HIGH COURT OF AUSTRALIA

Attorney-General (W.A.)

Vs.

Australian National Airlines Commission.

(Barwick C.J.(1), Gibbs(2), Stephen(3), Mason(4) and Murphy(5) JJ.)

17 December 1976

CATCHWORDS

Constitutional Law (Cth) - Powers of the Commonwealth Parliament - Trade and commerce - Territories - Intrastate air transport operations - Authority to Australian National Airlines Commission to operate airline services between places in the one State for the purpose of the efficient competitive and profitable conduct of its business of conducting interstate and territorial services - Validity - Severance - The Constitution (63 & 64 Vict. c. 2), ss. 51 (i.), 122 - Australian National Airlines Act 1945 (Cth), ss. 19B, 19C, 19H - Acts Interpretation Act 1901 (Cth), s. 15A.

HEARING

Melbourne, 1975, October 6, 7.
Sydney, 1976, December 17. 17:12:1976
QUESTIONS directed to be argued pursuant to the Judiciary Act 1902 (Cth), s. 18.

DECISION

1976, December 17.
The following written judgments were delivered: -

BARWICK C.J. The facts and circumstances necessary to be known to resolve the reasons for judgment prepared in the matter by my brothers Stephen and Mason. These I have had the advantage of reading. I have no need to supplement the recital of those facts and circumstances which is there made. Consequently, I am able immediately to express conclusions as to the question of law to which they give rise. (at p498)

2. It is convenient, however, that I set out in full s. 19B and a part of s. 19H of the Australian National Airlines Act 1945 (Cth), as amended, ("the Act").

> "19B. (1) The Commission may, to the extent provided by sub-section (2), transport passengers or goods for reward by air or by land, or partly by air and partly by land, between places in the one State.
> (2) The powers of the Commission under sub-section (1) may be exercised for the purposes of the efficient, competitive and profitable conduct of the business of the Commission in respect of its function under paragraph (a) of sub-section (1)

of section 19 or otherwise as incidental to the carrying on of that business.
19H. (1) The Commission has power to do all things necessary or convenient to be done for or in connexion with, or as incidental to, the performance of its functions and, in particular, without limiting the generality of the foregoing, power -
(a) to arrange for, or participate in, the formation of a company;
(b) to subscribe for or otherwise acquire, and to dispose of, shares in a company; or
(c) to enter into a partnership or an arrangement for sharing of profits." (at p499)

3. The question is whether these sections validly authorize the Australian National Airlines Commission, set up under the Act, to pick up or set down passengers and goods within the State of Western Australia in the course of an air transport service between Perth and that State and Darwin in the Northern Territory. The constitutional validity of these sections in relation to such an activity is sought to be placed on ss. 51 (i.) and 122 of the Constitution but particularly upon the latter provision. (at p499)

4. I agree with my brother Stephen that there is no power in the Parliament in exercise of the legislative power granted by s. 51 (i.) to authorize acts to be performed by the Commission in the course of intrastate trade. The fact, if it be the fact that the performance of these acts are by the interstate carrier by air would conduce to the efficiency, competitiveness and profitability of the interstate activity, it would not warrant the conclusion that legislative power to authorize such acts is involved as an incident of the legislative power granted by s. 51 (i.). The submission that the Court should treat economic success of the activity of interstate carriage by air as an object within the legislative power is, in my opinion, unacceptable. I agree with my brother Stephen and for the reasons he expresses that s. 19B of the Act could not be justified as within the scope of the legislative power granted by s. 51 (i.). (at p499)

5. I agree that it is possible by the use of s. 15A of the Acts Interpretation Act 1901 (Cth), as amended, to sever from the other functions of the Commission imposed by s. 19B of the Act, the function of conducting a territorial air line service. I am prepared to use s. 15A in order to apply a distributive operation to s. 19B, bearing in mind the way in which the several functions of the Commission are separately described. Thus the operation of s. 19B can be confined to the Commission's function of providing a territorial service. The operation of s. 19C depends on the validity of s. 19B and no special considerations arise in respect of it. (at p500)

6. There remains the question whether so confined that section can be justified as an exercise of the power granted to the Parliament by s. 122, that is to say, whether the law authorizing the carriage of persons and goods between places within one State is a law for the peace, order and good government of the Northern Territory. The Court in Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132 held that laws validly made by the Parliament in exercise of the power granted by s. 122 are operative throughout Australia to the same extent as a law made by the Parliament under heads of legislative power granted by s. 51. But this extensive operation of laws made under s. 122 does not increase the subject matter of the legislative power. Dixon C.J. said (1958) 99 CLR, at p 141 :

> "To my mind s. 122 is a power given to the national Parliament of Australia as such to make laws 'for', that is to say 'with respect to', the government of the Territory. The words 'the government of any territory' of course describe the subject matter of the power. But once the law is shown to be relevant to that subject matter it operates as a binding law of the Commonwealth wherever territorially the authority of the Commonwealth runs."

Though a law valid under s. 122 may operate in a State, the test of the validity of such a law must be whether the law is a law for the peace, order and good government of the Territory - treating the word "for" in s. 122 as implying the concepts expressed in that traditional formula. The remaining question therefore is whether s. 19B or s. 19H, if read as authorizing intrastate carriage by the Commission, are laws "for" the Northern Territory. (at p500)

7. I am unable to agree that s. 19B, confined in the manner already mentioned, is a law for the government of the Territory. It may be granted that a law providing for communication by air between a place in the Territory and a place in a State may be a law for the government of a Territory. Further, the Parliament may validly authorize a corporation to provide a service by aerial transport between a point or points within a State to a place within a Territory. The authority to conduct a business of aerial transportation and the imposition of a duty or function to provide by that business, a service between places in the Territory and places in the State is validly conferred and imposed upon the Commission by the Act. But, in my opinion, the legislative power does not extend to authorizing the performance of acts by such a corporation outside the Territory merely because such performance will increase the profitability of that business or will assist economically to maintain the service by aerial transportation from a place outside the Territory to a place within the Territory. The submission that the economics of the operation of such a service falls within the subject matter of the territorial power is, in my opinion, erroneous and unacceptable. (at p501)

8. The words supposedly limiting the authority sought to be conferred by s. 19B upon the Commission to perform acts outside the Territory to aid the efficient, competitive and profitable conduct of the business of the Commission do not themselves attract legislative power (see s. 19B (2)), nor do they really limit relevantly the nature or extent of the acts which the section authorize. The efficiency, competitiveness and profitability of the business of the Commission cannot be in themselves objects of legislative power to make laws for the Territory. In other words the economics of the business of the Commission do not, in my opinion, form part of the subject matter of s. 122 - the peace, order and good government of the Territory - nor are they incidentally part of that subject matter. Although not formally applicable, the substantial reasons why s. 19B (1) is not a valid law within s. 51 (i.), in my opinion, do require the same conclusion as to the validity of the section as an exercise of the power granted under s. 122. The fact that without the advantage of being able to perform certain acts within a State, the Commission may not find a service of aerial transportation between a point in the State and a place in the Territory sufficiently attractive financially to warrant undertaking it, does not justify the conclusion that authority to authorize the Commission to do those acts may be given by a law made under s. 122. A law authorizing such an act is not, in my opinion, a law for the peace, order and good government of the Territory. (at p501)

9. For these reasons, I would answer the questions asked as follows:
1. The Act and particularly ss. 19B, 19C and 19H do not validly authorize so much of the proposed service as involves the carriage of passengers or freight between places within the State of Western

Australia.

2. Does not arise.
3. See answer to question 1. (at p501)

GIBBS J. The important question which is raised in these proceedings is whether the Parliament may validly empower the Australian National Airlines Commission to transport passengers and goods for reward by air or by land between places within one State in the circumstances mentioned in s. 19B (2) of the Australian National Airlines Act 1945, as amended. That sub-section (which was inserted by the amending Act of 1973) provides as follows:

> "The powers of the Commission under sub-section (1) may be exercised for the purposes of the efficient, competitive and profitable conduct of the business of the Commission in respect of its function under paragraph (a) of sub-section (1) of section 19 or otherwise as incidental to the carrying on of that business."

