands figure of 14.36 ton-miles which was the next highest after Australia. It may be claimed, therefore, that Australia, on a per capita basis, is one of the foremost aviation countries in the world.

The Australian Constitution

The Australian Constitution finally adopted in 1900 is as markedly federal as that of the United States and even a superficial examination highlights the similarity of structure and the extent to which the framers were indebted to the United States model. Section 1 of the Constitution provides that the legislative power of the Commonwealth shall be vested in a Federal Parliament which shall consist of the Sovereign, a Senate and a House of Representatives. Section 61 provides that the executive power shall be vested in the Sovereign and exercisable by the Governor-General. Section 71 provides that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court to be called the High Court of Australia, and in such other federal courts as Parliament creates or invests with federal jurisdiction. This clear cut separation of powers bears very clearly the imprint of corresponding provisions of the United States Constitution (compare Article I Section 1, Article II Section 1, and Article III Section 1 respectively).

Legislative power is divided between the federal and state Parliaments by vesting the federal body with power to make laws with respect to a selected number of subject matters and leaving the unenumerated residue to the States. In this respect the Australian Constitution follows the American model rather than the Canadian where the primary principle is to vest enumerated powers in the Provinces and the residuary power in the Dominion. In addition, Section 91 of the British North America Act enumerates a number of specific Dominion powers which override the powers granted to the Provinces in Section 92. Both sets of enumerated powers are expressed to be exclusive, but in practice complex questions of interpretation arise which have no exact parallel under the United States or Australian Constitution. Under these latter Constitutions powers are exclusive or concurrent and a Federal law
made in pursuance of a concurrent power prevails over any inconsistent State laws.

The power of judicial review or control is not expressly conferred under either Constitution, but in each case it has been practiced from the beginning. In the United States the exercise of the power is based on the theory that the Constitution is a direct decree of a legal power, higher than that of Congress, namely, the power of a sovereign people, while in Australia it flows from the fact that the Constitution is a section of an Act of the Parliament of the United Kingdom.

The Courts in both countries apply the doctrine of "ultra vires" to any Statute which is repugnant to the Constitution and although this action may have the same practical result as the formal repeal of the Statute, the nature of judicial review under both Constitutions is disclosed whenever a subsequent decision over-rules a former decision, for in this event the Statute is treated as having been at all times, except in respect of any matter which is res judicata, a valid law.

Neither Constitution contains any reference to aviation or aircraft so that the Federal authority has had to rely on other heads of power in order to assume the control over aviation dictated by its national importance and the fact that it became apparent at a very early stage that the States were not equipped financially or technically to develop a national air transport system. In Australia constitutional support for aviation legislation has been sought in the power to make laws with respect to trade and commerce with other countries and among the States; postal and other like services (carriage of mail by air); the naval and military defense of the Commonwealth; external affairs and the express power under the Australian Constitution to make laws with respect to "matters incidental to the execution of any power vested by the Constitution in the Parliament." As almost eighty percent of Australian domestic air carriage is over interstate routes by far the most fruitful source of power has been the power to make laws with respect to interstate trade and commerce.

In Australia the central problem of regulating interstate commerce arises from the application of Section 92 of the Australian Constitution which provides that "trade, commerce and intercourse between the States shall be absolutely free." The decision of the Privy Council in James v. Commonwealth\(^8\) that this provision inhibits the federal body as well as the States, creates a fundamental difference between the United States and Australian Constitutions. As a result there is an area of commercial activity which is free from federal or state regulation or any combination of federal and state powers. For example, the States under placitum (xxxvii) of the Constitution cannot refer a matter to the Commonwealth which in conjunction with express and incidental Commonwealth powers would enable total and unlimited control of interstate trade and commerce. There is in effect a legislative vacuum

\(^8\) 55 C.L.R. 1. (1936).
in the field of trade and commerce so that laissez faire remains a dominant characteristic of Australian trade and commerce.

In contrast the American commerce power has been construed as at least quasi exclusive so that the mere failure of Congress to make express regulations is deemed an indication of its will that the subject should be left free from any restrictions or impositions. The wide interpretation of the commerce clause finds its genesis in the judgment of Marshall C. J. in *Gibbons v. Ogden* in which an exclusive franchise to navigate New York Waters by steamer was held inoperative against federal law. Although the doctrine of quasi exclusiveness is not part of the ratio of the case it was expounded by Marshall C. J. in such a way as to establish it, and in the absence of a provision analogous to Section 92, it was used during the great period of "laissez-faire" to maintain almost complete freedom of interstate commerce. There have been at all times, however, important exceptions to the doctrine. The States may in exercise of their local police power regulate many matters which are auxiliary to interstate commerce including the public health (e.g. inspection laws to prevent fraud or adulteration) safety, welfare and the preservation of national resources, but where there is a conflict between federal and state law the former is paramount if it has any relation to an express or implied federal power.

Since 1937, because of the absence of a constitutional fetter on federal power similar to section 92 of the Australian Constitution, the Supreme Court has been able to interpret the commerce clause so as to permit Congress to regulate interstate commerce in the national interest and welfare on whatever terms it considers appropriate, subject only to other limitations of the Constitution such as the due process clause. In doing so the Court has adopted a narrow construction of the tenth amendment and has given new vigor to the principle enunciated by Marshall C. J. in *Gibbons v. Ogden* that under the commerce clause the action of the Government may be "applied to all the external concerns of the nation and to those internal concerns which affect the States generally." Section 92 of the Australian Constitution has precluded any comparable development in Australia.

**The Air Navigation Act 1920**

The first Australian aviation statute, the *Air Navigation Act 1920*, came into force on the 28th March, 1921. Section 4 authorized regulations for two purposes—

1. for the purpose of carrying out and giving effect to the Paris Convention and the provision of any amendment to the Convention made under Article 34 thereof; and

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4 The Paris Convention signed on 13th October, 1919, was intended to have world-wide application but failed to be accepted by U.S.A. and most South American States which became parties to the Havana (Pan-American) Convention. Nevertheless, 36 States including Australia became parties to the Paris Convention. The Paris and Havana Conventions were superseded by the Chicago Convention of 7th December, 1944.
for the purpose of providing for the control of air navigation 
in the Commonwealth and Territories.

