THE BASIC STRUCTURE OF AUSTRALIAN AIR LAW

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Thesis submitted for the degree of

Doctor of Philosophy

in the

Australian National University

Canberra

October, 1965

ACKNOWLEDGEMENTS

My deepest gratitude and warmest thanks are due to Professor Geoffrey Sawer, whose constant supervision has always encouraged me in my studies. I am honoured that so prominent a scholar has taken the trouble to stimulate my ideas and to improve my poor English. I am also deeply obliged to Professor Jack E. Richardson who has made useful suggestions on international air law, and to Dr Harold W. Poulton whose information has been of particular help in connection with practical aspects of civil aviation legislation and administration in Australia. My warm thanks are also due to the Commonwealth Department of Civil Aviation and to Mesdames A.H. Edwards, L.S. White and N. Bardsley of the Department of Law of the Australian National University for their help.

This thesis is my own original work.

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PRECIS

Chapter I

As an introduction, we observe 'air law' in two aspects; firstly, how far the technology and social organization of aviation have affected the structure of rules known as air law, and secondly how far analogies from or the principles of other branches of law have been found appropriate or inappropriate for the solution of air law problems. Various legal problems have sprung from the impact of the aviation industry upon existing social, political and economic systems and have generated special enactments containing special principles and rules, largely independent of the existing common law or other relevant This thesis examines the basic structure field of law. of this newly emerging law in the special setting of Australian federalism, a system designed without regard for the special problems of aviation or air law; regard is had especially to the questions how far human ingenuity has enabled some accommodation of often conflicting considerations to be established, and how far distortion of air law desiderata or of constitutional desiderata has resulted.

Part I

This Part inquires into the scope of the Commonwealth's legislative powers in respect of aviation under the federal Constitution, by reviewing the judicial trends or interpretative approaches of the Australian Courts to various constitutional powers which have been, or will be, relied upon to justify Commonwealth's aviation legislation. The results of this inquiry form the basis of measuring the possible and desirable extent of the Commonwealth legislative competence on various subjects of Australian air law dealt with in the subsequent Parts of the thesis.

Chapter II

The principles of federal (inter-State and overseas) commerce power (sec.51(i)) and relevant constitutional clauses, viz., navigation and shipping power (sec.98) and freedom of inter-State commerce (sec.92), are examined. In the absence of any specific power of 'aviation' in the Constitution, the 'commerce' power is an important legislative source of aviation control. The Australian High Court has tended to decompose and characterize the elements of the 'commerce' power so as not to admit an indefinite pursuance of a constitutional power in a way which might threaten a predetermined federal distribution

of competence, and the tendency has been increased by doctrines applied under sec.92. It is suggested in this Chapter that the more comprehensive and practical concept of 'commerce' by air corresponding to the composite realities of the aviation industry should be preferred to a logical approach taken by the Court, which insists on perpetuating the constitutional dichotomy as between the Commonwealth and the States. Principles governing the federal commerce power in the Constitution of the U.S.A. should have set the proper pattern for the Australian document.

Chapter III

The precise scope of federal competence under the 'external affairs' power (sec.51(xxix)) to carry out international obligations has not been fully explored in judicial decisions. The Commonwealth has tried to justify most of its aviation legislation either under sec.51(i) or under this section, but the reliance upon this power has been gaining in importance, partly because of the rapid development of international legislation in this field, and partly because, under this power pursuant to the international obligations imposed upon Australia, the Commonwealth can disregard the constitutional dichotomy between inter-State and intra-State aviation matters.

Australia has entered into various aviation conventions or treaties, and, having regard to the growing development of international air navigation, international legislation should cover more aspects of air law and correspondingly influence national air law. This Chapter attempts to provide some theoretical basis for a wider approach to the meaning of 'external affairs' and the mode of domestic implementation of international air law, through reviewing cases (mostly aviation cases) having a direct bearing on the constitutional clause.