The function of the Commission referred to is that of transporting passengers and goods for reward by air between a place in a State and a place in another State; between a place in a Territory and a place in Australia outside that Territory; between a place in a Territory and another place in that Territory; or between a place in Australia and a place outside Australia (see s. 19). Under the power which s. 19B attempts to confer, the Commission proposes to establish an airline service between Darwin and Perth, with an intermediate stopping place at Port Hedland, which is in Western Australia. The proposed carriage of passengers and goods between Perth and Port Hedland will not necessarily be as part of any larger journey, whether between one State and another or between a State and a Territory. (at p502)

2. The source of power mainly relied on to support this legislation is s. 122 of the Constitution, although s. 51 (i.) and s. 51 (xxxix.) are also prayed in aid. In my opinion s. 51 (i.) and s. 51 (xxxix.) cannot support the validity of s. 19B. It has been held again and again - and in my respectful opinion, correctly held - that s. 51 (i.) recognizes a distinction between interstate trade on the one hand and the domestic trade of the States on the other, and that this distinction must be maintained however much interdependence may now exist between those two divisions of trade and however artificial the distinction may be thought to be. It is also established that the incidental power cannot be given an operation that would obliterate the distinction. I need refer only to R. v. Burgess; Ex parte Henry (1936) 55 CLR 608, at pp 628, 671-672 ; and Morgan v. The Commonwealth [1947] HCA 6; (1947) 74 CLR 421, at p 452 and to the remarks of Dixon C.J. in Wragg v. New South Wales [1953] HCA 34; (1953) 88 CLR 353, at pp 385-386 . The duty which this Court is called on to perform is plainly pointed out by Kitto J. in Airlines of New South Wales Pty. Ltd. v. New South Wales (No. 2) (1965) 113 CLR 54, at p 115 :

> "This Court is entrusted with the preservation of constitutional distinctions, and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical conceptions or with modern conditions they may appear to be in some or all of their applications."

The decision of the Court in that case, in so far as it related to reg. 200B of the regulations there

under consideration, strongly supports the view that s. 19B is not a valid exercise of the power conferred by s. 51 (i.) and s. 51 (xxxix.). Indeed some further remarks of Kitto J. bear directly on the present question. His Honour said [1965] HCA 3; (1965) 113 CLR 54 at p115 :

"Where the intra-State activities, if the law were not to extend to them, would or might have a prejudicial effect upon matters merely consequential upon the conduct of an activity within federal power, e.g. where the profit or loss likely to result from inter-State commercial air navigation would or might be affected, that mere fact would not suffice, in my judgment, to make the law a law 'with respect to' that activity itself. But, by contrast, where the law, by what it does in relation to intra-State activities, protects against danger of physical interference the very activity itself which is within federal power, the conclusion does seem to me to be correct that in that application the law is a law within the grant of federal power." (at p503)

3. The principal question that falls for decision is whether s. 19B is, at least in part, a valid exercise of the power conferred by s. 122. It is now accepted that under the power conferred by s. 122 (possibly assisted by s. 51) the Parliament may legislate to provide a means of aerial transport not only within a Territory but also between a Territory and other parts of Australia. That view was taken in Australian National Airways Pty. Ltd. v. The Commonwealth (1945) 71 CLR 29, at pp 71, 79, 84-85 by the majority of the Court, Rich, Starke and Dixon JJ. and their opinions were confirmed by the decision in Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132 . It does not, however, follow that the Commonwealth may permit the carrier which it authorizes to provide a means of transportation to a Territory to engage also in carriage that takes place entirely within a State, on the ground that to do so would render the business of the carrier more efficient, competitive and profitable. (at p503)

4. The operation of a law made under s. 122 is not confined to the Territory. "Provided that the law is otherwise within the power" (conferred by s. 122) "it will operate according to its tenor wherever the jurisdiction of the Parliament extends": Lamshed v. Lake (1958) 99 CLR, at p 146 ; Spratt v. Hermes [1965] HCA 66; (1965) 114 CLR 226, at pp 245, 270 ; Reg. v. Turnbull; Ex parte Taylor (1968) 123 CLR 28, at p 38 . It is well recognized that the power given by s. 122 is plenary in nature; it is "a complete power to make laws for the peace, order and good government of the territory": Spratt v. Hermes (1965) 114 CLR, at p 242 . But the power is limited by the area in and in relation to which it is to be exercised. The law made under it must be a law for the government of a Territory. Section 122 does not confer on the Parliament a power to legislate for the government of Australia. (at p504)

5. Conceding the width and universality of the power given by s. 122, and that a law made in its exercise may operate within Western Australia, the question to be decided is whether s. 19B is a law for the government of the Northern Territory. The section, if valid, would enable the Commission to carry for reward passengers and goods between places entirely within Western Australia, although the carriage in itself had no connexion with the Northern Territory. It is said that the section is a law for the government of the Northern Territory because it permits something to be done which will render it more efficient, competitive and profitable to establish and maintain aerial communications with the Territory. The dominant purpose of the section is said to be to provide a means of

communication with the Territory, which, as a matter of practical reality, could not be provided if it were not efficient, competitive and profitable. (at p504)

6. This seems to me very much the argument which Kitto J. rejected, although in relation to s. 51 (i.), in Airlines of New South Wales Pty. Ltd. v. New South Wales (No. 2) [1965] HCA 3; (1965) 113 CLR 54 , and with all respect I cannot accept it. If it were correct it would appear to follow that the Parliament might authorize any Commonwealth instrumentality to engage in intrastate trade if that would render more profitable the conduct of the commercial undertakings of that instrumentality within or in connexion with a Territory. Indeed, any regulation or control of intrastate trade by the Parliament would then appear to be permissible if effected for the purpose of making such a commercial undertaking more profitable. To give s. 122 such an operation would elevate it to a position of importance, even dominance, which it cannot possibly have been intended to occupy in the Constitution. Its purpose was to provide for the government of Territories which by their nature were dependent and subordinate and it cannot be construed "in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament", to borrow words used in a different context by Latham C.J. in Bank of New South Wales v. The Commonwealth [1948] HCA 7; (1948) 76 CLR 1, at pp 184-185 . (at p505)

7. The transportation for reward of passengers and goods between places within one State, otherwise than as part of a larger journey involving a Territory, is not something which in itself falls directly within a power to make laws for the government of a Territory. A law might be made under s. 122 affecting such intrastate transportation to the extent necessary to make effectual some valid exercise of the power conferred by s. 122. The provisions of s. 19B, however, are not necessary to make effectual the provisions of s. 19 in so far as they relate to Territories. The fact that it may be thought commercially desirable to use an aircraft on its way to a Territory to carry passengers or goods intrastate does not mean that a law authorizing such a course is covered by, or legally incidental to the execution of, the power conferred by s. 122. (at p505)

8. In my opinion s. 19B is not validly made under s. 122. It is not necessary to decide whether or not the section is entirely invalid. With the assistance of s. 15A of the Acts Interpretation Act 1901 (Cth) it may have a valid operation in States (such as Queensland and Tasmania) which have referred the necessary powers to the Parliament under s. 51 (xxxvii.) (at p505)

9. The other questions raised in the case need not be considered. It was agreed that s. 19C has no application to the present circumstances, and that if s. 19B is invalid (pro tanto at least), s. 19H cannot be sustained. (at p505)

10. I would answer the questions asked as follows: 1. No; 2. and 3. Do not arise. (at p505)

STEPHEN J. It has long been recognized that, in exercise of its powers with respect to interstate trade and commerce and of its power to make laws for the government of any territory, the Commonwealth may establish an airline service authorized to carry passengers and goods on interstate routes and on routes to, from and within territories (Australian National Airways Pty Ltd v. The Commonwealth [1945] HCA 41; (1945) 71 CLR 29). By the Australian National Airlines Act 1945 the Australian National Airlines Commission was created for this purpose and has conducted airline services on such routes ever since. (at p505)

2. Except where by State legislation power has been referred to the Commonwealth under s. 51

(xxxvii.) the Commission has not operated on intrastate routes and until amended in 1973 the Australian National Airlines Act did not expressly authorize the Commission to operate generally on such routes. In 1973 the Act was amended and by s. 19B the Commission is expressly authorized to operate intrastate services in certain circumstances. The constitutional validity of this amendment is the principal, although not the sole, issue in these proceedings. (at p506)

3. The Commission seeks to expand its airline services in the western areas of Australia by providing a weekly flight from Darwin to Perth and return, picking up and putting down passengers and goods at Port Hedland on each leg of this round flight. Such a flight would commence in the Northern Territory and then enter the State of Western Australia, stopping at Port Hedland en route to Perth; the return flight would leave Perth for Port Hedland and after stopping there would then leave Western Australia and again enter the Territory in returning to Darwin. Elements of movement both between a State and a Territory and also wholly within one State are thus involved. The Commission relies upon s. 19B of the Act as validly authorizing it to provide this service; some reliance is also placed upon s. 19H. The source of the legislative power validly to enact these two sections is said to be found in s. 122 of the Constitution, alternatively in s. 51 (i.), in each case recourse also being had to the incidental power conferred by s. 51 (xxxix.). (at p506)

4. Sections 19B and 19H each require to be read in the context of the opening provisions of Div. 2 of Pt II of the Act. That Division describes the powers, functions and duties of the Commission and commences with s. 19 of which sub-s. (1) is as follows:

> "19. (1) The functions of the Commission are:
> (a) to transport passengers and goods for reward by air between prescribed places;
> (b) to engage in other activities to the extent that they are within the limits of the powers of the Commission under a provision of this Act other than this section:
> (c) to provide to the Commonwealth and authorities of the Commonwealth, for reward, aviation, land transport and engineering services and such other services as can conveniently be provided by the use of the resources of the Commission,
> and the Commission shall carry on business for the purpose of performing those functions.".