Prior to the passing of the Act the question of the control of air navigation had been raised at the Premier's Conference of 1920 and on the motion of the Prime Minister a resolution had been carried recommending that each State should refer to the Parliament of the Commonwealth pursuant to Section 51 (xxxvii) of the Constitution the matter of the control of air navigation but so as to reserve to the States the right to own and use aircraft for the purpose of governmental departments and the police powers of the State.

The Commonwealth accordingly passed the Air Navigation Act in the widest possible terms in anticipation of complementary State legislation, but in fact only the State of Tasmania passed and proclaimed legislation in the precise terms of the resolution.

Notwithstanding the doubtful legal position resulting from the failure of States to give effect to the resolution the Federal assumption of plenary power over civil aviation remained unchallenged until 1936. In that year the validity of the Act and regulations was challenged in the High Court in The King v. Burgess, ex parte Henry (1936) 55 C.L.R. 608. The appellant sought an order absolute to prohibit further proceedings on a conviction under the Air Navigation Regulations made under the Air Navigation Act 1920. The flight in question was a purely intra-state flight. The High Court held that so much of section 4 of the Air Navigation Act 1920 as empowered the Governor-General to make regulations for carrying out and giving effect to the convention was a valid exercise of the "external affairs" power conferred upon the Commonwealth by section 51 (xxix) of the Constitution.

Turning to the Regulations made under the Act, the Court held that although they largely followed the Convention they did not embody all its provisions and in some respects differed therefrom and that, therefore, they could not be sustained on the basis that they carried out and gave effect to the Convention. However, the Court affirmed that Federal legislation may be enacted in so far as such legislation is necessary to give effect to duly concluded international agreements provided the obligations concerned are legitimate subjects for international co-operation and agreement.

In the Goya Henry case the High Court applied the tests that "the regulations must be in substance regulations for carrying out and giving effect to the Convention" and that "there must be a faithful pursuit of the purpose, namely a carrying out of the external obligation" and that "the regulations must be sufficiently stamped with the purpose of carrying out the terms of the Convention."

Under the Paris Convention considered in the Goya Henry cases the technical rules were adopted in a categorical form. Under the

5 For detailed discussion see K. H. Bailey "Australia and the International Labor Conventions" (1946) Int. Lab. Rev., Vol. LIV. See also King v. Poole, ex parte Henry (1939) 61 C.L.R. 684.
Chicago Convention the International Civil Aviation Organization (I.C.A.O.), on the other hand, adopts both standards and recommended practices. A recommended practice is defined as “a specification . . . the uniform adoption of which is recognized as desirable in the interests of safety regularity and efficiency of international air navigation and to which Contracting States will endeavor to conform in accordance with the Convention.” It is a rule which has not received the full status of a standard because some States are unable or unwilling to implement it immediately because of economic considerations, for example, the cost of installing a recommended navigation aid, or a lower standard of technical development. In the absence of other heads of constitutional power it is submitted that the External Affairs power would authorize implementation of recommended practices as well as the categorical standards.

Article 38 of the Chicago Convention also permits deviations from standards, except in the case of rules of flight and maneuver (see Article 12 of Convention), provided the procedure for notifying differences set forth in the Article is followed. An Australian deviation involving any substantial departure from the international standards would have to be sustained by some other head of power since a regulation prescribing such a deviation could not satisfy the test adopted by the High Court in considering the Paris Convention, viz. “the regulations (i.e. the whole of the regulations) must be stamped with the purpose of carrying out the Convention.”

Since the regulations could not be sustained under the External Affairs power the Court was required to pronounce expressly on the validity of the second branch of the regulation making power which clearly purported to authorize the regulation of all air navigation including intra-state activity irrespective of its connection with interstate of foreign trade and commerce. It will be noted that the draftsman had not attempted as in the case of the Civil Aeronautics Act of 1938 to dissect the totality of air navigation into a series of classes of operations so as to highlight the inter-relation between each class and to render simple the application of the severability tests if the Act were in excess of power in relation to any class.

The High Court gave clear indication that the Commonwealth could control air navigation insofar as it was part of interstate trade and commerce but that it had no general power to control all air navigation, and that the section purporting to assume such power was inseverable and, therefore, invalid. Consequently, at the date of the decision, there were no regulations in force in Australia regulating civil aviation.

In reaching the conclusion that the Commonwealth had no general power to regulate intra-State aviation, the Chief Justice, Sir John Latham, expressly rejected the “commingling theory” as applied by

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the United States Supreme Court in interpreting the scope of the commerce power under the United States Constitution. This theory had been firmly adopted by the United States Supreme Court in Southern Railways Co. v. United States (1911) 222 U.S. 20, 32 S. Ct. 2, when the Court held that the power to regulate interstate commerce authorized Federal legislation applying Federal safety standards and devices applicable to trains operating interstate to trains operating on the same railroads but on exclusively intra-State sectors. This followed a finding that it was impossible to regulate effectively commerce conducted by interstate trains unless the regulations could also extend to intra-State trains using the same railroad.

In the Goya Henry case the Chief Justice did go on to say—

"A new problem would be raised if in any given case it were established by evidence in respect of a particular subject matter that the intermingling of foreign and inter-State trade and commerce with intra-State trade and commerce was such that it was impossible for the Commonwealth Parliament to regulate the former without also directly regulating the latter. No such evidence, however, has been presented in this case, and it will be necessary to deal with such a question only when it is directly raised."