Chapter IV

Commonwealth legislative powers in relation to aviation within, to or from the Commonwealth Territories and aviation using Commonwealth facilities, i.e.,

Commonwealth-owned aerodromes, Commonwealth-controlled airspace and Commonwealth aircraft, form together an important basis for federal competence.

The Commonwealth power under sec.122 enables the Parliament to make aviation laws for the government of any Territory as it thinks fit, and once the law is shown to be relevant to the Territorial aviation it operates as a binding law of the Commonwealth wherever territorially the authority of the Commonwealth runs, and prevails over an inconsistent State law.

The power as to the Commonwealth aerodromes flows directly from the common law of ownership of land, or from sec.52(i) derived from sec.51(xxxi) or sec.85(i) of the Constitution, while the power as to licensed or authorized aerodromes stems from other legislative powers affecting aviation, such as the commerce and external affairs powers. The main questions are firstly the extent of the Commonwealth economic control based upon its ownership of aerodromes (and facilities) and secondly the character of State power over such places.

In examining the scope of the legislative power for the Commonwealth controlled airspace (save airspace over the Commonwealth aerodromes and Territories) based on the federal commerce power, external affairs power or other legislative powers affecting aviation (e.g., defence power), emphasis should be placed upon different approaches to the Commonwealth aerodromes and the Commonwealth controlled airspace by virtue of their different legislative sources. But the two topics have a clear practical interrelation; the questions arise as to whether or how far the exclusive power over Commonwealth aerodromes can be extended to the use of controlled airspace adjoining the controlled aerodromes, and how far the area of this airspace may be extended.

The Commonwealth has plenary power to regulate aviation problems arising from the operation by 'Commonwealth aircraft' irrespective of whether it be international, inter-State, Territorial or intra-State. Some problems of 'shield of the Crown' might arise from their activities, but the scope of the Commonwealth 'legislative' power is mainly a matter of constitutional interpretation of sec.51(xxxix), combined with various legislative heads and/or with the general executive power in sec.61 of the Constitution. Operations of aircraft by the Australian National Airlines Commission, as distinct from aircraft possessed or controlled by the governmental departments, raise a special problem.

Chapter V

Among various other constitutional powers allowing the Commonwealth Parliament to enact aviation legislation, four subjects of special importance are discussed: defence, full faith and credit, reference of State aviation powers to the Commonwealth, and the 'incidental' power.

Since intermingling phases of civil aviation and military activities exist in a number of cases, there are problems how far the Commonwealth can extend its legislative and executive powers to the field of civil aviation in connection with and through its regulation of defence matters.

Aviation raises many difficult problems of private international law, because aircraft traverse national borders at extremely high speed and in a short time have a relation with many different countries and legal system. Hence it is often difficult to determine applicable law or jurisdiction to govern crimes, torts, contracts, etc. Under the 'full faith and credit' powers (sec.51(xxiv), sec.51(xxv) and sec.118) of the Constitution, the Commonwealth can exercise some control over these private international law problems within Australia, but the operative scope and effect of these constitutional powers has not been fully discussed in Australia. It is necessary for us to review Australian cases, make reference to American cases and suggest a possible meaning of the 'full faith and credit' clause in the Australian Constitution. As an illustration of such Commonwealth legislative control involving conflict of laws in aviation matters, some problems arising from creation of rights in aircraft in Australia in relation to the ratification of the Geneva Convention are summarised in Appendix I of the thesis.

Attempts at inducing the States to refer under sec.51(xxxvii) the power to make laws with respect to aviation were made on several occasions in the Australian constitutional history, but none of them has been fully

successful. There are some unsettled questions in the interpretation of the constitutional clause, in particular the question as to whether a State referring aviation power to the Commonwealth can revoke the reference with or without time limitation.

