AIRLINES OF NEW SOUTH WALES PTY LIMITED v. NEW SOUTH WALES [No. 2][1]

Constitutional law—External affairs power—Trade and commerce power—Civil aviation—Commonwealth and State legislation.

Recent conflict between the Government of New South Wales and the controllers of the State's major airlines has resulted in a decision of the High Court of paramount importance in laying the boundaries of State and Federal power over civil aviation. Although technically a victory

[1] (1964-1965) 38 A.L.J.R. 388. High Court of Australia; Barwick C.J., McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ.

for New South Wales, *Airlines of New South Wales Pty Limited v. New South Wales* has established an area of Commonwealth control over air navigation hitherto unrecognized.

The case arose when, as a result of a policy decision of the New South Wales Government designed to foster competition in intrastate air transport services, the Commissioner for Motor Transport of New South Wales cancelled the plaintiff's licence to operate between Sydney and Dubbo, and purported to re-allocate that service to East-West Airlines Limited. The cancellation was followed by the enactment of the Air Transport Act 1964 (N.S.W.) which made the State Transport (Co-ordination) Act 1931-1956 (under which the plaintiff's former licence had been issued) no longer applicable to aircraft, and provided,[2] in effect, that no person should carry goods or passengers by aircraft within New South Wales without a licence issued by the Commissioner in the name of the carrier and in respect of the specific route and unless the aircraft was duly licensed under the Act. Having already obtained from the Director-General of Civil Aviation the necessary Commonwealth licences under regulations 199, 320A and 320B of the Air Navigation Regulations[3] as amended, Airlines of New South Wales duly applied for a State licence under this new Act. The application was refused. On the other hand, the Director-General was unwilling to issue Commonwealth licences to East-West Airlines. In this situation the plaintiff took proceedings in the High Court seeking, *inter alia*, a declaration that the Air Transport Act of N.S.W. was invalid. As a result the following questions were referred to the Full Court—

1 Whether regulations 6, 198, 199, 200B, 320A and 320B of the Air Navigation Regulations in so far as they purported to apply to purely intrastate transport operations were valid laws of the Commonwealth; and
2 If so, whether they were inconsistent with the provisions of the Air Transport Act so as to render that Act invalid by operation of section 109 of the Constitution.

Validity of Commonwealth Regulations

The Court found no difficulty in upholding regulations 320A and 320B. These regulations prohibited aircraft from using Commonwealth-owned aerodromes or from being flown in 'controlled airspace' respectively without a permit from the Director-General.

The other regulations enumerated in the first question were in a more doubtful position.

Regulation 6 (1), by its various paragraphs, defined the area of operation of the total body of regulations. Before October 1964 the area so defined did not, in accord with the distinction made by section 51 (i) of the Constitution, include purely intrastate air navigation. On

[2] S. 3.

[3] Made under the Air Navigation Act 1920-1963 (Cth).

2 October, however, following clear suggestions by certain members of the High Court in the first *Airlines Case*[4] that the regulations were in that respect unnecessarily restricted, regulation 6 (1) was amended by adding a new paragraph (f). This made it perfectly clear that the Regulations then applied to all air navigation.[5]

Regulation 198 prohibited the use of aircraft in regular public transport operations except under the authority of and in accordance with a licence issued by the Director-General.

Regulation 199 provided for the issuing of such licences and, in particular, required that, in deciding whether or not to grant or cancel a licence, or upon what conditions a licence will be granted, the Director-General was to have regard solely to matters concerned with the 'safety, regularity and efficiency of air navigation'.

Regulation 200B, in effect provided that the holder of a licence could conduct operations in accordance with its provisions. As construed by the Court, it was an attempt to give to licences issued under regulation 199 the character of a positive authority to conduct the services specified, notwithstanding any State law.

In arguing for the validity of all these regulations counsel for the plaintiff made two main submissions—

1 That the regulations were a valid exercise of the Commonwealth's power under section 51 (xxix) of the Constitution—the 'external affairs' power. In this connexion it was asserted that the Chicago Convention 1944, ratification of which was approved by Federal Parliament in 1947, brought into existence an external affair of Australia which attracted that power, and that the regulations were properly made to carry out the obligations imposed, or to secure the benefits conferred by that Convention; and

2 That all the regulations could be sustained by virtue of the power with respect to interstate and overseas trade and commerce. According to this submission it was reasonably necessary in order to ensure the safety, regularity and efficiency of interstate and overseas air services that all air transport operations be controlled in this way.