In fact there are so many aspects of intra-State transport which must be regulated in order to make interstate air transport safe that there is an unanswerable case for uniform rules. An obvious example is the flight of an interstate transport aircraft under instrument flight rules while in controlled airspace. It would clearly be a grave threat to public safety if intra-State aircraft engaged in flights in controlled airspace were subject to different sets of rules or even different standards of pilot licensing or airworthiness. It is, therefore, unfortunate that this major constitutional issue which, in the final analysis, depends on fact finding, was determined in proceedings in which the facts could not be readily established. In contrast the United States has developed a rather sophisticated technique for establishing facts which underlie the constitutionality of statutes. Where the constitutionality of legislation may depend on facts the enactment is usually preceded by a detailed legislative fact finding procedure. The United States Civil Aeronautics Board followed this technique before pre-empting the air safety field by making a specific finding after protracted technical hearings that all aircraft in the United States may "directly affect or endanger safety in air commerce." The Courts could, of course, review this finding but would be less likely to reach an adverse finding if it were clear that Congress had acted in accordance with the finding of a body of technical experts.

The Civil Aeronautics Act of 1938 defines air commerce as "inter-state, overseas, or foreign air commerce... or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger

7 (1936) 55 C.L.R. 608, 629.
safety in, interstate, overseas, or foreign air commerce.” Regulations issued pursuant to this Act in 1941 require Federal pilot licenses and aircraft certificates for all pilots and aircraft operating in the airspace overlying the United States. The validity of the regulations imposing this requirement was upheld in United States v. Drumn, (1944) 55 Fed. Supp. 151, notwithstanding that the pilot concerned had engaged in a purely intra-State flight clear of civil airways and it was not proved that the specific flight actually affected or endangered any aircraft engaged in air navigation as defined.

It is interesting to note that since 1956 the Australian Air Navigation Regulations (regulation 6) are expressed to apply in relation 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;
(d) air navigation to or from the Territories; and
(e) air navigation in controlled airspace which directly affects, or which may endanger, the safety of persons or aircraft engaged in a class of air navigation specified in paragraphs (a), (b) or (d) of this sub-regulation.”

The influence of the United States Act is readily apparent although the limitation to controlled airspace is a very modest application of the United States experiment which it has been noted extends to all airspace. The validity of paragraph (e) is hardly open to doubt but it has not been tested in Australian courts and is most unlikely to be tested while the Uniform State Air Navigation Acts work so effectively.

**THE AIR NAVIGATION ACT 1936**

Shortly after the Goya Henry decision the Commonwealth amended the Air Navigation Act 1920 by the Air Navigation Act 1936. The amendment authorized regulations for the purpose of giving effect to the Paris Convention and 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 practical result was that the Commonwealth Regulations no longer purported to extend to intra-State air navigation, except to the

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8 “Controlled airspace” means an airspace or an aerodrome and the airspace in its vicinity designated by the Director-General, in pursuance of regulation 95 of these Regulations. Regulation 95 (1.) provides—

“The Director-General may designate—
(a) airspace extending upwards from a specified height above the surface of the earth as a control area;
(b) airspace extending upwards from the surface of the earth as a control zone; and
(c) an aerodrome and the airspace in its vicinity as a controlled aerodrome,
and a control area, control zone or controlled aerodrome so designated is a controlled airspace.”
limited extent necessary to give effect to the Paris Convention. The validity of the Act as amended and the new Regulations was subsequently upheld in the second Goya Henry case.\(^9\)

The Commonwealth then sought a constitutional amendment to give the Federal legislature power to make laws with respect to air navigation and aircraft. This was unsuccessful\(^10\) and in April, 1937 the Commonwealth convened the historic aviation conference of Commonwealth and State Ministers to consider means to ensure that uniform rules would apply to all classes of air navigation. All States agreed to enact in uniform terms State Air Navigation Acts, which would in effect adopt the Commonwealth Air Navigation Regulations as State law.

Each of these State Acts provided in substance that:

1. the regulations from time to time in force applicable to and in relation to air navigation within the territories should apply *mutatis mutandis*, to and in relation to air navigation within the State;
2. the administration of the Regulations in their application to intra-State air navigation by virtue of the State Act should be vested in the Commonwealth authority responsible for administration of the regulations in their application as Federal law; and
3. all fees payable under the Regulations in their application to intra-State air navigation by virtue of the Act should be paid to the Commonwealth.

It is interesting to note that the system of Uniform State Air Navigation Acts is also derived directly from United States experience even to the extent of using the convenient Latin expression *mutatis mutandis*\(^11\) which avoids complex drafting problems.

The uniform Acts, which may be amended at any time by State Governments, must be clearly distinguished from a reference of power to the Commonwealth authorized by *placitum* (xxxvii) of the Con-

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\(^9\) King *v.* Poole, *ex parte* Henry (1939) 61 C.L.R. 634.
\(^10\) The Constitution Alteration (Aviation) Act 1936 provided for the insertion in section 51 after paragraph (vi) of the following paragraph:—“(vi. A) Air Navigation and Aircraft.”

Voting at the referendum in favor 1,924,946; not in favor 1,669,062. Separate State majorities were obtained only in the States of Victoria and Queensland whereas separate majorities are required in a majority of States (i.e. four). Since the amendment was not a political issue it is possible that the result was adversely affected by a separate referendum held concurrently on the highly contentious question of Federal control over marketing which was decisively rejected. A second unsuccessful referendum dealing with aviation was held in 1944, but in this instance “air transport” was included in a list of fourteen subject matters which were submitted as a single proposed law to the electors and defeated. Separate State majorities were obtained only in Victoria and Queensland whereas the Constitution requires a majority in a majority of States (at present 4 States).

\(^11\) The Uniform State Law adopted by the American Bar Association in 1926 provides:—“It is hereby declared that the policy principles and practice established by the United States Air Commerce Act of 1926 and all amendments thereto are hereby extended and made applicable *mutatis mutandis* to cover all air traffic in this State, so far as not covered by Federal law at any time.”
The State Acts incorporate not only existing regulations but all valid regulations applicable to the territories promulgated from time to time thereafter. Since the State Acts only purport to apply the Federal regulations as State Law in the areas where they do not apply as Federal law, questions of paramountcy of Federal law over the State Acts incorporating the Federal regulations do not arise. The formula skillfully avoids the possibility of an hiatus but can lead to difficulties, for example, in determining whether prosecutions should be instituted under the Federal or State Act.