Various aviation powers conferred by the Constitution must always be read together with sec.51(xxxix), for, whenever the legislative reach of a federal power is in question, the extent of its 'incidentality', whether it be regarded as included in the grant of power itself or conferred expressly under the placitum, becomes a vital The conflicting approaches to the scope of this 'incidental' power come from the differing individuals' ideals or convictions as to a desirable political, economic and social order in the 'Federation'. In one view, the Commonwealth plenary powers in pursuing the ends of any power vested under the Constitution are not denied, but this approach is maintained only within the restricted area where a law said to be incidental to the main power cannot, under the guise of incidental powers, intrude into the exercise of the constitutional powers of the Aviation is one of the fields where many types of legal relation are intricately inter-related, and the determination of their 'incidentals' materially affects the scope of federal power.

Part II

This Part elucidates the fundamental principles and rules governing aviators' liberty to fly as against landowners' property rights, and as against sovereign claims by governments, State and Federal, to control of airspace. Such liberty is conditioned by detailed governmental regulations of air navigation which are designed both for the purpose of the protection of the public and for the purpose of regular development of civil aviation. Greater legislative control by the Commonwealth in this field is suggested.

Chapter VI

Firstly, the principle of 'complete and exclusive' sovereignty of States in airspace above their territories and freedoms of air in international law is examined. Secondly, federal and State jurisdictions in airspace are discussed in relation to the special status of Australian airspace in constitutional law. Australian federalism has so far divided legal competence to accommodate conflicting demands of aviation and of surface ownership and sovereignty among several dispersed jurisdictions. The establishment of a public right of innocent passage as against landowners' and States' rights over their lands

and territories is a basic question for the regular conduct of flight activities. Hence, we examine the questions whether the Commonwealth can authorize every citizen's liberty to fly over privately held lands or States' territories, and whether it can authorize foreign aviators' innocent passage by virtue of international agreements conferring foreign aviators a right to fly over the Australian territory. Such Commonwealth authorization, if enacted, over-rides State law governing surface damage caused by aircraft pro tanto insofar as damage arising from the mere passage of aircraft so authorized is concerned.

Chapter VII

Governmental regulation of air navigation to ensure the safety of the public and regular development of civil aviation has become more detailed and complicated in accordance with the growth of the industry. This matter is almost completely entrusted to the Commonwealth authority, particularly under the strong influences of international legislative and administrative control of air navigation, except some aspects of intra-State licensing control. A question remains as to whether the same power should extend to economic controls if the policy-making decisions for the industry as a whole cannot properly be

carried out without interfering with intra-State activities. This Chapter examines basic features of these international regulations and domestic regulatory systems of air navigation; main topics of the Commonwealth and States regulations which are mostly of technical nature are summarized in Appendix II, and legislation relating to air corporations and their operations in Appendix III of the thesis.

Part III

This Part deals with contractual, delictual and criminal responsibilities arising from operations and uses of aircraft, viz., carriage by air, surface damage caused by aircraft and aircraft crimes. The principles and rules governing these liability relations are governed by a combination of common law, and Commonwealth and State enacted law. The common law rules supplement the deficiencies of statutory rules, or, in the absence of the latter, are applied directly or by analogy. Commonwealth enacted law gives effect to international legislation and extends international law to certain flights within Commonwealth legislative competence. State enacted law operates in the areas not covered by Commonwealth law. The main objects of our study are to examine the influences of international law rules upon Australian legislation,

differences of these three sources of law, and the possible scope of the Commonwealth legislation in these subjects.

Chapter VIII

A considerable number of rules of international legislation relating to civil liabilities of the owner or operator, as carrier, to persons who are, or whose goods are, carried in aircraft, have been adopted in the Commonwealth statute not only as to the so-called 'Warsaw' carriage, but also as to carriage within the Commonwealth's legislative competence, which has further been extended to purely intra-State carriage under the uniform State Acts of all Australian States except New South Wales. scope of application of common law rules is therefore limited in this field. Principles, occurrence, limitation and exclusion of carriers' liability, measure of damages, documents of carriage and action against carriers are examined respectively, special reference being made to the carrying out of the Convention, and the differences between international law, Commonwealth enactments, State enactments, and common law.