Section 19 (2) gives meaning to the reference in s. 19 (1) (a) to transport "between prescribed places", it means transportation interstate, transportation from a Territory to a place in Australia outside that Territory, intra-Territory transportation and transportation from Australia to overseas. (at p507)

5. Sections 19B and 19H may now be set out:

> "19B. (1) The Commission may, to the extent provided by sub-section (2), transport passengers or goods for reward by air or by land, or partly by air and partly by land, between places in the one State.
> (2) The powers of the Commission under sub-section (1) may be exercised for the purposes of the efficient, competitive

and profitable conduct of the business of the Commission in respect of its function under paragraph (a) of sub-section (1) of section 19 or otherwise as incidental to the carrying on of that business."

"19H. (1) The Commission has power to do all things necessary or convenient to be done for or in connexion with, or as incidental to, the performance of its functions and, in particular, without limiting the generality of the foregoing, power -

(a) to arrange for, or participate in, the formation of a company;

(b) to subscribe for or otherwise acquire, and to dispose of, shares in a company; or

(c) to enter into a partnership or an arrangement for sharing of profits.

(2) A provision of this Act conferring a power on the Commission shall not be read so as to limit the powers of the Commission under any other provision." (at p507)

6. In s. 19B the grant of power is made by sub-s. (1) but the extent to which it may be exercised is prescribed by sub-s. (2); the precise limit of permitted extent of exercise, to be determined by an examination of the terms of the latter sub-section, will be found to be critical to constitutional validity. Before turning in greater detail to the terms of that sub-section it may be noted at the outset that because the sub-section refers to the Commission's function under s. 19 (1) (a) which, by reason of s. 19 (2) extends to some matters which have no connexion with any Territory of the Commonwealth, s. 122 of the Constitution, the Territories' power, cannot alone be relied upon as supporting validity of the whole reach of s. 19B. Only by recourse also to s. 51 (1) can the full operation of s. 19B be held valid. (at p507)

7. To identify the precise extent of intrastate carriage by air which is authorized by s. 19B (2) calls for some interpretation of the sub-section. The "business" of the Commission to which the sub-section twice refers is, no doubt, on each occasion to be understood as confined to its business in respect of its function as a carrier by air between prescribed places. The sub-section, as I would read it, contains two limbs; the first, beginning after the words "may be exercised", describes three specified purposes for the better attainment of which the Commission may exercise the power to carry intrastate; the second, contained in the last eight words of the sub-section and introduced by the preceding phrase "or otherwise as", describes other permitted occasions for the exercise of that power. The words "or otherwise as" which introduce the second limb signify that what is described in the first limb are but instances of that which falls within the second limb. It follows that the power to carry intrastate may be exercised whenever it is incidental to the carrying on of the Commission's business in respect of its function as a carrier by air between the places prescribed by s. 19 (2) and that "incidental" as used in s. 19B (2) extends at least to occasions when the incidentality of intrastate carriage depends exclusively upon the fact that such carriage will conduce to the efficient, competitive or profitable conduct of that business. (at p508)

8. The important conclusion which flows from this view of the meaning of the sub-section is that although the extent of the power to carry intrastate is in all cases confined to what the sub-section describes as "incidental" to the carrying on of the business of the Commission as a carrier by air between prescribed places, the word "incidental" is here used with a relatively wide meaning. If s.

51 (i.) of the Constitution is to be relied upon as supporting this grant of power to the Commission to carry intrastate, at least to the extent that power under s. 122 is deficient, it must be upon the ground that the penumbral incidental power which the subject matter of s. 51 (i.) attracts to itself is at least as wide as that which s. 19B of the Act purports to confer. (at p508)

9. Does, then, s. 51 (i.), by its grant of legislative power over interstate trade and commerce, incidentally include a grant of power to legislate for intrastate trade and commerce when its only relationship to interstate trade and commerce lies in the fact that the purpose of engagement in such intrastate activity is to conduce to the efficiency, competitiveness and profitability of the interstate activity? (at p508)

10. The authorities in this Court on the scope of that implied incidental power which attaches to each specific grant of power as to subject matter provide, in my view, a clear negative answer to the question posed. It is primarily to decisions upon s. 51 (i.) that attention must be directed since, as Dixon C.J. pointed out in Victoria v. The Commonwealth [1957] HCA 54; (1957) 99 CLR 575, at p 614 the nature and subject of the particular head of power in question will be critical in determining what is incidental to that particular power - and see Federal Commissioner of Taxation v. Official Liquidator of E.O. Farley Ltd., per Dixon J. [1940] HCA 13 [1940] HCA 13; ; (1940) 63 CLR 278, at p 316 . (at p509)

11. It is notable that in considering the extent of the incidental power in the case of s. 51 (i.) particular emphasis has always been placed upon the distinction drawn by the Constitution between those aspects of trade and commerce assigned to Commonwealth legislative competence and that which is left to the States. In R. v. Burgess; Ex parte Henry, Dixon J. said [1936] HCA 52; (1936) 55 CLR 608, at p 672 that "the express limitation of the subject matter of the power to commerce with other countries and among the States compels a distinction however artificial it may appear and whatever interdependence may be discovered between the branches into which the Constitution divides trade and commerce". In Wragg v. New South Wales [1953] HCA 34; (1953) 88 CLR 353, at p 386 Dixon C.J. again referred to that distinction which, he said, must be observed and maintained in the application, to s. 51 (i.), of the doctrine of implied incidental power; that distinction made "impossible any operation of the incidental power which would obliterate the distinction". In Redfern v. Dunlop Rubber Australia Ltd. [1964] HCA 9; (1964) 110 CLR 194, at p 220 Menzies J. referred to the distinction as having always been insisted upon and in Airlines of New South Wales Pty. Ltd. v. New South Wales (No. 2) (1965) 113 CLR, at pp 76-79 Barwick C.J. affirmed this view, citing at length from the judgment of Dixon C.J. in Wragg's Case (1953) 88 CLR, at pp 385-386 . (at p509)

12. The effect of this constitutional division of power over trade and commerce between the Commonwealth and the States has led to a quite narrowly confined ambit being given to the incidental power in the case of s. 51 (i.), at least where what is in question is possible intrusion into the field of intrastate trade and commerce. (at p509)

13. In R. v. Burgess; Ex parte Henry, Latham C.J. said that merely to discover that it was expedient to include intrastate trade within the ambit of Commonwealth control would not bring it within the incidental power under s. 51 (i.), although if it were "impossible" to regulate some aspect of interstate trade without regulating intrastate trade that might call for a different conclusion (1936) 55 CLR at pp 628-629 Dixon J. said that intrastate trade could be affected, under the Commonwealth's power, "only to the extent necessary to make effectual its exercise in relation to commerce among the States" (1936) 55 CLR, at p 671 . In their joint judgment Evatt and

McTiernan JJ. spoke of the need for "so direct and proximate a relationship" of a part of intrastate aviation to interstate aviation as would bring the former into such "a sufficiently proximate relationship" as would justify control of it as incidental to the power under s. 51 (i.) (1936) 55 CLR, at p 677 . In O'Sullivan v. Noarlunga Meat Ltd. [1954] HCA 29; (1954) 92 CLR 565, at p 597 Fullagar J., the Chief Justice and Kitto J. concurring, followed this Court in D'Emden v. Pedder (1904) 1 CLR 91 in adopting, as a criterion of the extent of grants of legislative power, what had been said by Marshall C.J. in McCulloch v. Maryland (1819) 4 Wheat 316 (4 Law Ed 579) ; every power and every control the denial of which would render the grant itself ineffective was, without special mention, to be taken to be included in the power or control expressly granted. In Airlines of New South Wales Pty. Ltd. v. New South Wales (No. 2) [1965] HCA 3; (1965) 113 CLR 54, at p 78 Barwick C.J., having affirmed earlier rejection of the notion that any commingling of the two divisions of trade and commerce could enlarge the subject matter of Commonwealth legislative power, said that nevertheless Commonwealth power might include within its sweep intrastate trade and commerce if that were necessary for the Commonwealth law to be "effective" as to interstate trade. The Chief Justice went on to say that the fact that international or interstate carriage by air may profit by, or to a significant degree depend upon, the level of intrastate carriage by air did not warrant the conclusion that the Commonwealth might stimulate and encourage the latter so as to foster the former (1965) 113 CLR, at p 88 . Kitto J. drew a distinction between a law protecting from the danger of physical interference an activity within power and one which prevents prejudice to matters merely consequential to such an activity, as for instance the profitability of interstate commercial air navigation (1965) 113 CLR, at p 115 . Only the former, he said, would be within power. Taylor J. adopted as a test of extent of power whether its exercise was necessary to the safety and efficiency of interstate air navigation (1965) 113 CLR, at p 128 . Menzies J. did likewise (1965) 113 CLR, at pp 142-143 ; he spoke of power to control intrastate air navigation if "necessary for the effectual control" of interstate air navigation; was it, he asked, "necessary to make effectual" the latter? Windeyer J. would have required some imperilling of the safety of interstate air navigation before intrastate air navigation could come within Commonwealth competence (1965) 113 CLR, at p 155 . (at p510)