External affairs power

In support of its first submission, the plaintiff emphasized the enormous scope of the Convention and its Annexes, and the comprehensive nature of the matters there contained; but reliance was placed principally

[4] (1964) 37 A.L.J.R. 399 ; Especially Dixon C.J. and Windeyer J. at 403 and 411-412. These remarks were only dicta as the case was decided on the ground that there was no inconsistency between the Commonwealth Regulations and the State Transport (Co-ordination) Act as they then stood.

[5] With an exception relating to military aircraft not relevant to the present discussion.

and more specifically on the terms of article 37.[6] To establish the validity of regulation 200B, counsel seized on such words as 'facilitate and improve' and sought thereby to give to the article a construction that would establish an obligation to promote and encourage efficient and regular air navigation. The argument was completed by the assertion that to confer rights on operators was an appropriate means of achieving such promotion or encouragement.

All members of the Court, however, found that the article was incapable of so wide a construction. They said the construction sought by the plaintiff was faulty, in that it expressed the aim or object of the article in terms of a separate obligation. The aim was to 'facilitate and improve' air navigation: the obligation was to do no more than secure uniformity of standards, procedures and organization in relation to certain matters concerned with the safety, regularity and efficiency of air navigation in Australia. The Court held that neither article 37 nor any other provision of the Convention (or the Annexes) placed an obligation on the Commonwealth[7] to encourage air transport operations or to authorize persons to carry them on, and therefore 200B could not be supported by the external affairs power.

However, the primary submission gained some acceptance in relation to regulations 198 and 199. McTiernan, Menzies and Owen JJ. were all of the opinion that these regulations were supported by the external affairs power of the Commonwealth.

The view of McTiernan J. was that the licensing provisions were valid as being 'adapted to carry out and give effect to the Convention' because the object to which they were directed was the enforcement of the general body of regulations (which were properly made under the Convention). Owen J. gave a similar reason.[8] Menzies J. agreed

[6] Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.

To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:

(a) Communications systems and air navigation aids, including ground marking;
(b) Characteristics of airports and landing areas;
(c) Rules of the air and air traffic control practices;
(d) Licensing of operating and mechanical personnel;
(e) Air worthiness of aircraft;
(f) Registration and identification of aircraft;
(g) Collection and exchange of meteorological information;
(h) Log books;
(i) Aeronautical maps and charts;
(j) Customs and immigration procedures;
(k) Aircraft in distress and investigation of accident;

and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

[7] Taylor J. said 'the article does not . . . even contemplate': (1964-1965) 38 A.L.J.R. 388, 414.

[8] He held the licensing system valid because it 'provides a means of ensuring that permitted air transport operations shall be conducted in accordance with the conditions laid down for their conduct and it enables the licensing authority to consider whether an applicant for permission to conduct such a service is qualified to provide and maintain the necessary aircraft, equipment, ancillary services and skilled personnel:' *ibid.* 429.

with these reasons, in substance,[9] but his conclusions were more widely based. Taking a much broader view than any other member of the Court, he said—

> If, having regard to the Convention, the power under s. 51 (xxix) would support a law forbidding any flight that may imperil international air navigation, as I think it does; and if any unauthorized intrusion into air space may imperil international air navigation, as I think it could; then all operators may be controlled, and to do something less and merely to forbid unauthorized operations of a particular character must be within power, for the greater includes the less.[10]

Implicit in this reasoning is the idea that the Convention imposes an obligation on Australia to do anything it thinks fit to secure the safety of international air navigation—an idea which none of his brethren endorsed. It would appear to be based on general conceptions of the ideals and aims of the Convention rather than its specific provisions.

On the other hand, Taylor, Windeyer and Kitto JJ. held that regulations 198 and 199 were not justified by the external affairs power.

Taylor J. agreed that, although there is no express or implied obligation to set up a licensing system, it could be valid as a means of enforcement of properly made regulations, but he pointed out that the words inserted in regulation 199 (4) to regulate the exercise of the Director-General's discretion were sufficiently wide to enable him to base his decision on considerations having no relation whatever to the obligations assumed under the Convention or the Regulations made to give effect to it. In his opinion—

> [T]he conditional prohibition erected by reg. 198 does not appear as a provision designed merely to secure observance of the general body of the regulations and, therefore, as ancillary to the fulfilment of the Commonwealth's obligations under the Convention but as a prohibition from which there may be no escape because of matters quite unrelated to those obligations.[11]

Kitto and Windeyer JJ. both reached their conclusion on finding that neither article 37 nor the Annexes dealt with such a matter and they gave no consideration whatever, (or no expressed consideration) to the possibility that the licensing system might be valid as a means of securing obedience to the other regulations. The decision of the remaining judge, Barwick C.J., on this matter was a qualified one. He said that, to the extent that the licensing provisions were merely a means of securing the observance of those regulations which were properly made in carrying out the Convention, they could be justified by the external affairs power, but he preferred to rest their validity on the trade and commerce power, which in his opinion would support them on a wider basis.