Chapter IX

Present Australian legislation relating to damage relations between aviators and persons or property on the ground lacks uniformity and requires consolidation. The applicable rules may differ in accordance with whether the aircraft was at the time of a ground injury engaged in international, inter-State or intra-State flights, and also in accordance with which Australian State's territory the aircraft was then flying over. International legislation is given force in Australia by the Commonwealth statute which extends the principles of the Convention to two other classes of 'international' flights. Purely domestic flight, whether inter-State or intra-State, is governed by State legislation; only four States have enacted statutes dealing with the basic principles of Since it is not desirable for such matters to liability. be regulated by different principles and rules of liability in the one country, special reference is made to the possible extent of Commonwealth legislative powers to procure uniformity of the relevant law.

Chapter X

The Convention on offences and certain other acts
committed on board aircraft has not been ratified by
Australia, but the Commonwealth has enacted an Act dealing

with crimes on board aircraft and crimes affecting the aircraft themselves, by which some problems of conflict of laws in respect of criminal jurisdictions are solved. Some States have also passed legislation amending their own criminal law to create offences closely related to those created under the Commonwealth Act, though the terms and conditions under these States statutes differ from State to State. This Chapter summarizes the main features of the Convention and the Commonwealth legislation on these matters, pointing out problems of importance and the possibility of Australian ratification of the Convention.

Chapter XI

From the foregoing discussions, we draw some concluding remarks on the basic structure of Australian air law in accordance with the main scheme of the thesis. Apart from constitutional amendment, our study suggests ways in which the Commonwealth might assume more legislative jurisdiction in various aspects of the law. Special emphasis is placed upon the influence of international law on the national law, deepening awareness of the need for central control and lessening the difficulties encountered by Australian federalism in civil aviation legislation.

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CHAPTER I

Introduction

Why 'air law'? As the following discussions will account for the problems involved in the law, 'air law' is for the present definable as 'a body of laws relating to flights by aircraft in airspace and relations incidental thereto'.

There would be little point in collecting rules of law from disparate branches of the law merely because they happened to apply to a particular set of social relations; however, there is always some antecedent probability that a social activity presenting unique features, particularly one involving highly specialized technological problems, will in time generate rules having some degree of cohesion as rules, and having characteristics distinguishing them from other rule-clusters. Air law exemplifies this situation, as, say, in earlier periods did matrimonial law, or more recently law concerning factory employment or credit sales to consumers.

The writers on air law usually avoid a definition of air law and treat the subject as covering the application

of the existing law of tort, contract or crime to fact situations involving the operation of aircraft rather than a generic branch of law. But, it is now agreed that subjects of the law should be classified and analysed in the light of principles and rules of air law itself. Accordingly, we shall observe air law in two aspects in this Chapter; firstly, how far the technology and social organization of aviation have affected the structure of rules known as air law, and secondly how far analogies from or the principles of other branches of law (e.g., maritime law) have been found appropriate or inappropriate for the solution of air law problems.

Man's dream of flying in the air through centuries of history came true when the Montgolfière balloon was successfully realised at Paris in 1783; finally came the first successful flight of a power-driven aeroplane, achieved by the Wright brothers at North Carolina in 1903. The progress of the aeronautical technology and industry since then has surpassed imagination, and; having become part of every national life, aviation - the youngest of all forms of transport - has attained a position as an important traffic means with promising potentiality for the nation's and nations' economic and social development. Since Duigan's first powered flight in 1910, the aerial expansion has rapidly taken place in Australia which is

well endowed geographically and climatically for the development of aviation; the isolation and remoteness of many outback centres and the distances between the various capitals have greatly contributed to the development. The isolated geographical position of the Australian continent in the southern hemisphere has made the air-minded nation's eyes to turn to international aviation from the early stage of its aviation development. Volumes and frequencies of operation of regular internal and oversea services by Australian airlines are annually growing at a rapid rate. By way of illustration, with unrivalled air safety record, Australia is second in world in ton miles per head of population, fourth in ton miles by domestic operations, and fifth in ton miles by international lines. 1