14. In the light of the foregoing it is apparent that the permitted exercise of the power conferred by s. 19B, and which is described in sub-s. (2) as "incidental", extends beyond the ambit of that incidental power which s. 51 (i.) carries with it. It follows that the validity of s. 19B cannot gain any support by reliance upon s. 51 (i.); nor can the resultant deficiency of power be wholly made good by recourse to s. 122, those deficiencies do not lie only in areas related to Commonwealth Territories, where alone s. 122 can be called in aid. (at p511)

15. I accordingly conclude that s. 19B is ultra vires the legislative power of the Commonwealth. However it does not therefore wholly fail; s. 15A of the Acts Interpretation Act may come to its aid affording it validity over a restricted range of application. Section 19B of the Australian National Airlines Act is well suited to the application to it of the provisions of s. 15A of the Acts Interpretation Act and if those provisions be applied, the section being read down to the extent necessary to bring it within power, it will retain a substantial sphere of operation and will, in my view, apply in its full vigour in relation to territory air services and to air services between a Territory and other parts of Australia. Before stating my reasons for assigning to it this area of application I should deal with the question of the operation of s. 15A of the Acts Interpretation Act to the present facts. (at p511)

16. That this is an appropriate instance for the application of s. 15A is apparent from the terms of s. 19 and s. 19B of the Australian National Airlines Act. Section 19 (1) of that Act, read in the light of

sub-s. (2), defines as a function of the Commission four distinct types of transportation by air and s. 19B then empowers the Commission to engage in intrastate transportation by air for the purposes of the efficient, competitive and profitable conduct of its business in respect of this particular function or otherwise as incidental to the carrying on of that business, that is, its business in respect of that function. If the function to which s. 19B refers be limited to transportation by air within a Territory and between a Territory and a place in Australia outside that Territory and if, as I will endeavour to show, the effect of s. 19B, when so confined, is amply supported by s. 122 of the Constitution, a situation is revealed in which s. 15A of the Acts Interpretation Act may properly operate to confer pro tanto validity upon s. 19B. (at p511)

17. When s. 19B is applied to the "function" to which it refers, namely that described in s. 19 (1) as elucidated by s. 19 (2) , it may be seen to operate on the four distinct classes of carriage by air identified in the lettered paragraphs of s. 19 (2); that is the intended subject matter to which s. 19B is to apply. It was said by Dixon J. in Huddart Parker Ltd. v. The Commonwealth [1931] HCA 1; (1931) 44 CLR 492, at p 513 , that "Plainly it was intended that the power to regulate both persons and subject matter should be exercisable as to each and every part of the subject matter and each and every class of persons comprised within the general description"; so here the legislative intent must be that the power conferred by s. 19B should apply individually to each one of those four classes of carriage by air. In Huddart Parker Dixon J. concluded that s. 15A applied and that a wide regulation-making power, while void in relation to persons and things not within Commonwealth legislative power might validly apply to the more limited classes of persons and things within such power and that s. 15A was properly to be employed to produce that result. A similar application of s. 15A is to be seen in Newcastle and Hunter River Steamship Co. Ltd. v. Attorney-General (Cth) [1921] HCA 31[1921] HCA 31; ; (1921) 29 CLR 357, at p 369 ; and see in R. v. Burgess; Ex parte Henry, per Evatt and McTiernan JJ. (1936) 55 CLR, at p 676 . I would apply s. 15A in like manner in the present case. (at p512)

18. Usefully to invoke s. 15A requires that s. 19B of the Australian National Airlines Act should be capable of valid operation if suitably read down; it is to s. 122 of the Constitution that I turn to discover the necessary validating power if s. 19A be read down so as to apply only to carriage by air within a Territory and to and from a Territory. (at p512)

19. Section 122 confers plenary legislative power; the power is to "make laws for the government of any territory". In that context "for" means "with respect to" and the words "the government of any territory" describe the subject matter of the power, which embraces "everything which is fairly incidental to the legislative power", "every proper provision" about its government (Lamshed v. Lake, per Dixon C.J. [1958] HCA 14; (1958) 99 CLR 132, at pp 141, 144, 146). It is a wide power; under it Parliament "may deal with the whole subject of running each such territory as a federal territory" (per Kitto J. (1958) 99 CLR, at p 153) and may "make what provision it will for every aspect and every organ of territorial government" (Spratt v. Hermes, per Kitto J. [1965] HCA 66; (1965) 114 CLR 226, at p 251). Barwick C.J. in that case described it as "as large and universal a power of legislation as can be granted" (1965) 114 CLR, at p 242 . (at p512)

20. The limits of this power to legislate are primarily to be found from the very words which describe it, to legislate for "the government of any territory". A law purportedly made under it must concern that very widely expressed subject matter. Dixon C.J., in Lamshed v. Lake (1958) 99 CLR, at p 148 described the line denoting the frontiers of this power as being drawn "only where what is incidental to the purpose stops" - the purpose being the government of a territory. He had earlier (1958) 99 CLR, at pp 144-145 quoted a passage from his previous judgment in the Airlines Case

[1945] HCA 41; ; (1945) 71 CLR 29 in which, after warning against pedantic and narrow constructions of an instrument of government - "I do not see why we should be fearful about making implications" - he described it as "absurd to contemplate a central government with authjority 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" (1945) 71 CLR, at p 85 . (at p513)

21. Section 19B, even if read down as proposed, is necessarily concerned with acts done outside a Territory because its effect is to authorize intrastate transportation. That this is, however, in itself no objection to validity emerges from the reasoning in a majority of the judgments in the Airlines Case [1945] HCA 41; (1945) 71 CLR 29 ; in that case only Latham C.J. and Williams J. would have denied to a law enacted under s. 122 effective operation outside a territory as a law of the Commonwealth. Then in Lamshed v. Lake (1958) 99 CLR 132 the majority judgments placed beyond doubt the proposition that, if otherwise within power, a law enacted under s. 122 might operate within a State and, being a law of the Commonwealth, would prevail over State law. (at p513)

22. The expression "otherwise within power" serves to remind that a law purportedly enacted under s. 122 not only must be a law with respect to the government of a Territory but may perhaps also have to observe other constitutional requirements, for instance those of s. 92 and s. 116 to name but two; it may also be that to the extent to which it operates within a State or, as some would express it, to the extent to which it operates as an integral part of federal law as distinct from territorial law, it may also have to conform to a wider set of constitutional requirements than it must in its operation simply as a Territory law. However with this aspect the present case is not concerned; the only such constitutional requirement which it has been suggested that s. 19B infringes is its failure to observe the division of trade and commerce into two parts and to restrict itself to that part, interstate, territorial and overseas trade and commerce, which the Constitution alone allocates to federal competence. When the power under s. 122, as distinct from that under s. 51 (i.), is in question I would regard it as impermissible to seek to qualify it by reference to this constitutional division of the power over trade and commerce; the power conferred by s. 122 is not, I think, to be limited by reference to an implication drawn from the terms of s. 51 (i.) or s. 92. (at p514)

23. The present law goes rather futher than to concern itself with "the establishment, maintenance and control of communications with the territory governed" (Airlines Case, per Dixon J. (1945) 71 CLR, at p 85); even if read down as I have suggested, it is not concerned to authorize the undertaking by the Commission of air transportation to and from Territories, this is already effected by s. 19; rather it authorizes such transportation by air from point to point within one State as is, in the wide sense which I have already indicated, incidental to transportation between a State and a Territory. (at p514)

24. Section 19B, read down as indicated above, will, in my view, be valid if it may be seen to be sufficiently referable to the subject matter "government of a territory". Its nexus with that subject matter rests on the fact that although it legislates in relation to conditions external to the Territory it does so for the purpose of enhancing the profitability, efficiency and competitiveness of the Commission's airline services which connect a Territory with other parts of the Commonwealth. If such a nexus be sufficient the last words of s. 19B, with their reference to that which is otherwise incidental to the Commission's business, "business" being understood as confined to Territory air transportation, will not of themselves suffice to carry the section beyond power. (at p514)

25. In considering the permissible scope of laws enacted under s. 122 there is, I think, no reason for the exclusion of laws whose connexion with "the government of a territory" is confined to the production of desirable qualities in functions of government; thus a law which has as its object the reduction in cost of or the improvement in the efficiency of some governmental activity related to a Territory is, I think, a law with respect to the government of that Territory. In this respect the position is in marked contrast to that governing the scope of incidental powers to be implied in s. 51 (i.) and which I have already noticed. I may say that it is not clear to me that any question of implied incidental legislative power can arise in the case of s. 122, which itself confers a plenary legislative power, leaving little room for any implication of incidental power. Rather than speak of an implied incidental power in connexion with s. 122 it may be preferable to regard the express words of grant as including within the power the entirety of power necessary to legislate for the government of a Territory. However if, as has sometimes been suggested in the authorities, there be implied incidental powers in the case of s. 122, neither authority nor general principle calls for their restriction to that which is "necessary" or "essential" to the effective exercise of the express power to legislate for the government of a Territory; and if not so restricted it should, in my view, extend to the authorization of that which will render a function of territorial government more efficient, competitive and profitable. (at p515)