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[9] *Ibid.* 417; see also at 416 and 418.

[10] *Ibid.* 418.

[11] *Ibid.* 414.

The case contains little general discussion of criteria for determining whether a law is valid under the external affairs power; but it would seem that McTiernan, Menzies and Owen JJ. took a very wide approach —one which might be compared with that taken by Evatt and McTiernan JJ.[12] or even Starke J.[13] in *The King v. Burgess; Ex parte Henry.* Their Honours did not closely scrutinize the challenged provisions in the way that Taylor J. did, for example, and appeared to find it sufficient to validate the regulations that they were substantially in conformity with the Convention, and in their opinion directed to, or, in the terminology of Evatt and McTiernan JJ. 'stamped with the purpose' of, giving effect to it. These judgments may signify a trend towards a more liberal interpretation of the external affairs power.

However, the Chief Justice and Taylor J. adopted the 'traditional' or narrow approach of Dixon J. in the first *Goya Henry Case*[14]. Rather than test the validity of the regulations by what was appropriate to the general aims and provisions of the Convention as a whole, the emphasis in their judgments was on its specific terms and whether the regulations gave effect to particular obligations.

A narrower approach again was taken by Windeyer J. who seemed to suggest that for legislation to be valid under the external affairs power it should be 'required' by the Convention—

> It is only necessary to read art. 37 to see that it contains nothing requiring the Commonwealth to make a law in the terms of regs. 198 and 199. In short those regulations are not laws with respect to external affairs.[15]

No particular approach is sufficiently discernible for comment in the judgment of Kitto J.

All members of the Court agreed that the Convention brought into existence an 'external affair' of Australia. In most of the judgments this was an unexpressed assumption. However, the Chief Justice did give some guide, indefinite as it was, to the matters which are relevant

[12] In their joint judgment they held the regulations invalid 'because they are not stamped with the purpose of executing the air convention but are stamped with the unauthorised purpose of controlling civil aviation throughout the Commonwealth': (1936) 55 C.L.R. 608, 696.

[13] 'All means which are appropriate, and are adopted to the enforcement of the convention and are not prohibited, or are not repugnant to or inconsistent with it, are within the power. The power must be construed liberally, and much must necessarily be left to the discretion of the contracting States in framing legislation, or otherwise giving affect to the convention': *ibid.* 659-660.

[14] 'It is apparent that the nature of this power necessitates a faithful pursuit of the purpose, namely a carrying out of the external obligations, before it can support the impositions upon citizens of duties and disabilities which otherwise would be outside the power of the Commonwealth. No doubt the power includes the doing of anything reasonably incidental to the execution of the purpose. But wide departure from the purpose is not permissible, because under the colour of carrying out an external obligation the Commonwealth cannot undertake the general regulation of the subject matter to which it relates': *ibid.* 674-675. Barwick C.J. does however in the present case acknowledge that the Commonwealth may pass laws to '*secure the benefits*' of treaties and conventions: (1964-1965) 38 A.L.J.R. 388, 395 (italics added).

[15] *Ibid.* 424.

in considering whether a particular international agreement attracts the power granted by section 51 (xxix)—

> [I]n my opinion the Chicago Convention, having regard to its subject matter, the manner of its formation, the extent of international participation in it and the nature of the obligations it imposes upon the parties to it unquestionably is, or, at any rate, brings into existence, an external affair of Australia.[16]

But he went on to say that he was not to be taken as saying that all these features must be present in every case.

However, the Chief Justice was definite that ' the mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth Parliament '.[17]

Trade and commerce power

Despite the opinion of Dixon C.J., apparent in the first *Airlines Case*,[18] that it would be the external affairs power which would justify the extension of Commonwealth regulations to intrastate air transport, it was the plaintiff's second submission—that the regulations drew their validity from the trade and commerce power—that gained wider acceptance by the Court in the present case.

A majority of five[19] (Taylor J. dissenting)[20] held that regulations 198 and 199 were, in their application to intrastate air navigation, valid laws of the Commonwealth under the trade and commerce power. In so doing they finally broke the chains of *Burgess' Case* which had shackled the Commonwealth for so long. In that case the High Court held that Air Navigation Regulations made under the Air Navigation Act 1920 (Cth) and similarly applicable to all civil aviation were invalid

[16] *Ibid.* 395.