The total number of registered aircraft owners in Australia in 1963 was 1,006, registered aircraft 1,787 (and 125 gliders), and aerodromes (Government and licensed) 602 (and 13 flying boat bases). Statistical summaries of operations of regular internal services (excluding Papua/New Guinea services) and operations of oversea services during the financial year 1962-63 are as follows: Hours flown - 217,897 (domestic); 48,669 (international); Miles - 43,700,000; 20,343,000; Paying passengers - 2,832,934; 294,908: Paying passenger miles - 1,014,867,000; 1,221,178,000: Freight short ton-miles - 28,270,000; 33,135,000: Mail short ton-miles - 3,324,000; 15,191,000. Cf. Year Book of the Commonwealth of Australia, No.50, 1964; The Modern Encyclopaedia of Australia and New Zealand, pp.121-22.

Some observations of the <u>medium</u> in which, and the <u>instrumentality</u> by which, aviation operates, may help us to understand the legal problems corresponding to the substantive aspects of the activity and to suggest some classification of the problems.

The universality of 'airspace', with a special and substantially uniform physical nature and chemical components, provides a traffic medium where the flying instrumentalities are given an inexhaustive possibility to disregard natural and political boundaries, with far more flexibility than other forms of transport on land, or even at sea, or on other waters. Only the portion of airspace close to the earth's surface had been used before by mankind in the construction of buildings and other similar uses, but with the appearance of aviation age this vast stratum then entered into new legal conflicts between landowners and aviators, or between sovereign States and foreign aviators. Although it is doubtful how far 'space' can become the subject of ownership, in view of the mobility or non-identity of air, ownership of land both at common law and under the civil codes has been gradually modified, and construed as not to extend in the airspace above the surface without limit, so as to harmonize the law with the existence of aircraft flight. In the international sphere, however,

each State is now treated as having exclusive sovereignty in the airspace above its territory; some doubts however, exist as to the arbitrary demarkation of boundaries of 'airspace-territory', in view of the theory of relativity, the rotation of the earth and the physical properties of the stratosphere. This doctrine was originally derived from States! experiences during the World War I; their self-protection against the potential danger of aviation to the subjacent State and its inhabitants, demanded some such theory. The rule that a State's sovereignty extends upward has been retained and flight made possible only by international agreements and domestic law which treat flight as permitted or licensed by the subjacent State. The legal status of airspace determines the liberty to fly above private lands or the freedom of the air in the international sky, and so forms a basis for every legal problem arising from flight activities in the airspace.

The word 'aircraft' is often used loosely as a synonym for 'aeroplane' which has also slowly become synonymous with 'powered aeroplane'. However, both in international law and in national law, an 'aircraft' is generally defined as 'any machine that can derive support in the atmosphere from the reactions of the air', thus including balloons, kites, gliders, helicopters, airships,

seaplanes as well as ordinary aeroplanes. The daily progress of the technical structure of aircraft towards its insatiable conquest of time and space makes it difficult to lay down any exact legal definition of 'aircraft'. The question whether a rocket is included in that definition is an important problem for distinguishing 'air' law from 'outer space' law. The present air law excludes it from its scope of application, partly because a rocket engine is a reaction propulsion engine whose fuel includes an oxidiser, making it independent of the atmosphere, and partly because it resembles a projectile launched from and returning to the surface rather than an instrument for air navigation. Upon the appearance of an intermediate type of rocket having the functions of both aircraft and space-vehicles, problems will arise whose answer may depend upon the possibility of navigating the rocket in airspace. The development of modern aeronautical science has conferred extraordinary speed (nowadays exceeding that of sound) on aeroplanes, greatly reducing the time previously spent in travelling over long distances. Recently, helicopters have also begun