The practical result is that the Commonwealth Air Navigation Regulations apply uniformly to all classes of air navigation and their administration, whether as Federal or State law, is vested exclusively in the Federal aviation authority.

**STATE TRANSPORT LICENSING SYSTEMS**

In 1937 when the States enacted the uniform Air Navigation Acts the Commonwealth regulations merely required that aircraft engaged in public transport operations should be registered, have a valid certificate of airworthiness and be operated by duly licensed personnel. Subsequently, the Commonwealth introduced regulations requiring licenses for territorial and interstate public transport services which, although inspired by safety considerations, were wide enough to give power to regulate the economic as well as safety aspects of air transport. As the various State Acts caught up these regulations the effect was that the Commonwealth authority could license intra-State air services which in some cases competed with State-owned railways or surface transport in which the State had a revenue interest. Although the Commonwealth maintained close liaison with State Transport authorities these latter authorities quite naturally reviewed the uniform State Air Navigation Acts and several State Governments introduced amendments which either restored to the States or shared with the Commonwealth control over the economic aspects of intra-State services.

Briefly, the present position is as follows: In Queensland the *State Transport Facilities Acts* require the operator of intra-State services to obtain a license issued by the State Transport Authority as well as a license issued under the Air Navigation Act. The Director-General in issuing a license under this Act is expressly limited to safety considerations and in addition the State authority is empowered to declare that

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12. P1. (xxxvii) provides that the Parliament make laws in respect of matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law. There is no comparable provision in the United States Constitution. The Airlines Commission conducts intra-State services in Queensland pursuant to Commonwealth legislation adopting a reference of the matter of air transport (subject to certain conditions) by the Queensland State Parliament.

any Commonwealth Air Navigation Regulation does not apply to intra-State aviation by virtue of the State Air Navigation Act. This power has never been exercised.

In New South Wales the State Transport (Co-ordination) Act makes the issue (where required) of a license under that Act a condition precedent to the issue of a license under the Federal Air Navigation Regulations in their application as State law. In considering applications for licenses the Commonwealth authority is not, however, restricted to safety considerations.

In Victoria the Transport Act 1951 vested the State authority with power to grant or refuse an application for a commercial aircraft license and to attach conditions. The obligation to obtain licenses from the Commonwealth and State authority were concurrent and both sets of requirements had to be satisfied before conducting commercial operations. However, in 1956, the aircraft licensing provisions of the State Act were repealed and at present only a Federal license is required.

South Australia has not established a State-administered licensing system and, therefore, the only formal requirement is a license issued by the Federal authority.

Under the Tasmanian Traffic Act an aircraft may not be used as a public vehicle unless licensed. The obligation to obtain a license from the Federal and State authority is concurrent but the requirements of the two sets of regulations may be satisfied in any order.

The Western Australian State Transport Co-ordination Act provides that no aircraft shall operate intra-State unless licensed by the Transport Board. Section 46 of the Act provides that the Board may grant a license providing all laws or regulations of the Commonwealth have been complied with. Strictly speaking, therefore, the issue of the Federal license is a condition precedent to the issue of a State license.

While it will be noted that the formal requirements vary substantially as between the various States, in practice the differences are not significant since Federal and State transport authorities maintain close, although frequently informal, liaison in all matters affecting State interests. Indeed, in the field of safety I am not aware of any instance since the system was first introduced in 1937 of any differences between the Federal and State authorities.

THE AIR NAVIGATION ACTS OF 1947

The Air Navigation Act 1920-1936 was amended on two occasions during 1947. The first amendment was primarily to approve the ratification on behalf of Australia of the Chicago Convention but an attempt was made to widen the regulation making power so as to summon up all possible sources of Federal power. In addition to regulations giving effect to the Chicago Convention Section 5 of the Act authorized 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;
(b) in relation to the Naval and Military defense of the Commonwealth and of the several States;
(c) in relation to postal and other like services;
(d) within any Territory of the Commonwealth;
(e) within any State the Parliament of which has referred to the Parliament of the Commonwealth the matter of the control of air navigation within that State; and
(f) for carrying out and giving effect to any other international convention or agreement relating to air navigation to which Australia is or becomes a party.”

The Air Navigation Act (No. 2) 1947 further amended the principal Act with the apparent object of widening the scope of the regulation making power. Section 5 was repealed and a new section inserted which authorized regulations to give effect to the Convention and in addition for—

“(b) prescribing all matters—

(i) in respect of air navigation which are necessary or convenient to be prescribed in relation to any matter with respect to which the Parliament has power to make laws; or

(ii) which are necessary or convenient to be prescribed in respect of air navigation within any Territory of the Commonwealth or to or from any such Territory.”

While this formula rather skillfully seeks to invoke all federal sources of power the regulation making power is limited by the content of the expression “air navigation” which is probably narrower than “air transport” or “civil aviation.” There have been no court decisions since 1947 which give any guidance as to the success with which the draftsman achieved the apparent objective.

The Airlines Case:

The next major milestone in the legal history of civil aviation is the Airlines Case in which the private airline operators challenged the validity of the Australian National Airlines Act 1945. This Act established the Australian National Airlines Commission, popularly known as T.A.A., as a body corporate with powers necessary and appropriate for operating airline services for the transport of passengers and goods by air between States, between a State and a Territory of the Commonwealth, within the Territories and, with the approval of the Minister, international air services. The Act (Section 19) also imposed a duty on the Commission to exercise the powers so conferred as fully and adequately as may be necessary to satisfy the need for the service.