[17] *Ibid. Cf.* Dixon J.—' If a treaty were made which bound the Commonwealth in reference to some matter indisputably international in character, a law might be made to secure observance of its obligations if they were of a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern, which apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs ': *Burgess' Case* (1936) 55 C.L.R. 608, 669. In the present case, Windeyer J. left this point open: (1964-1965) 38 A.L.J.R. 388, 423.

[18] (1964) 37 A.L.J.R. 399, 402—' A study of the Schedule suggests that obligations are placed upon the Commonwealth which extend over the whole territory of Australia and that in almost all respects the legislative power which arises from the need of carrying out the Convention given by s. 51 (xxix) would suffice to support laws made with a complete disregard of the distinction between interstate and intra-State trade; it would follow that no reliance upon s. 51 (i) by the Commonwealth would be necessary.'

[19] McTiernan J. expressed no view as to the validity of rr. 198 and 199 under s. 51 (i).

[20] Consistently with the view he expressed in the first *Airlines case* (1964) 37 A.L.J.R. 399, 408—that if rr. 198 and 199 applied to intrastate public transport operations their validity would be very doubtful. His Honour's dissent on this point in the instant case was for reasons similar to those for which he held rr. 198 and 199 invalid under the external affairs power.

to the extent that they applied to intrastate trade. However, the unshackling, and resultant expansion of Commonwealth control, involved no reversal of principle. According to the Court, the power had not changed, but only what might be done under it, by reason of the changed factual circumstances. The commingling doctrine was again emphatically rejected, the distinction between the two kinds of trade was maintained, and the principle, that intrastate trade can be controlled by the Commonwealth only to the extent that it is necessary to make effectual the exercise of power in relation to interstate and overseas trade was upheld.

But the circumstances had changed so that the application of the old tests brought a new result. Whereas in 1936 Australian civil aviation, especially regular public transport services, had not progressed beyond an embryonic stage, and interstate air navigation could be effectually regulated and safeguarded without exercising any significant control over intrastate air navigation, today—

> The great increase ... in the volume of air traffic, especially of interstate and overseas air traffic, the invention and development of new and larger types of aircraft flying at great speed, the increasingly complex procedures and organization necessary for the direction and control of air navigation . . . combine to make it necessary for the safety of interstate and overseas air navigation that all aircraft should obey the same rules of flight and manoeuvre, the same code of signals, the same procedures in landing and take-off, and so forth; and that to this end they all be subject to the control of one authority.[21]

Many facts of air navigation were enumerated by the various members of the Court all of which went to show that in the present state of Australian civil aviation—

> [I]t is impossible to assume in advance that any impairment of the safety, regularity and efficiency of intra-State air navigation will leave unimpaired the safety, regularity and efficiency of the other departments into which air navigation may be divided for constitutional purposes . . . [and it follows] that a federal law which provides a method of controlling regular public transport services by air with regard only to the safety, regularity and efficiency of air navigation is a law which operates to protect against real possibilities of physical interference the actual carrying on of air navigation, and therefore is, in every application that it has, a law ' with respect to ' such air navigation as is within federal power, and none the less so because it is also legislation with respect to that intra-State air navigation which is not within the power.[22]

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[21] (1964-1965) 38 A.L.J.R. 388, 422-423 *per* Windeyer J.

[22] *Ibid.* 408 *per* Kitto J. *Cf.* Evatt and McTiernan in *Burgess' Case* (1936) 55 C.L.R. 608, 677 where after rejecting the application of the commingling doctrine their Honours went on to say—' Moreover, the rejection of the " commingling " theory does not deny that there may be occasions when parts of intra-State aviation will be seen to occupy so direct and proximate a relationship to inter-State aviation that the agents and instruments of the former will be drawn within the ambit of the Federal power, for otherwise the particular Commonwealth regulation of inter-State commerce would be entirely frustrated and nullified.'

Thus, while the reasoning in *Burgess' Case* is still good law, the decision has to a large extent been rendered obsolete.

As a result of the decision in this case, the Commonwealth can now exercise considerable power over intrastate commercial air transport. But this power is not plenary and does not, it seems, extend to any form of economic control. Throughout the judgments, emphasis was placed upon the fact that the operation of the safety provisions in question upon air services within a State had a direct effect on interstate services. Regulations 198 and 199 were held valid as being, in substance, laws with respect to interstate and overseas trade because their application intrastate was reasonably necessary to protect interstate and overseas air trade against the possibility of physical interference.

Any attempt at economic control of intrastate air services could have only a consequential effect on interstate and overseas trade, and would therefore probably be invalid.