Sanitary Convention for Aerial Navigation 1933 (Art. 1) and the U.S. <u>Civil Aeronautics Act</u> 1938 (Title 1, sec. 1 (4)), Pub. No.706, 75th Congress, as amended by the <u>Federal Aviation Act</u> 1958, expressly define 'aircraft' as the one intended for 'air navigation'.

to reduce times over much shorter distances. relation to the State's jurisdictional rights in the superincumbent airspace, this has caused complex and difficult problems of conflict of laws in determining the law applicable to events occurring and acts performed on board an aircraft, i.e., crimes, torts, contracts, births, deaths, marriages, execution &c. of wills and legal instruments. The governmental regulation of the aircraft industry extends now to their design, production, registration, airworthiness, etc. In private law, an aircraft is treated as a movable property, and is prima facie governed by general laws, concerning goods or But its legal status has many aspects differing from that of ordinary movables and in some aspects resembling the status of ships. Hence, a tendency to accord aircraft a special status as property sui generis has emerged in subjects dealing with rights in aircraft, precautionary arrest of aircraft or assistance and salvage of aircraft or by aircraft at sea. I

These subjects have been the topics of international legislation; the Convention for the Unification of certain Rules relating to the Precautionary Attachment, signed on May 29, 1933; the Convention on the International Recognition of Rights in Aircraft, signed on 19 June, 1948; the Convention for the Unification of certain Rules relating to Assistance and Salvage of Aircraft or by Aircraft at Sea, signed on September 29 1938 (which did not come into force).

The history of air law is as old as the practical appearance of aircraft; it can readily be imagined that police regulation of the machine's flights led the way in the origin of the law, tracing back to the police order to regulate the use of the Montgolfiere balloon in Paris in 1784, but various legal problems have been gradually generated by the development of this new social phenomenon. Above all, the rapid development of air traffic has produced a tendency to enact air law rules, whether public law or private law, on an international scale; that is because of the 'international' character of aviation and consequently of the necessity of 'uniform' national laws. As early as 1919 the Paris Convention for the Regulation of Aerial Navigation was adopted by 38 countries as a first attempt at regulation of international public air law on a world-wide scale; it has now been superseded by the Chicago Convention of 1944 with 105 member-States in June, 1964. The convention regulates various aspects of the right to fly among the sovereign States and requires uniformity of national regulations in accordance with prescribed international National laws incorporating these public law standards. principles and rules of the Convention extend to a wide range of subjects, including regulations on aircraft, qualifications and training of aircraft pilots, flight

rules and flight control, aerodromes and air navigation facilities, accidents investigation, rescue and search, punishment of regulation breaches, etc. Machinery for creating and administering international law concerning civil aviation has been established in various forms, and, in the domestic sphere, government departments and local authorities have been specialized in the Executive functions. The fast-growing air transport industry by airlines has necessitated government economic as well as administrative control over the huge industry, for example, control over airways corporations (e.g. establishment and constitution, governmental loans thereto) and laws governing the establishment and operation of air transport services (e.g., licensing of air transport and commercial flying, co-ordination and rationalization In the international sphere, the economic aspects scheme). of air transport services of scheduled air services are still governed by bilateral agreements among the sovereign States concerned in the reciprocal exchange of the freedoms of the air. Such public law aspects of civil aviation legislation are directed to the development of international and domestic civil aviation in a safe, regular and efficient manner.