26. The Parliament, charged with the general government of Territories, has created a corporation to conduct, in competition with whatever services private enterprise may care to furnish, airline services providing, inter alia, communications with those Territories. In the preamble to the legislation by which it has effected this it has recited its intention of ensuring that, among other things, "the development of the Territories is promoted with the utmost expedition". The taking of steps to promote the efficiency of those airline services is, I think, very much a part of the subject matter described as "the government of a Territory". Because the airline service in question is one funded by government that government must also necessarily be concerned with its profitability. Its competitiveness with any rival service is but a reflex of efficiency and profitability. (at p515)

27. No question here arises of degrees of efficiency, competitiveness of profitability since s. 19B does not speak in relative but in absolute terms. Thus, concluding that the undertaking of intrastate transportation for the purpose of conducing to those three purposes or any of them is within power, it matters not whether the undertaking of it assists the Territory transportation towards an unattained goal of efficient, profitable and competitive carriage by air or merely enhances the degree to which that transportation, already possessing those qualities, answers that description. The degree to which those qualities are already possessed, unaided by the authorized intrastate transportation, will not affect the relationship of that authorizing law to the subject matter of s. 122, that of the government of a Territory. (at p515)

28. It is for these reasons that I conclude that s. 19B, in empowering the Commission to exercise the power conferred by sub-s. (1) in respect of the Commission's function under s. 19 (1) (a), is valid in respect of that part of its function which is confined to intra-Territory transportation and transportation to and from a Territory, referred to in s. 19 (2) (b) and (c). Section 19B is otherwise invalid and the Commission is accordingly not empowered to exercise the power conferred by sub-s. (1) in respect of its function under s. 19 (1) (a) in respect of that part of its function which extends to interstate transportation and to transportation overseas, referred to in s. 19 (2) (a) and (d). (at p516)

29. In arriving at this conclusion I have not found it necessary to refer to s. 19H; to the limited extent to which that section was relied upon on behalf of the Commission it does not appear to me

to add anything to the weight of the argument advanced on its behalf and founded upon s. 19B. (at p516)

30. Three questions were formulated for argument before this Court. The first two relate to the particular service, from Darwin to Perth and return, which the Commission proposed to operate. That service is one between "a place in a Territory and a place in Australia outside that Territory" - s. 19 (2) (b) of the Act. It follows that I would regard s. 19B as empowering the Commission to undertake that service in the manner described in the Findings of Fact, that is with calls, in each direction, at Port Hedland for the purpose of taking on and setting down passengers and cargo so long as to do so will conduce to efficiency, profitability and competitiveness. That it does so in the present case is apparent from the Findings of Fact. I would answer question 1 accordingly; question 2 does not, in the circumstances, call for any answer. (at p516)

31. Question 3 is directed generally to the validity of the Act and in particular to ss. 19B, 19C and 19H. No argument was advanced as to either the relevance or the validity of s. 19C. It is also unnecessary in this case to pass generally upon the validity of s. 19H. Section 19B is invalid as it stands but when read down in the manner indicated in these reasons for judgment is valid and effective to authorize the Commission's proposed service. I would answer question 3 accordingly. (at p516)

32. In conclusion I should refer briefly to two arguments advanced on behalf of the relator which I have been unable to accept. The first is that the Commonwealth licence held by the Commission, understood in the light of the Commonwealth Air Navigation Regulations under which it is issued, does not permit it to carry passengers who wish only to travel on, or cargo which is consigned only for, one sector of the licensed route between the fixed terminals of Darwin and Perth, for instance only between Perth and Port Hedland. It is true that in reg. 191 of the Air Navigation Regulations the criterion of operating with fixed schedules between fixed terminals is used to distinguish regular public transport operations from other passenger or freight-carrying aerial operations; but neither in the regulations nor in the licence is there anything to suggest either that when intermediate stopping places are approved the carriage of passengers and freight must necessarily take place only between ultimate terminal points or that the approved stopping places are intended only for refuelling, servicing or the like. The Commission's licence specifically refers to intermediate stopping places between fixed terminals and the Director-General has in fact approved of Port Hedland as such a stopping place. It is the air service operation, and not the carriage of passengers and cargo, that must be conducted between fixed terminals. Accordingly, in my view, the Commission's licence authorizes it to carry passengers and cargo on one sector only of the licensed route; it may carry between either Perth or Darwin, and Port Hedland so long as it does so in the course of conducting its service between the fixed terminals of Darwin and Perth. (at p517)

33. The second argument turned upon the consequence should s. 19B be held valid. It was said, correctly in my view, that in consequence the Commission, unlike the relator, would not be required to comply with the Western Australian Transport Commission Act, which provides for the licensing of aircraft and imposes a not insubstantial licence fee. The resultant financial inequality as between the relator and the Commission ran counter, it was said, to the declared purpose and tenor of the Airlines Agreements Act and of the agreements scheduled to it and to avoid this consequence s. 19B should be understood as doing no more than conferring upon the Commission the legal capacity to fly intrastate if duly authorized in that behalf by relevant licensing authorities, including State authorities. Reg. v. Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty. Ltd. [1964] HCA 15; (1964) 113 CLR 207 was relied upon by counsel on behalf of the

Commission as an authority directly opposed to this argument and, in my view, correctly so. It is enough to say that I regard what was there said in the judgment of the Court (1964) 113 CLR, at pp 223-224 as directly applicable to the present case; s. 19B is not merely facultative, it does not merely confer upon the Commission a capacity to undertake intrastate carriage, but instead directly authorizes it to do so. (at p517)

34. I would, accordingly, answer as follows the questions directed to be argued before this Court:

1. Yes.
2. Does not arise in light of the answer to question 1.
3. Section 19B is valid only to the extent to which it applies in respect of

that part of the Commission's function under s. 19 (1) (a) which consists of the transportation of passengers and goods for reward by air between a place in a Territory and a place in Australia outside that Territory and between a place in a Territory and another place in that Territory. It is not otherwise a valid law of the Commonwealth. (at p518)

MASON J. This action, at the relation of Ansett Transport Industries (Operations) Pty. Ltd. (hereinafter called "the relator"), in which declarations of invalidity of ss. 19B, 19C and 19H of the Australian National Airlines Act 1945 are sought, arises out of a proposal by the first defendant, otherwise known as Trans-Australia Airlines ("T.A.A."), to commence a regular airline service between Perth and Darwin with an intermediate stop at Port Hedland at which passengers and cargo from Perth and Darwin will be discharged and passengers and cargo bound for Perth and Darwin will be loaded. Hitherto the first defendant has not conducted a regular airline service between Perth and Darwin. Its proposal to commence such a service with an intermediate stopping place at Port Hedland is dictated by economic reasons for it seems that a direct service between Perth and Darwin would be uneconomic, whereas a service with an intermediate stopping place at Port Hedland may well prove profitable by reason of the traffic available at Port Hedland for Perth and Darwin respectively. (at p518)

2. The relator has for some time past operated, and still continues to operate, a regular airline service between Perth and Darwin with intermediate stopping places in the northern regions of Western Australia, in particular at Port Hedland. The relator discharges at Port Hedland passengers and cargo from Perth and Darwin and picks up passengers and cargo bound for those two ports. (at p518)

3. The first defendant made application for an airline licence authorizing it to conduct its proposed service between Perth and Darwin under reg. 198 of the Air Navigation Regulations made pursuant to the Air Navigation Act. The Director-General issued a licence on this application on 15th February 1974. In terms the licence authorized the use by Trans-Australia Airlines for one year from 15th February 1974

> "of aircraft in the following regular public transport
> operations... between the following fixed terminals:
> ...
> 12. DARWIN and PERTH
> ...
> with such intermediate stopping places if any between those
> terminals, as are from time to time approved by the

Director-General."

