monwealth, the Territories outside may possibly fall within a different category. The practical significance of this distinction may emerge in the years to come, when the Territory of Papua and New Guinea attains self-governing or independent status or its boundaries undergo some transformation, or the constitutional status or territorial area of one or other of the Territories in the Indian or Pacific Oceans is modified.

R. D. LUMB*

The inter-State trade and commerce power

Some might argue that the recent *Airlines Case*,[1] decided by the High Court of Australia, is not a landmark in constitutional law, but that it merely affirms well established attitudes about s. 51 (i) of fthe Constitution. With the passage of the Commonwealth *Trade Practices Act* 1965, however, the *Airlines Case* should not be allowed to pass completely unnoticed by this journal.

S. 51 (i) of the Constitution empowers the Commonwealth Parliament to make laws with respect to trade and commerce among the States. The words "trade and commerce among the States" seem to describe the movement of a person or thing from one State to another, movement which is carried out so that some purpose may be achieved in the latter State.[2] In other words, the phenomenon described by s. 51 (i) is a form of movement. This is a very narrow conception. But it is a well known doctrine that a legislative power with respect to a subject matter extends, as well, to matters which are incidental to that subject matter. "A legislative power . . . . with respect to any subject matter contains within itself authority over whatever is incidental to the subject matter of the power and enables the legislature to include within laws made in pursuance of the power provisions which can only be justified as ancillary or incidental."[3] The identification of those matters which are incidental to trade and commerce among the States and therefore within Commonwealth power is the central problem of s. 51 (i).

The phrase "among the States" is proving to be an important limitation upon the doctrine of incidental power insofar as it applies to s. 51 (i) of the Constitution. The doctrine cannot be applied to s. 51 (i) so as to render meaningless the phrase "among

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1. *Airlines of N.S.W. Pty. Ltd. v. N.S.W.* (1965) 38 A.L.J.R. 388.
2. For argument in favour of this proposition, see an article by the writer 'S. 92 of the Commonwealth Constitution', (1964) 4 U.Q.L.J. 369. For discussion concerning the relationship between s. 51 (i) and s. 92 of the Constitution, see 28 C.L.R. at p. 549, 71 C.L.R. at p. 82, 88 C.L.R. at p. 386, and 93 C.L.R. at p. 77.
3. Dixon C.J., *Wragg v. N.S.W.* (1953) 88 C.L.R. 353, 386.

the States". In other words, those matters which are incidental to trade and commerce among the States cannot be so numerous that the legislative power conferred by s. 51 (i) extends to trade and commerce generally. This limitation first clearly emerged in *Wragg* v. *New South Wales* where Dixon C. J. expressed the view that ". . . . the distinction which the Constitution makes between the two branches of trade and commerce must be maintained. *Its existence makes impossible any operation of the incidental power which would obliterate the distinction*".[4] It is significant that in the *Airlines Case,* Sir Owen Dixon's successor in office, Barwick C. J., quoted this passage with approval.[5]

If one matter is to be incidental to another, there must be some connecting link between the two. Insofar as an activity might physically interfere with movement from one State to another, movement amounting to inter-State trade and commerce, the activity would appear to be incidental to inter-State trade and commerce, and its control within Commonwealth power. In the *Airlines Case,* five[6] of the seven Justices of the High Court held that Commonwealth regulations which prohibited the unlicensed use of aircraft in intra-State operations, a licence being granted according to the "safety, regularity and efficiency of air navigation and to no other matters", were within power under s. 51 (i). Kitto J. expressed the view that where a 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."[7] The Commonwealth law, to be valid, must operate " . . . . to protect against real possibilities of physical interference . . . . . ".[8]

The real possibility of physical interference is a fairly obvious connecting link between a subject matter of legislative power and a matter incidental thereto. What other connecting links may there be? In the *Airlines Case,* Barwick C. J. stated that "The power given by s. 51 (i) includes power not merely to protect but to *foster and encourage* inter-State and foreign trade and commerce."[9] However it is clear that the learned Chief Justice considered that the fact that inter-State air navigation profits by the existence of intra-State air navigation did not warrant "the conclusion that in fostering inter-State and foreign trade, the

4. (1953) 88 C.L.R. 353, 386. Italics inserted by the writer.
5. (1965) 38 A.L.J.R. 388, 392.
6. Barwick C.J., Kitto, Menzies, Windeyer and Owen JJ. Only Barwick C.J., however, considered that the Commonwealth could exclude a State's power to license the use of aircraft.
7. (1965) 38 A.L.J.R. 388, 408.
8. *Ibid.*
9. (1965) 38 A.L.J.R. 388, 397. Italics inserted by the writer.

Commonwealth may stimulate and encourage intra-State trade".[10] The irrelevance of certain types of economic connecting links was also suggested by Kitto J. when he said that "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."[11]

To summarize: dicta in the *Airlines Case* suggest that (1) the limitation upon the doctrine of incidental power enunciated by Dixon C. J. in *Wragg v. New South Wales* remains good law; and (2) economic interference is not necessarily a connecting link between the subject matter of the legislative power conferred by s. 51 (i) and those matters which are incidental thereto. To this extent the *Airlines Case* may have an important bearing on the ambit of the *Trade Practices Act* 1965.

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CRIMINAL LAW

The standard of proof of voluntariness of a confession

The principle that a confession is not admissible unless it is voluntary in the sense that it has not been obtained either by fear of prejudice caused or hope of advantage held out by a person in authority is to quote the words of Henchman J. "as old as Old Hale".[1] That the burden of proof of voluntariness is on the Crown has not been seriously disputed since the judgment of the Court of Crown Cases Reserved in *R. v. Thompson*[2] and as far as Queensland is concerned necessity for voluntariness and the burden of proof have been made a matter of statute by s. 10 of *The Criminal Law Amendment Act* 1894.[3]

However when one considers the multitude of cases in which confessions are sought to be tendered by the Crown, and the intensity with which the defence almost invariably disputes the claim that the confession was voluntary, it is somewhat surprising that the Queensland Court of Criminal Appeal could find itself as

10. (1965) 38 A.L.J.R. 388, 396.
11. (1965) 38 A.L.J.R. 388, 408.

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1. *R. v. Lewis & Wilson* (1933) 27 Q.J.P.R. 55 at 59.
2. [1893] 2 Q.B. 12.
3. For a consideration of the questions whether the section requires the crown to prove affirmatively the voluntariness of a confession even where the issue is not raised by the defence, and whether the Statute abrogates the common law see *Attorney General of N.S.W. v. Martin*, (1909) 9 C.L.R. 713.