Developments of private law aspects of civil aviation legislation are less marked. National laws establishing

rights and obligations of private persons and property involved in or affected by aviation have developed slowly in the process of common law evolution or by the application of the existing general law of civil and commercial codes, through which principles have been gradually determined by the courts of different jurisdictions deciding the particular case presented. However, as much flight and carriage by air become necessarily international, national private laws affecting aviation have been made more uniform by international conventions applying directly or by adoption in national law and similar considerations have arisen in domestic air law which tends in many respects to adopt international rules or to provide their origin. One of such major subjects is the carrier's civil liability for damage to a passenger, baggages or goods during the carriage by air and for damage caused by delay. The legal relations arising from operator's liability for damage caused by aircraft to third parties on the ground and other instances of liability from the operation of aircraft (e.g. aerial collision) are unique to aviation and therefore cause special legal questions. Laws relating to insurance or relations between master and servant in connection with use and operation of aircraft, etc. are also included in this field. In considering these problems, special

characters of aviation activities based upon the characteristics of 'airspace' and 'aircraft' must be taken into account; for example, owing to the gravity of aviation accidents and the difficulty of finding out the real cause of the accident, there is a tendency in the regulation of international aviation to seek unification of actions for surface damage, by confining jurisdiction to a Court of the State where the accident actually happened, requiring the courts in other States to permit uniformly the execution of the original decision.

In a short period of aviation development, various legal problems have sprung from the impact of the industry upon existing social, political, and economic systems. Such problems cannot satisfactorily be solved or adjusted without consideration of these backgrounding factors determining the policies of the law; these factors include impacts upon or competition with other forms of transport (ships, trains, buses or cars), inescapable military implications, potentialities in expanding national and

Cf. Art. 20 of the Rome Convention of 1952 concerning Ground Damage caused by Aircraft, which amended the 1933 Convention. As another instance of special considerations required in air law problems, the estimation of surface damage may be calculated in proportion to the weight of aircraft, but in the case of aerial collision there are some suggestions in favour of deciding a maximum amount of compensation irrespective of aircraft's weight, which is based upon the idea that, in an aerial collision, as distinct from the collision of ships, there is no corelation between the weight of the assailant aircraft and the degree of the damage caused thereby.

world economy, national interests and prestige, etc. in justifying or in rejecting the principle of the limitation of carriers! or operators! liability in air law, one must consider such factors as the necessity of fostering a national aircraft industry, and the enormous costs of running air transport businesses often requiring heavy government subsidy or ownership by the government, on the one hand, and on the other hand the claim to adequate compensation for injury by individual users (who are also, in a sense, the 'public' whose interest is served by the policy of damages limitation) or in the case of surface damage the injustice of making the incidental victims on the ground financial supporters of aviation against their own wish. The introduction of compulsory insurance in this legal relation should also be decided upon full consideration of the social and economic background of the industry in a particular country.

The independence of a field of law is ultimately based on our recognition that it consists of the regulations most fit to be applied to a certain range of social relations having some identity or similarity in their nature and phenomena. The more it is felt to be necessary to regulate an area of social relations as a unit, the more likely is a specialization of the relevant rules,

though the extent and rate of specialization varies from case to case. Civil aviation is such an area, and, as seen from the foregoing outlining of the problems involved therein, civil aviation legislation presents such a unique regulation-unit. What are, then, its relations with common law or general law, with laws concerning other forms of transport, and with international law?

Large parts of the field of air law have already been regulated by statute law, and the scope for the application of the common law correspondingly limited or excluded, partly because aviation has developed so rapidly that it has had to be regulated by statute and partly because it has been to a large extent subject to international agreements. But the statutory law does not always cover the whole field of the legal relations arising from or incidental to aviation; hence, room is left for the application of common law rules, as for example, both in England and in several States of Australia, the common law rules as to trespass or nuisance and aviators! liability for resulting damages, modified by statute, apply in certain circumstances where the statute law does not apply. Likewise, the general law of the civil codes or commercial codes supplement air law in countries with such written codes. Statutory enactments are naturally predominant in public law aspects of air law, but in its private law aspects (e.g., laws of tort, contract, and conflict of laws) Parliamentary interference has been less. Some particular air law topics may be readily solved by the application or the analogy of these general law rules, but most of the legal principles in air law have special principles, rules or usages according to their relevant special features of aviation. Hence, regard must always be had to the soundness of such general law rules applied to the actuality of aviation problems, to the extent to which they are so applicable.