Subsequently the Director-General authorized Port Hedland as a stopping place between Darwin and Perth. On the expiration of the licence granted on 15th February 1974 a new licence in identical terms was issued to the first defendant, Port Hedland being again approved as an intermediate stopping place. (at p519)

4. The Airlines Agreements Act 1952 (Cth) incorporates the agreements made from time to time between the relator and the first defendant. One of these agreements, that which is contained in Schedule 2 of the Act, sets out the procedures for the settlement of disputes between the parties concerning the proposed operation of airline services over certain routes (see cll. 10-12 inclusive). When the first defendant announced its intention to commence a regular airline service between Perth and Darwin involving the setting down and taking up of passengers and cargo at Port Hedland, the relator objected to the proposal and there came into existence a dispute which attracted the procedures set out in the agreement contained in Schedule 2 of the Act. In accordance with these procedures the dispute came initially before the Co-ordinator who decided that the first defendant should be given access to the Perth-Darwin route with a stopping place at Port Hedland. The relator then exercised its right to appeal to the Arbitrator who gave his decision on 17th June 1974. He confirmed the decision of the Co-ordinator, deferring consideration of incidental questions relating to fares, freight rates and timetables pending the determination by this Court of the questions of law raised in the proceedings now before us. (at p519)

5. Before turning to the sections which are under challenge it is convenient to set out the provisions of s. 19 of the Australian National Airlines Act which states the functions of the Commission:

> "19. (1) The functions of the Commission are l 17610
> (a) to transport passengers and goods for reward by air between prescribed places;
> (b) to engage in other activities to the extent that they are within the limits of the powers of the Commission under a provision of this Act other than this section; and
> (c) to provide to the Commonwealth and authorities of the Commonwealth, for reward, aviation, land transport and engineering services and such other services as can conveniently be provided by the use of the resources of the Commission.
> and the Commission shall carry on business for the purpose of performing those functions.
> (2) For the purposes of sub-section (1), passengers or goods are transported between prescribed places if they are transported -
> (a) between a place in a State and a place in another State;
> (b) between a place in a Territory and a place in Australia outside that Territory;
> (c) between a place in a Territory and another place in that Territory; or
> (d) between a place in Australia and a place outside

> Australia, being places between which the provision of air transport by the Commission is approved by the Minister."
>
> Section 19B provides:
>
> "19B. (1) The Commission may, to the extent provided by sub-section (2), transport passengers or goods for reward by air or by land, or partly by air and partly by land, between places in the one State.
> (2) The powers of the Commission under sub-section (1) may be exercised for the purposes of the efficient, competitive and profitable conduct of the business of the Commission in respect of its function under paragraph (a) of sub-section (1) of section 19 or otherwise as incidental to the carrying on of that business." (at p520)

6. The case for the defendants is that s. 19B and s. 19C are authorized by ss. 51 (i.), 122 and 51 (xxxix.) of the Constitution. The relator's case is that none of the sections in question is authorized by the provisions of the Constitution on which the defendants rely. Alternatively, the relator says that, even if the statutory provisions in question are valid, the first defendant cannot operate its proposed service without obtaining a licence to operate that service under State law. (at p520)

7. It is in these circumstances that Stephen J. directed that there be argued before a Full Court the following questions of law:

> "1. In the circumstances set forth in the said Findings of Fact is Australian National Airlines Commission as the holder of a current Commonwealth licence in the terms referred to in par. 8 of the said Findings of Fact but without being the holder of any State licence such as is referred to in par. 19 thereof purportedly empowered by the Australian National Airlines Act 1945-1973 and in particular by ss. 19B, 19C and 19H thereof or any of them to undertake the transportation of passengers and goods for reward by air between the places and otherwise in the manner described in the said Findings of Fact as the proposed service on the proposed route?
> 2. If no to question 1 would Australian National Airlines Commission be so empowered if it were the holder of such a State licence in that behalf as is referred to in the said par. 19?
> 3. If yes to either of questions 1 or 2 are the provisions of the said Australian National Airlines Act 1945-1973 which purport so to empower Australian National Airlines Commission and in particular the said Sections thereof and each of them valid laws of the Commonwealth?" (at p521)

8. It is common ground that s. 122 of the Constitution empowers the Commonwealth Parliament to

legislate for the provision of an air service involving the carriage by air of passengers and goods between a place in a Territory and a place in a State (see Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132) and, accordingly, that s. 19 (2) (b) is a valid enactment. Consequently, it is conceded that s. 19 (2) (b) authorizes the first defendant to operate an air service involving the carriage of passengers and goods between Darwin and Perth and Darwin and Port Hedland. What is in contention is the authority of the defendant to carry passengers and goods between Perth and Port Hedland. (at p521)

9. In terms the authority to transport passengers and goods between two places in the one State is conferred by s. 19B (1) to the extent provided by sub-s. (2) of that section, that is, so long as the transport of passengers and goods between the two places is for the purposes of "the efficient, competitive and profitable conduct of the business of the Commission in respect of its function" under s. 19 (1) (a) "or otherwise as incidental to the carrying on of that business". (at p521)

10. The principal question is whether this provision is authorized by s. 122 or a combination of s. 122 and s. 51 (xxxix.). Whether consistently with the decision of this Court in Pioneer Express Pty. Ltd. v. Hotchkiss [1958] HCA 45; (1958) 101 CLR 536 , or, more accurately, the reasoning on which that decision was based, s. 19B could be supported as an exercise of the trade and commerce power standing on its own or supported by s. 51 (xxxix.) is a question that need not be decided. (at p521)

11. There is no occasion to invoke past authority for the proposition that the power conferred by s. 122 is wide and extensive. As I have already said, it includes authority to regulate, control and make provision for the transportation by air of passengers and goods between a Territory and any State of the Commonwealth. The power also includes "everything which is incidental to the main purpose of a power ... so that it extends to matters which are necessary for the reasonable fulfilment of the legislative power over the subject matter" (Burton v. Honan, per Dixon C.J. (1952) 86 CLR 169, at p 177). In determining what is incidental, "not only must you take into account the nature and subject of the power but you must pay regard to the context in which you find the power" (Victoria v. The Commonwealth, per Dixon C.J. [1957] HCA 54; (1957) 99 CLR 575, at p 614). (at p521)

12. The decision of this Court in Attorney-General (Vict.) v. The Commonwealth [1935] HCA 31; (1935) 52 CLR 533 illustrates how a legislative power may be exercised so as to apply to that which is incidental or reasonably necessary for the fulfilment of the power over the subject matter. There the provisions of the Defence Act 1902-1932 authorizing the operation of the Commonwealth Clothing Factory, which was established for the production of uniforms for the Defence Forces, for the making of civilian uniforms, were upheld as a valid exercise of the defence power. (at p522)

13. Gavan Duffy C.J., Evatt and McTiernan JJ. said (1935) 52 CLR, at p 558 :

> "It is obvious that the maintenance of a factory to make naval and military equipment is within the field of legislative power. The method of its internal organization in time of peace is largely a matter for determination by those to whom is entrusted the sole responsibility for the conduct of naval and military defence. In particular, the retention of all members of a specially trained and specially efficient staff might well be considered necessary, and it might well be thought that the policy involved in such retention could not

be effectively carried out unless that staff was duly engaged. Consequently, the sales of clothing to bodies outside the regular naval and military forces are not to be regarded as the main or essential purpose of this part of the business, but as incidents in the maintenance for war purposes of an essential part of the munitions branch of the defence arm." (at p522)

14. Rich J. said (1935) 52 CLR, at p 562 :

"A doctrine exists in the case of trading corporations that, when for the purpose of their undertakings they must control property, premises or appliances, it is within their incidental powers to utilise them for purposes akin to and not inconsistent with the primary purpose of the corporation, and thus avoid the ill consequences of their being left vacant, idle and unemployed. (See Brice on Ultra Vires, 3rd ed. (1893), p. 135; Simpson v. Westminster Palace Hotel Co. [1860] EngR 1064[1860] EngR 1064; ; (1860) 8 HL Cas 712 (11 ER 608)). The question how far this doctrine is to be pushed in relation to corporations is one of degree, and has excited some difference of opinion (Forrest v. Manchester, Sheffield and Lincolnshire Railway Co. [1861] EngR 631; (1861) 30 Beav 40 (54 ER 803) and on appeal (1861) [1861] EngR 777; 4 De G F & J 126 (45 ER 1131)). It illustrates an application of the general doctrine that things may be done which are fairly incidental or conducive to the purpose for which a power is enjoyed. On the whole I think we may apply it to the peculiar situation in which the Commonwealth Clothing Factory stands." (at p522)

15. In Helicopter Utilities Pty. Ltd. v. Australian National Airlines Commission (1962) NSWR 747, at p 752 , Jacobs J. said:

"It is then argued that if the helicopters are not required for this purpose it is open to the defendant to make use of the helicopters in order to avoid economic waste. I do not doubt that the defendant may operate helicopters as an incident of its regular airline services and that it could, when they were not required for that purpose, make use of them in other ways in order to avoid waste." (at p523)

16. To the extent to which it is necessary for the reasonable fulfilment of the power to legislate for the government of the Territory, including the provision of an air service between the Territory and a State, there can be no doubt that the power extends to a law which provides for the establishment of an air service from the Territory to a place in a State, with an intermediate stop at another place in the State. If it be reasonably necessary for the provision of that air service for aircraft to call at an intermediate point in the State to take on fuel or to set down or pick up passengers and cargo, then in my opinion the power extends to the carrying out of these activities. (at p523)

17. In the context of a power so all-embracing as a power to legislate for the government of a Territory, in its application to the provision of an airline service between the Territory and a State, the notion of what is reasonably necessary to the fulfilment of the legislative power cannot be confined to that which is physical, excluding all that which is economic. No distinction can or should be drawn between what is physically necessary and what is economically necessary. In essence the conception of what is necessary or reasonably necessary includes all those factors which must be accounted for or satisfied so as to achieve the end in view. Physical and economic considerations cannot be divorced or separated one from the other. Thus, in determining whether an air service can be provided between points A and B without an intermediate stop at C, it is not merely a matter of ascertaining whether commercial transport aircraft are available which will fly the distance without refuelling at an intermediate point; the inquiry, if it is to have any relevance to practical reality, must have regard to the volume of traffic likely to be available and the economics of operation. In this sense the physical and economic considerations are both relevant and indispensable elements to be taken into account in assessing what is reasonably necessary for the particular end in view. (at p523)