In addition, the Airlines Act contained certain provisions (Sections 46 and 47) which purported to render inoperative licenses issued to

14 Australian National Airways Pty. Ltd. v. the Commonwealth and Others (1946) 71 C.L.R. 29.
competitors of the Commission on both interstate and territorial services and also prohibited the licensing authority from issuing a license over any route on which the Commission is operating except to the extent that the issue of the license is necessary to meet the needs of the public in respect of those services. The provisions were clearly aimed at ultimately eliminating competitive airline services.

The private operators challenged, firstly, the right of the Commonwealth to establish an instrumentality to engage actively in air transport as distinct from its unquestioned power to regulate interstate air transport, and secondly, the provisions of the act designed to give the Commission a monopoly. On the first issue it was argued that the commerce power authorized the regulation of overseas and interstate trade and commerce but not the entry of the Government itself into that field of air transport activity. This argument was decisively rejected. The second issue hinged on the application of section 92 of the Constitution. The monopoly provisions of the act had been carefully drafted so that licenses of competitors were rendered inoperative or refused only if the Commission were providing an adequate service. It was, therefore, arguable that aircraft were merely a medium for engaging in interstate trade and that provided users were receiving adequate services there was no impediment to interstate trade. Whatever the merit of this argument, the Court had no difficulty in concluding that the provision of an air transport service was itself trade and commerce and that the sections of the act which prevented private operators from providing interstate services solely because the Commission was operating adequate services infringed Section 92 of the Constitution. The Court also held that sections 46 and 47 of the Airlines Act were severable and were a valid exercise of power in relation to territorial services to which, of course, section 92 does not apply.

The net result was that the Commission was able to commence operations while private operators were free to compete on the interstate trunk routes. While the Commission could be given a monopoly of territorial air services (and has been in the case of the Northern Territory, but not Australian Capital Territory) it cannot engage in purely intra-state services unless States refer the necessary matter and the Commonwealth enacts complementary legislation adopting the reference. The Commission's current intra-state network within Queensland is operated pursuant to such legislation. The Commission can also carry passengers between points within a State as incidental to its interstate or territorial services, for example, between Adelaide and Leigh Creek (both within the State of South Australia) on its Adelaide-Darwin services.

**The First A.N.A. Crisis—Civil Aviation Agreement 1952**

The Commission rapidly consolidated its position and by 1951 its very success threatened the continued existence of Australian National
Airways Pty. Ltd., its major competitor. The primary problem of A.N.A. was its inability to attract fresh capital for re-equipment so as to compete with a successful Government instrumentality with substantially greater capital resources. The Commission's capital was £4.37m. and the subscribed capital of A.N.A. £1.5m. (On a net worth basis the difference was not at this time as significant as these figures may suggest because substantial reserves had been built up by A.N.A. during the war period.) For the same reason A.N.A. could not borrow on reasonable terms to finance an essential re-equipment program. It maintained that its financial difficulties were attributable to such matters as the Commission's virtual monopoly of Government business and mails, unnecessary duplication of services, the heavy incidence of air route charges and discrimination in favor of the Commission in the granting of import licenses and the allocation of hangars, terminals and other airport facilities.

While the Commission undoubtedly, and perhaps naturally, received favored treatment during its establishment period it is fair to say that a great measure of its success was due to the efficiency and enterprise of its management. However, it is also fair to say that it was apparent that the position of private enterprise in the air transport industry would become untenable unless it was assured on a long term basis of treatment similar to that accorded to the Commission.

The Civil Aviation Agreement of 1952 sought to establish such conditions for A.N.A., the major private operator, while maintaining effective competition between it and the Commission. Under the Agreement the Commonwealth undertook to guarantee the repayment of loans not exceeding in total £3 million to be made to Australian National Airlines for the purchase of not more than six heavy aircraft and spares. In addition the Commonwealth agreed to facilitate the borrowing of funds which might be required by the company to purchase an equal number of heavy aircraft comparable in type and price to those which would be authorized for purchase by T.A.A. after 1952, subject to the limitation that the total of all amounts borrowed by the company and not repaid under this and the previously mentioned guarantee should not exceed £4 million. Australian National Airways subsequently purchased two DC.6 and four DC.6B aircraft with the assistance of Government guarantees under these provisions.

The Agreement also settled pending High Court proceedings in respect of unpaid Air Navigation Charges. The legal basis of these charges, which had been imposed under subordinate legislation, had been challenged in the High Court and at the date of the Agreement the proceedings were part heard. The agreement provided that A.N.A. would pay to the Commonwealth an amount of $740,000 in full settlement of the air navigation charges levied up to 30th June, 1952. This amount was one-third of the total of $2.2m. which had been claimed from the company for that period. For the period after 30th June, 1952, air navigation charges were reduced to one-half of the rates
originally applied. The Agreement also provided that the scale of charges would not be increased except to the extent that an increase became necessary because of the provision of additional or improved facilities and services or because of higher costs of maintaining and operating facilities and services. The *Air Navigation (Charges) Act* 1952 placed the scheme on a sound statutory basis. The *Air Navigation (Charges) Act* 1957 increased the charges by 10%, consistently with the provisions of the Agreement.

The Commonwealth also agreed to take all steps necessary to ensure that A.N.A. would receive an equal share of the airmail carried on the routes over which it operated in competition with T.A.A. This provision in the Agreement has been fully implemented, and has resulted in A.N.A.'s mail revenue increasing from a figure of $110,000 per annum to more than $550,000 per annum in the current year. The Commonwealth similarly agreed to take steps necessary to ensure that during the continuance of the Agreement Government business would be available to both airlines without discrimination.

The Commission and A.N.A. were bound by Statute and contract respectively to take immediate steps to review and keep under review at all times during the continuance of the Agreement (which was expressed to be for a period of fifteen years) air routes, timetables, fares and freights and other related matters in respect of routes on which both the Commission and the Company were operating at the date of commencement of the Agreement “as to avoid unnecessary overlapping of services and wasteful competition.” If the parties failed to agree the Agreement provided for further discussion under an independent Chairman vested with power to decide the matter in dispute.