> Where the intrastate 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 interstate commercial air navigation would or might be affected, that mere fact would not suffice . . . to make the law a law ' with respect to ' that activity itself.[23]

It is also outside the competence of the Commonwealth to assume sole authority to initiate purely intrastate air transport operations. This is what it sought to do by regulation 200B and all members of the Court held the attempt invalid.[24] This assumption of authority was in no way necessary to, or even convenient for, the effectual regulation of interstate and foreign air transport operations by the Commonwealth. Nor could it be validated as a safety provision because the non-existence of an air service could not conceivably endanger interstate or overseas air services. Again, it was not justified as a means of promoting air navigation, because as such it had only a consequential effect on interstate trade, that is, the commercial or economic fact that interstate air navigation depends quite significantly on the existence of intrastate air navigation and thereby profits by its encouragement was not sufficient to warrant the legal conclusion that a law to stimulate and encourage intrastate air navigation was a law with respect to interstate trade.

Thus the result of the case is that the State has power to authorize or prohibit air transport operations within the State. The Commonwealth has power for air navigational reasons to authorize or prohibit the use of aircraft engaged in such operations but not the operations themselves.

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[23] (1964-1965) 38 A.L.J.R. 388, 408 *per* Kitto J.

[24] Barwick C.J. and Taylor J. pointed out that a contrary view would allow the Commonwealth (while purporting to act under the Convention) to establish its own intrastate airline service.

This result is quite consistent with dicta on this question in the first *Airlines Case.* Windeyer J. in that case did say something which at first sight seems to be inconsistent with this—

> In my opinion the powers with respect to trade and commerce with other countries and among the States (s. 51 (i)), external affairs (s. 51 (xxix)), and incidental matters as described in s. 51 (xxxix) are ample to give the Commonwealth Parliament *complete* power over all air navigation in Australia.[25]

But he went on to qualify this statement and through the course of his judgment showed quite clearly that by 'complete power over air navigation' he meant only complete power over traffic in the air, or how aircraft were used. He did not mean that the Commonwealth could control everything relating in any way to aircraft, and towards the end of his discussion of Commonwealth power he made the following very significant observation—

> It does not mean that a State can say nothing as to the purposes for which aircraft may be used within State borders . . . A State law that said simply that within the State aircraft should not be used at all for some specified purpose, such as the carriage of particular articles or the carriage of persons from one place within the State would, in my opinion, be a valid law. It would deal with a subject that it seems to me is, in present circumstances, beyond Commonwealth power.[26]

Inconsistency of laws

A majority of the Court answered the question as to inconsistency in the negative.

Regulation 200B was necessarily excluded from consideration since a valid Commonwealth law is a prerequisite to the operation of section 109.

The Court had no difficulty in rejecting the submission that the provisions of the Air Transport Act were inconsistent with regulations 320A and 320B for in no way did the State Act purport to authorize the landing at a Commonwealth aerodrome or the flying in controlled air space without the prescribed Commonwealth permit.

In regard to the other regulations the State provisions were held not to be inconsistent because the ends to be served by the respective licensing systems were different, and the two sets of provisions were therefore directed to different subjects of legislation. In the State legislation, the issuing of licences was based on matters concerning public needs; in the Commonwealth Regulations it was based on matters concerning safety regularity and efficiency.

The 'deadlock' created by the existence of a dual control was held not to be evidence of an inconsistency in the constitutional sense.

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[25] (1964) 37 A.L.J.R. 399, 411; italics added.

[26] *Ibid.* 412.

Barwick C.J. (dissenting) held that the State Act was inconsistent with regulations 198 and 199. According to his reasoning, the judgment of the individual airline operator, his capacity and organization were important to the safety of air operations and the Commonwealth therefore had power to choose the operator of any authorized air service. In his opinion, not only had the Commonwealth exercised this power, but it had exercised it exclusively. He did not see the Commonwealth Regulations as the assumption of a power merely to veto State choice for safety reasons but the assumption of a power to determine to the exclusion of the State what aircraft were to be used and by whom a particular air service should be operated. It followed, that since this was what the Commonwealth purported to do, and in his view, could do, the State's attempt to enter this field was inconsistent with the Commonwealth Regulations and therefore invalid.

Conclusion

The end result of this case is that nothing has been done to resolve the particular problem which gave rise to it, namely the deadlock in relation to an air service between Sydney and Dubbo. However the second *Airlines Case* is by no means without significance. Though servitude to doctrines has hampered the Court in finding the best solution in the interests of commerce, it has achieved an important development in the centralization of control of air navigation.

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