18. Indeed, these considerations are so interwoven and so complex that the carriage of passengers and goods between intermediate ports of call or between a terminal point and an intermediate port of call should be regarded as incidental to the provision and conduct of an airline service between its terminal points. If the constitutional power extends to the provision of an airline service between two terminal points, as I hold that it does in the instant case, it is incidental to the provision of that service and to the transport of passengers and goods between those ports, to carry passengers and goods between intermediate stopping places and between an intermediate stopping place and a terminal point. Any other view would, I think, pay scant regard to the economic and technical factors which influence the establishment and organization of commercial airline operations. (at p524)

19. In my opinion s. 19B (1) and (2) in authorizing the first defendant to transport passengers and goods by air between places in one State for the purposes of "the efficient, competitive and profitable conduct" of its business between a place in a Territory and a place outside that Territory is a valid exercise of the power conferred by s. 122 of the Constitution. The carriage of passengers and cargo between places in the one State on such an airline service makes that airline service more "efficient, competitive and profitable" and is therefore an activity which is reasonably necessary for the fulfilment of the power conferred in its application to the provision of an airline service between a Territory and a State. Moreover, the carriage of passengers and cargo on that airline service otherwise than between its terminal points is, in accordance with the view I have already expressed, incidental in the sense already discussed. The carriage of passengers and cargo between Perth and Port Hedland is therefore authorized by s. 19B (1) taken in conjunction with the first and second limbs of s. 19B (2); in particular, it is an activity which is "otherwise incidental to the carrying on of that business", namely the business of transporting passengers and goods for reward by air between prescribed places, within the meaning of s. 19 (1) (a). The second limb of s. 19B (2) is plainly an alternative to the words "for the purposes of the efficient, competitive and profitable conduct of the business of the Commission in respect of its function" under s. 19 (1) (a). (at p524)

20. However, the application of s. 19B is not in terms limited to the carriage of passengers and goods on an airline service between a Territory and a State, that is, transport operations falling within s. 19 (2) (b). The application of s. 19B extends as well to transport operations between two different States falling within s. 19 (2) (a). There is then a question whether this application exceeds the inter-State trade and commerce power. It is not a question which I find it necessary to discuss

because it is my opinion that, even if this application of s. 19B is ultra vires, the operation of the section in relation to transport operations falling within s. 19 (2) (b) is severable and is saved by s. 15A of the Acts Interpretation Act 1901 as amended. Section 19B relates back to s. 19 (1) (a) which is framed in terms of "prescribed places" generally without drawing any distinction between transportation between a place in a State and a place in another State on the one hand and a place in a Territory and a place outside that Territory on the other hand. But s. 19 (2) in denoting the categories of "prescribed places", draws a very clear distinction between transportation among different States and other transportation connected with a Territory. Section 19B must be read with s. 19 (2), as well as s. 19 (1) . When s. 19B is so read, it is capable of a severable application. (at p525)

21. It is unnecessary to review the findings of fact made by Stephen J. To the extent to which it may be necessary, these findings make it clear that the availability of traffic between Port Hedland and Perth is relevant to the economic viability and therefore to the provision of an airline service between Darwin and Perth. (at p525)

22. The authority conferred on the first defendant by s. 19 and its associated provisions in terms relates to the transport of passengers and goods, rather than to the provision of air services or airline services between places. The choice of language is perhaps of some significance in that it does not restrict the defendant to the carriage of passengers and goods by a regular airline service; it enables the defendant to engage in ad hoc, as well as regular, transport operations (cf. s. 19 (1) of the Australian National Airlines Act 1945-1959; Helicopter Utilities Pty. Ltd. v. Australian National Airlines Commission (1962) NSWR 747). To this extent the authority conferred by the Act is wider than the grant of a power to establish an airline service between prescribed places. However, from the standpoint of constitutional power I cannot think that the distinction entails any difference. The same considerations as those already discussed would dictate the conclusion that the carriage between intermediate points was incidental to the carriage between the terminal points, in particular to the business of carrying passengers and goods between the terminal points. At the same time it cannot be questioned that the authority conferred by s. 19 and its associated provisions contemplates that the carriage of passengers and goods will be achieved, where appropriate, by the provision of an airline service, this being the usual method of operation. (at p525)

23. The case for the relator was, so it seemed to me, largely founded on considerations deriving from the judicial decisions on s. 92 and to a lesser extent on considerations which are relevant to the trade and commerce power. We are here concerned with the plenary power to legislate for the government of a Territory and I should have thought that limitations deriving from the constitutional concept of interstate trade, whether as the subject of a legislative power or as the subject of a guarantee of freedom or immunity, have little place in its elaboration. It should not be overlooked that in the past a distinction has been drawn between the area that it the subject of the constitutional guarantee and the wider ambit which is accorded to the grant of legislative power. But in both respects the conceptions differ from the power presently under consideration. (at p526)

24. What I have already said may be expressed by stating that the conferment on the first defendant by statute of a power to carry passengers and cargo between ports in a State on an air service between a Territory and a State, thereby contributing to the efficient, competitive and profitable conduct of that air service, has a sufficient connexion or nexus with the good government of the Territory as to constitute a valid exercise of the legislative power conferred by s. 122. Indeed, the validity of the statutory provisions under challenge must be judged by this criterion and not by considerations relevant to the constitutional conception of interstate trade and commerce, which to

my mind is not necessarily co-extensive. (at p526)

25. There remains the final question whether the first defendant, in order to pick up and set down passengers at Port Hedland, needs a State licence or authority to operate its proposed service. In my view no such licence or authority is required. In accordance with what I have said, s. 122 confers authority upon the Commonwealth to legislate so as to provide for the establishment of the proposed airline service. Laws enacted in pursuance of the power conferred by s. 122 operate throughout the length and breadth of the Commonwealth (Lamshed v. Lake [1958] HCA 14; (1958) 99 CLR 132). A State law which denied authority to the first defendant to operate its service in accordance with the valid authority provided by Commonwealth law would conflict with that Commonwealth law and, being inconsistent with it, would be rendered inoperative by s. 109 of the Constitution. (at p526)

26. The challenge to the validity of ss. 19C and 19H was consequential upon the challenge to s. 19B and had no independent basis. These sections therefore do not require separate discussion. In the result I would answer the questions asked by his Honour as follows: 1. Yes. 2. Does not arise. 3. Yes; s. 19B is a valid law of the Commonwealth at least to the extent to which it applies to that part of the first defendant's function under s. 19 (1) (a) which consists of the transportation of passengers and goods for reward by air between a place in a Territory and a place in Australia outside that Territory and between a place in a Territory and another place in that Territory. (at p527)

MURPHY J. The question is the validity of the provisions of ss. 19B, 19C and 19H of the Australian National Airlines Act 1945. (at p527)

2. Section 19B authorizes the Australian National Airlines Commission (which operates the national airline, Trans-Australia Airlines ("T.A.A.")) to transport passengers or goods for reward between places in the one State. Section 19C provides that the Commission may provide services for reward which involve the use of aircraft. The powers in ss. 19B and 19C are to be exercised for the purposes of efficient competitive and profitable conduct of the business of the Commission in respect of its functions under s. 19 (1) (a) or otherwise as incidental to the carrying on of that business. Section 19H provides that the Commission has power to do all things necessary or convenient to be done for or in connexion with or as incidental to the performance of its functions. Section 19 states:

> "(1) The functions of the Commission are -
> (a) to transport passengers and goods for reward by air between prescribed places;
> (b) to engage in other activities to the extent that they are within the limits of the powers of the Commission under a provision of this Act other than this section; and
> (c) to provide to the Commonwealth and authorities of the Commonwealth, for reward, aviation, land transport and engineering services and such other services as can conveniently be provided by the use of the resources of the Commission.
> and the Commission shall carry on business for the purposes of performing those functions.
> (2) For the purposes of sub-section (1), passengers or goods

> are transported between prescribed places if they are transported -
> (a) between a place in a State and a place in another State;
> (b) between a place in a Territory and a place in Australia outside that Territory;
> (c) between a place in a Territory and another place in that Territory; or
> (d) between a place in Australia and a place outside Australia, being places between which the provision of air transport by the Commission is approved by the Minister." (at p527)

3. The relator, Ansett Transport Industries (Operations) Pty. Ltd. claims that the sections are invalid in so far as they would permit passengers or goods to be carried between places in one State (in particular between Perth and Port Hedland in Western Australia) on the ground that it is beyond the powers of Parliament (and therefore unconstitutional) to authorize a national airline to carry passengers on intrastate journeys. It contended that the power to make laws with respect to such journeys is wholly within the competence of the State of Western Australia to the exclusion of the Australian Parliament. (at p528)

4. The Constitution did not create a partnership between the Commonwealth and the six States for the government of the nation, nor does it express in detail the various powers of the national government. It indicates the broad areas of the powers within the scope of the legislative branch, many of which were not used in the early days of the Federation. The extent to which the national legislative powers could become interwoven was probably not realized then but now they form a matrix enabling Parliament to authorize the carrying out of the functions of a modern national government. (at p528)

5. The Commission relied on ss. 51 (i), 51 (xxxix.) and 122 of the Constitution as legislative powers for the challenged sections. (at p528)

6. Presumption of Validity. The strong presumption of the validity of any Act of Parliament which does not appear to conflict with a constitutional prohibition or guarantee is an attribute of the respect which the judiciary, the unelected branch of government, accords to the acts of the elected representatives of the people.