Many discussions were held between A.N.A. and T.A.A. pursuant to this undertaking covering every aspect of rationalization. However, there was only one hearing before the Chairman, Sir John Latham (a former Attorney-General and Chief Justice of the High Court), appointed by agreement between the parties pursuant to the Civil Aviation Agreement. That hearing was held at A.N.A.'s request and was concerned with proposals that one operator should vacate specified routes in favor of the other (i.e. a form of zoned monopoly). Following discussions extending over three months, the two operators reached agreement without the Chairman being called on to determine the matters in issue. The most important part of the agreement was that both operators should remain in competition on the main trunk routes extending from Perth to Cairns. There were other decisions affecting regional services.

**The Second A.N.A. Crisis—Civil Aviation Agreement 1957**

Although considerable savings resulted from co-operation between the two operators the 1952 Agreement did not, in the long run, produce the hoped for stability. For various reasons A.N.A.'s decline as
a commercial enterprise continued. Firstly, it failed to appreciate the public preference for pressurized and turbine powered aircraft. A.N.A.'s small fleet of DC.6 aircraft, backed by 8 non-pressurized DC.4 aircraft, could not compete successfully on the trunk routes with the large combined fleet of T.A.A. and Ansett Airways of pressurized Viscounts and Convairs. Secondly, the rapid expansion of Ansett as a major airline made the rationalization provisions of the Civil Aviation Agreement unworkable. There was in fact no room for a third major airline and A.N.A. with its inadequate fleet of pressurized aircraft was the harder hit by the activities of Ansett. Thirdly, the rapid increase in cost levels made the operation of DC.3 aircraft on lightly loaded rural services very uneconomical. A.N.A. suffered the greater disability because its DC.3's were equipped with Curtis Wright engines which had more severe payload restrictions. The company's concentration on freight traffic with lower yields per ton mile also did not prove helpful. These factors combined to produce a second major post war crisis in the air transport industry.

In June, 1957 shipping interests which controlled the entire A.N.A. shareholdings announced that the company could not meet its commitments under the guaranteed loans and requested time in which to negotiate the sale or liquidation of A.N.A. This accommodation was granted and after protracted and often dramatic negotiations Ansett Transport Industries Ltd. finally emerged as the only likely purchaser.\(^{15}\) The Government's role in these negotiations was clearly stated in advance by the Prime Minister in the course of a review of Civil Aviation Policy in the House on 3rd September, 1957:

"The policy adopted in the case of trunk route operations is basically the same in concept as that embodied in the 1952 Civil Aviation Agreement Act—that of providing fair and equal conditions of competition for two major operators. The private airline concerned will be given continued access to Government mail and business and assistance for re-equipment purposes. It will, however, be necessary to eliminate the wasteful effects of uneconomic competition on trunk routes by strengthening the rationalization provisions of the Civil Aviation Agreement Act. Under these conditions the Government believes that the trunk route operators should be able to make reasonable profits and yet provide at the same time the highly competitive type of service for which Australian airlines are noted."

Ansett Transport Industries Ltd. agreed to purchase the entire A.N.A. shareholdings for £3.3m. (£1m. deposit and the balance over two years) subject to the Commonwealth agreeing to extend the period of repayment of the balance of the outstanding loans. On completion of negotiations for a supplementary Civil Aviation Agreement the Commonwealth agreed to introduce legislation for this purpose. The recitals of the agreement indicate its relationship to the 1952 Civil

\(^{15}\) For detailed review of negotiations and loan arrangements see Parliamentary Debates 22nd Commonwealth Parliament at p. 1209 \textit{et seq.}
Aviation Agreement, that Ansett Transport Industries Ltd. has purchased all the shares in A.N.A. and controls Ansett Airways Pty. Ltd. and that the parties desire to establish a Rationalization Committee to supplement the rationalization machinery of the old agreement. The recitals also reaffirm the Commonwealth’s policy of two and only two trunk route operators, one being the Commission, each capable of effective competition with the other.

It has been noted that the rationalization provision of the 1952 Agreement applied only to routes on which T.A.A. and A.N.A. competed. It did not extend to routes developed thereafter or to routes on which T.A.A. competed only with Ansett Transport Industries Ltd. or its subsidiaries (other than A.N.A.). The 1957 Agreement extends rationalization to all competitive routes including any route on which competition is proposed at a future date.

The Agreement also establishes a Rationalization Committee comprising a Co-ordinator nominated by the Minister for Civil Aviation and two additional members nominated by the operators. If the Commission and the Company are unable to agree on questions of routes, fares and freights, timetables and other related questions, the matter in dispute may be referred to the Committee and if, after further consideration, the airlines are still unable to agree the Co-ordinator decides the matter. His decision is binding but either airline, if still dissatisfied, may appeal to the independent Chairman, Sir John La-tham, in which event the Co-ordinator is required to furnish the reasons for his decision in writing to the Chairman. In presenting the legislation to Parliament, Senator Paltridge gave the following reasons for this supplementary rationalization machinery:

"The present machinery is unsuitable for obtaining day-to-day decisions on rationalization matters, and, in some respects, unsuitable for broad policy decisions since this type of issue has to be considered in the light of over-all air transport policy and no procedure existed for placing such policy considerations before the Chairman. It is believed that the supplementary machinery will cure both these defects while retaining, as I believe is essential, a completely impartial Chairman to decide issues after all other avenues of agreement have been exhausted. The informal Co-ordination Committee can meet at very short notice on matters of detail which are in their cumulative effect of great importance but would not justify separate references to the Chairman and, indeed, in practice would not be referred to him, but could simply snowball into uneconomic operations. I refer to such matters as the take-off time of a particular flight and the increase of frequencies or the introduction of an additional stopping place on a particular route. Where major policy issues are involved the Chairman will now have the advantage of detailed reasons for the Co-ordinator's decision which will no doubt survey national civil aviation policy considerations as well as the views of the partisan operators."

There has been a great deal of consultation between the two airlines pursuant to the 1957 agreement and in addition several matters have been referred to the Co-ordinator.
Fleet Rationalization: the Airlines Equipment Act 1958

The first major task facing the new Ansett-A.N.A. management was to re-equip with a fully competitive fleet. Clause 3 of the 1952 Civil Aviation Agreement was stamped with the intention of ensuring that the private operator could borrow funds necessary to maintain fleet parity with the Commission. However, it is significant that apart from Clause 3 neither the 1952 nor the 1957 Agreement contains any mention of fleet rationalization although this could be as important for the stability of the industry as rationalization of routes, timetables and fares and freight rates, since fleet capacity predetermines the extent to which rationalization is practicable.

Because of the financial support in the form of Treasury advances or guaranteed loans, as well as the provision of expensive facilities, the Government had a vital stake in ensuring that re-equipment decisions did not undermine the system of regulated competition established by the Civil Aviation Agreements. The problem was intensified because the equipment position of the two airlines was badly out of phase. Subject to its requirements for a heavier and longer range aircraft for operation on the Adelaide-Perth route (the longest Australian domestic sector) for which its Viscounts do not provide the requisite capacity, the Commission has an efficient fleet of pressurized turbo prop aircraft which could, provided its major competitor did not acquire almost immediately a more competitive turbo prop aircraft, substantially meet the Commission's needs until the transition to the pure jet age. The Commission had been operating turbo-prop aircraft for more than four years and to meet its Adelaide-Perth requirements its forward thinking had been focussed on pure jet aircraft such as the Caravelle. Ansett-A.N.A., on the other hand, inherited a heterogeneous fleet which for the most part lacked the passenger appeal of the Commission's fleet, and fully appreciated the urgent need to match, as soon as practicable, the Commission's fleet. Ansett-A.N.A., however, focussed attention on the Electra and Viscount 800 series.

The Government was also vitally concerned because of the effect of equipment decisions, firstly on Federal expenditure on aerodromes and facilities and secondly on the stability of the industry. Premature transition of the domestic operators to the pure jet age would involve the Government too soon in large capital expenditure on aerodromes and ground facilities over and above expenditure necessary for international operations. The pure jet needs longer and stronger runways, faster handling by the ground control system, enlarged technical facilities and special procedures to modify the effects of noise, heat and blast. It will become increasingly difficult for manufacturers to produce and sell aircraft on the assumption that benevolent Governments will provide aerodromes and facilities necessary for their operation regardless of cost.

The stability of the industry could be adversely affected by aircraft
replacement before existing units are adequately obsolesced and also if the airlines in aggregate operate excess capacity. The Department distributes comprehensive statistics of regular air transport and keeps under continuous observance the rate of traffic growth in the air transport industry. Following a period of rapid expansion after the war this appeared to be stabilizing at a 7 to 8% annual growth, although recently the rate dropped to 3% and at the moment is as low as 1%. In the view of the industry this is, however, a temporary decline and a return to a growth rate of at least 5% per annum is anticipated.

Using the estimated traffic figure for any given year it is possible to calculate the aircraft capacity necessary to carry the total estimated traffic on a profitable basis. The first step is to work out the productivity of the total aircraft fleet. This is the product of the number of passenger seats in each aircraft, "block" speed\(^{16}\) in miles per hour, and the planned annual utilization for the aircraft type. Using this formula the total productivity in seat miles of a given fleet or the total of two or more competitive fleets can be calculated. It will be recognized that seat configurations can be varied and there is usually room for difference of opinion as to what would constitute the optimum block speed and annual utilization of particular aircraft types.

An airline, as with other forms of transport, cannot plan on achieving full use of its available capacity and, accordingly calculations are made to determine on a given cost and fare structure the load factor which must be obtained to achieve reasonably profitable operations. Under existing Australian conditions the optimum passenger load factor is probably in the vicinity of 70%. This, of course, over-simplifies the picture and in fact any analysis of this nature must take into account other factors such as the likely growth of tourist services and the freight policy of the airline concerned. T.A.A. has always carried freight substantially on a "fill up" basis and minimized special freighter services while A.N.A. until the recent take over by Ansett Transport Industries, concentrated on air freight as a special activity.

To some extent the problem of avoiding excess capacity is inherent in all forms of competitive industry. Each competitor tends to gear up to handle his expected individual peak. This raises few problems when traffic is growing very rapidly but forecasting becomes particularly critical in cyclical business swings. On the upswing each competitor, assuming continuing rapid growth, may add more capacity than their share of the market would justify, either overlooking the fact that other competitors are doing the same or being obliged to proceed with what they consider to be dubious expansion in order to retain their share of the market. Thus over-capacity in the aggregate can result even without a slackening in the rate of traffic growth—cyclical swings make matters worse. In an industry like air transport where several years may

\(^{16}\) This differs from the cruising speed of the aircraft because allowance is made for the time spent in taxiing before take-off and after landing.
elapse between orders for new capacity and delivery of aircraft to produce it, such errors of planning can result in serious imbalance between equipment and traffic, with the result that load-factors are forced down below "break-even" point.

Following intense negotiation in which these factors were carefully weighed the airlines finally agreed, with Government approval, to each purchase two Lockheed Electra aircraft for use on the longer routes, Viscount aircraft for the short haul trunk line routes and Fokker Friendship aircraft for feeder services.

The stake of the Commonwealth in the selection of airlines equipment became much clearer to the industry when the proposed financial arrangements of the two major domestic airlines in connection with this re-equipment program were submitted for Parliamentary approval. The *Airlines Equipment Act* 1958 authorized extensive financial support to both the Commission and the Company on the condition that they assumed certain obligations. In the case of the Company these obligations could not be imposed by Statute and it was, therefore, required to assume the obligations under a contractual arrangement.