> "It is but a decent respect to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the Constitution is proved beyond all reasonable doubt". (Washington J. in Ogden v. Saunders [1827] USSC 21; (1827) 25 US 213, at p 269 (6 Law Ed 213, at p 268)).
> "Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will". (Isaacs J. in Federal

Commissioner of Taxation v. Munro [1926] HCA 58; (1926) 38 CLR 153, at p 180).

The members of the Privy Council were wrong in Attorney-General (Cth) v. Colonial Sugar Refinery Co. Ltd. (1914) AC 237, at p 255 when they proceeded on the view that "the burden rests on those who affirm that the capacity to pass these Acts" (that is, those which were "before Federation vested in the legislatures of" the "States") "was put within the powers of the Commonwealth Parliament to shew that this was done". (at p529)

7. The presumption of validity of statutes is a practical necessity in the everyday administration of justice and is applied in other countries such as India (Chiranjit Lal v. Union of India (1951) All IR SC 41 ; State of Bombay v. Balsara (1951) All IR SC 318), Pakistan (Province of East Pakistan v. Sirajul Huq Patwari (1966) PLD SC 854, at p 954), and Bangladesh (see Mr. Justice Munim, Rights of the Citizen under the Constitution and Law, 1st ed. (1975)). (at p529)

8. The Commerce Power. This is perhaps the greatest legislative power and is at the heart of the federal system. It is the first legislative power in the Constitution and is necessary for the national government of our federation.

9. "Trade and commerce ... among the States" is a comprehensive phrase and should not be construed narrowly. Although usually abbreviated to "interstate trade and commerce", it means trade and commerce which concerns more than one State (Gibbons v. Ogden [1824] USSC 18; (1824) 22 US 1 (6 Law Ed 23)). (at p529)

10. The legislative power was adopted from the United States Constitution. The scope of the Australian power to make laws "with respect to" trade and commerce among the States is at least as wide as, if not wider than, the United States power "to regulate" commerce among the States. The commerce power under our Constitution is not exclusive to the national legislature as it is under the doctrine developed in the United States. There is thus less reason for construing the power narrowly here than there. Yet it has been construed narrowly. One reason for this is to avoid the destructive effects of what I consider to be a misreading of s. 92 of the Constitution (see Buck v. Bavone [1976] HCA 24; (1976) 135 CLR 110, at p 132 ; J. Stone, "A Government of Laws and Yet of Men Being a Survey of Half a Century of the Australian Commerce Power" New York University Law Review, vol. 25 (1950), p. 451). Another reason is the persistence of the doctrine that the national legislative powers are to be limited so that the reserved power of the States is not invaded. In this case, the reserved power is that over intrastate trade and commerce. (at p529)

11. The scope of the legislative power with respect to trade and commerce among the States should not be ascertained by assuming a division between interstate and intrastate commerce. Sections 51 (i.) and 92 of the Constitution make a distinction between trade and commerce among the States and that which is not, but do not make trade and commerce among the States and intrastate trade and commerce mutually exclusive. The Constitution does not mention intrastate trade and commerce and contains nothing which suggests a rigid separation between the two. Almost any act of trade and commerce among the States can be regarded as a series or combination of acts which from another point of view are intrastate commerce. "Commerce among the States must of necessity be commerce with the States..." (Gibbons v. Ogden (1824) 22 US, at p 196 (6 Law Ed, at p 70)). (at p530)

12. Even if there were such a division and mutual exclusion, legislative power with respect to trade and commerce among the States and legislative power with respect to intrastate trade and commerce

would not be mutually exclusive. The States were not given exclusive power over intrastate trade and commerce. The Commonwealth may override the suggested dividing line, for the words "with respect to" in s. 51 and the incidental aspect which is attached to each head of power authorize laws dealing not only with trade and commerce among the States but with intrastate trade and commerce and with acts or transactions which are not trade and commerce, as long as these are with respect to, that is relevant to, trade and commerce among the States. The maintenance of the supposed division and the further insistence (see Wragg v. New South Wales [1953] HCA 34; (1953) 88 CLR 353) that even the use of the incidental power in s. 51 (xxxix.) cannot obliterate the division, keeps the pre-Engineers ghosts walking. This approach minimizes the trade and commerce power and inhibits its use. (at p530)

13. This legislation does not regulate intrastate non-government air transport. It is an authorization of government air transport which meets the stated criteria of connexion with interstate government air transport services. The criteria are obviously connected with protection of the revenues and expenditures of the Commonwealth, as well as with the promotion of trade and commerce among the States. (at p530)

14. The sections in question authorize intrastate transport for the purposes of efficient competitive and profitable conduct of the interstate transport of the Commission. These criteria adopted by Parliament are well within the scope of the commerce power. It is permissible for Parliament to take account of commercial effects in legislating under the commerce power. It would be as illogical to exclude commercial considerations from the construction of the commerce power as it would be to exclude defence considerations from the defence power (s. 51 (vi.)) or industrial considerations from the industrial power (s. 51 (xxxv.)). I find no basis in the Constitution for the distinction that Kitto J. drew between physical and economic effects upon "interstate commercial air navigation" in Airlines of New South Wales v. New South Wales (No. 2) [1965] HCA 3; (1965) 113 CLR 54, at p 115 . (at p531)

15. This Court should not replace Parliament's judgment with its own unless the relation of the disputed sections to trade and commerce among the States (or other legislative power) clearly does not exist (Stafford v. Wallace [1922] USSC 93; (1922) 258 US 495 (66 Law Ed 735)). (at p531)

16. The Territories Power: Constitution s. 122. Equally, so far as it relates to transport outside a Territory for the purposes of efficient competitive and profitable transport within or to and from a Territory, the legislation is within the power conferred by s. 122. In my opinion, the criteria set out in the disputed sections demonstrate a rational connexion with the government of the Territories. Under s. 122 Parliament is not confined to regulating affairs within the Territories. Parliament may authorize the provision of services or the marketing of products of the territory outside the territory. (at p531)

The Incidental Power: Constitution s. 51 (xxxix.)

17. The disputed sections can be supported without resorting to the incidental power. The trade and commerce power is wide enough. It is not easy to see how the incidental power could expand the Territories power. (at p531)

18. The incidental power may be relevant in other ways. It may operate in conjunction with the

defence power in s. 51 (vi.); the power over Commonwealth places in s. 52 (particularly transport of persons or cargo between, to and from airports which are Commonwealth places although s. 52 may be thought so comprehensive as not to require resort to the incidental power); the postal power in s. 51 (v.); the executive power in s. 61 authorizing intrastate transport of persons or cargo in connexion with the affairs of the Commonwealth (legislative, executive or judicial) or its agencies, and in connexion with the execution and maintenance of the Constitution and laws of the Commonwealth. The possible paramountcy of the Commonwealth over the air space above the zone of land activity was not raised, no doubt because of the decision in R. v. Burgess; Ex parte Henry (1936) 55 CLR 608 although in New South Wales v. The Commonwealth [1975] HCA 58; (1975) 135 CLR 337 the paramountcy of the Commonwealth in the airspace over the territorial sea (dealt with in an international convention) was upheld. (at p532)

19. The questions should be answered

1. Yes. 2. Not necessary to answer. 3. Yes. (at p532)

ORDER

The questions in the case stated to be answered as follows:

1. In the circumstances set forth in the said Findings of Fact is Australian National Airlines Commission as the holder of a current Commonwealth licence in the terms referred to in par. 8 of the said Findings of Fact but without being the holder of any State licence such as is referred to in par. 19 thereof purportedly empowered by the Australian National Airlines Act, 1945-1973 and in particular by ss. 19B, 19C and 19H thereof or any of them to undertake the transportation of passengers and goods for reward by air between the places and otherwise in the manner described in the said Findings of Fact as the proposed service on the proposed route?

Answer: Yes.
2. If no to question 1 would Australian National Airlines Commission be so empowered if it were the holder of such a State licence in that behalf as is referred to in the said par. 19?
Answer: Not necessary to answer.
3. If yes to either of questions 1 or 2 are the provisions of the said Australian National Airlines Act 1945-1973 which purport so to empower Australian National Airlines Commission and in particular the said sections thereof and each of them valid laws of the Commonwealth?
Answer: Section 19B is valid only to the extent to which it applies in respect of that part of the Commission's function under s. 19 (1) (a) which consists of the transportation of passengers and goods for reward by air between a place in a Territory and a place in Australia outside that Territory and between a place in a Territory and another place in that Territory. It is not otherwise a valid law of the Commonwealth.

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