Part II of the Act deals with financial arrangements in relation to the Australian National Airlines Commission. It amended the *Australian National Airlines Act* so as to authorize the Commission to borrow up to $6.6m. in the form of interest bearing Treasury advances or Government guaranteed loans. Previously it could not borrow in excess of $2.2m. and then only by way of bank overdraft. In addition to this amount the Act authorized the Commission to borrow amounts not exceeding three million dollars in the currency of the United States of America from the Commonwealth for the purchase of a Lockheed Electra aircraft and related spare parts. The *Loan (Australian National Airlines Commission) Act* 1958 authorized the Treasurer on behalf of the Commonwealth to borrow this amount from J. P. Morgan and Associates at 4¾% repayable over five years for the purpose of re-lending it to the Commission. The Act also authorized the Commission to accept credit from Qantas up to an amount not exceeding the equivalent of $2.25m. in the currency of the United States of America for a second Lockheed Electra aircraft out of the proceeds of a $13m. loan from the Chase Manhattan Bank. This loan was originally negotiated by the Commonwealth to finance five Lockheed Electra aircraft for Qantas but because of pooling arrangements subsequently entered into between Qantas and T.E.A.L. the former company finally required only four Lockheed Electra aircraft. The loan was authorized by the *Loan (Qantas Empire Airways Limited) Act* 1958. The Parliamentary Debates also indicate that the Commission was to receive capital subscriptions for re-equipment totalling $3.3m. thus increasing its capital to approximately $12m.

Part III of the Act authorized the Treasurer, on behalf of the Commonwealth, to guarantee the repayment of loans not exceeding
$6.6m. to Ansett Transport Industries Ltd. and its airline subsidiary Australian National Airways Pty. Ltd. for the purchase of two Lockheed Electra aircraft and related spares and loans not exceeding $4.4m. for the purchase of six Fokker Friendship aircraft and related spares. The Act expressly provided that these guarantees would not affect the rights of Australian National Airways Pty. Ltd. under clause 3 of the Civil Aviation Agreement Act 1952 which it will be recalled authorized, in certain circumstances, the guaranteeing of loans not exceeding at any one time $8.8m. In addition to usual conditions necessary to protect the financial interests of a guarantor the Act provided that the Treasurer should not give a guarantee unless certain undertakings were given to the satisfaction of the Minister that the Company would comply with the obligations specified in Part IV of the Act. As a correlative the Act provided that while the Company was contractually bound by these obligations the Commission would be under a statutory duty to also comply with those obligations.

Senator Paltridge in presenting the Bill to Parliament explained the rationalization aspects of Part IV of the Bill in the following terms:

"These obligations all relate to the ‘quality’ and ‘quantity’ of aircraft capacity to be provided by the two major domestic operators. The Government has already taken decisions which set the qualitative pattern of domestic airline services. It will be recalled that, originally, the Commission proposed to purchase two (2) Caravelle aircraft and Ansett-A.N.A. four (4) Lockheed Electra aircraft. The Government rejected both these requests since it was quite clear that the stage would be set for a struggle by each airline to out-equip the other, regardless of the capital cost involved.

In the domestic field, where there are only two major operators, the prerequisite for stability is to achieve adequate and comparable front-line equipment and then to ensure that such equipment is used for a reasonable period before being replaced, thus reducing to a minimum the heavy capital investment involved in airline operations. When these principles were made clear to the operators they finally agreed to purchase two (2) Lockheed Electra aircraft each and to build the remainder of their fleets around Viscounts and Fokker Friendship aircraft, both of which have Rolls Royce Dart Engines.

What I might term the quantitative aspect of aircraft capacity is simply the number of revenue traffic ton miles which the aircraft fleets are capable of providing in a given period at a particular revenue load factor.

Part IV of the Bill sets up machinery to ensure that the two airlines do not provide excess capacity. First of all, an estimate is to be made of the traffic on competitive and non-competitive routes during a specified period. A determination will then be made on the basis of an optimum revenue load factor of the aircraft capacity necessary for the Commission and the Company respectively to carry one half of the total traffic on competitive routes and to operate its non-competitive services during that period.

In the light of this determination the two operators will then

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17 Parliamentary Debates Twenty-Second Parliament at p. 755 et seq.
be mutually bound during the period in which any guaranteed loans are not repaid in full by three obligations:

First, neither airline must provide on competitive routes, during the specified period, more aircraft capacity than is necessary to carry half the estimated traffic at the predetermined revenue load factor.

Second, the operators must dispose of any aircraft capacity in excess of that required to operate their competitive and non-competitive services after making due allowances for the need for stand-by aircraft, maintenance and overhaul of aircraft and crew training and similar matters.

Finally, there is an obligation on the airlines not to acquire additional aircraft which would result in the capacity limitations being exceeded and not to introduce aircraft of a type which, having regard to the types already in operation, would be detrimental to the stability of the air transport industry. This latter obligation is, of course, designed to stop a wasteful re-equipment race leading to a multiplicity of new and expensive aircraft types."

"Nothing in the Bill affects existing rationalization machinery established under the Civil Aviation Agreements. This machinery will continue to be used to determine routes, timetables and fares and freight rates and related matters but the task of coordination will be greatly simplified because aircraft capacity of the airlines has first been pegged to the amount necessary to perform the domestic air transport task."

The Airlines Equipment Act 1958 has no counterpart in the legislation of any other country and reflects two factors affecting Australian air transport which are probably unique. Firstly the Australian Government has a declared policy of maintaining competition between a Government instrumentality and a private airline and of ensuring that actions of the executive do not unfairly discriminate in favor of either airline. Secondly the Federal authority must to some extent rely on contractual undertakings to exercise controls which the Civil Aeronautics Board and other aviation administrations, which are not inhibited by Constitutional limitations, exercise pursuant to direct statutory authority. Notwithstanding these special features the legislation will be of interest to all aviation administrations since it sets out to solve re-equipment problems which are common to all countries. Only time will tell whether the methods of predetermining the capacity of the major operators and controlling the introduction of new aircraft types as well as disposal programs will achieve the expressed objectives.