The question whether an air carrier is a 'common carrier' is illustrative on these points. It is to be observed that opinions differ in treating as a common carrier with an insurance liability in common law an air carrier who carries on the public employment of carrying goods by air for all persons indifferently. In one view, the application of the common carrier's status to air carriers is denied on various grounds - that there is no precedent for applying this abnormal liability to an air carrier, that the modern tendency is to restrict the class of common carriers, that since the inception of air carriage express written contracts with air carriers have been in general use, that there is on principle no justification for imposing an extraordinary responsibility

upon air carriers, and that it is debatable on purely historical grounds whether anybody other than a carrier by land can be said to be a common carrier. criticisms, the most important point seems to be the fourth question that there is no a priori reason why air carriers should be answerable for loss or damage caused by pure accidents and without any negligence on their part or the part of their servants. Hence, the question touches the social requirement and the policy of law of torts in respect of carriers in general. Negligence doctrines had important applications in the development of industries and other spheres of social life in the nineteenth century, but they have been undergoing changes. Modern law tends to impose strict liability on the person who undertakes an industry or business in relation to the labourers working within the undertaking, and even as to some aspects of the relation between the undertaking and the outside public - for example, in connection with transport accidents. But strict liability in this sense is distinct from the older established cases such as the English rules in Ryland v Fletcher, 2 because the matter

E.G.M. Fletcher, The Carrier's Liability, 1932, pp.248-52. As for oppositions against Fletcher's view, see McNair, The Law of the Air, 1953, second ed., by M.R.E. Kerr and R.A. MacCrindle, p.155.

⁽¹⁸⁶⁸⁾ L.R. 3 H.L. 330.

should be considered from the viewpoint of equitable distribution of damage occurred in the community. is particularly so in the case of motor traffic which involves potential danger for the public, while it is extremely important for their ordinary life. Distinction may be drawn between the damage caused to third parties on the ground and the damage caused to passenger or goods carried by aircraft, though sometimes they occur simultaneously. We should probably not develop liability of the carrier to the consignor of goods by reference to the carrier's liability to third parties; the former is essentially in the sphere of contract. The carrier who is engaged in carrying as a regular business and holds himself out as prepared to carry for anyone who chooses to employ him should have a higher duty than that of a private or gratuitous carrier, but not absolute liability in any Even if strict liability should be imposed upon common carriers by legal policy, it may now be considered of minor importance, because strict liability almost invites extensive transfer of the risk by insurance. Indeed, the wide-spread use of insurance against fault as well as strict liability has tended to weaken civil liability as a sanction for careful conduct; 'care' has rather to be enforced by criminal sanctions and licensing

of operators. By such means society will be able to secure the carrier's or operator's care for his conduct more efficiently. However, carriage by air is normally regulated by a contract, and where there is such contract the rights and obligations of the carrier and the goodsowner depend on its provisions. Moreover, statutory law tends to modify the status of common carriers so inconsistently with the rights and obligations created by the common law as to destroy the concept of common carrier; an air carrier who is carrying subject to the provisions of either international law or domestic statutory law incorporating the international rule, which allow him to reserve the rights to reject traffic, is no longer a common carrier. The question whether an air carrier is a common carrier or not should therefore be decided in each case in which regard must be had to the content of the contract and the effect of the statutes. It follows that the actual scope of the application of common law rules is apt to be small in aviation cases. Such statutory rules in air law embody the 'negligence'

Cf. Art. 33 of the Warsaw Convention of 1929 as amended at The Hague 1955, concerning the unification of certain rules relating to international carriage by air; Civil Aviation (Carriers' Liability) Act 1952 (C'th) (First Schedule, Art. 33). See also, Shawcross and Beaumont, Air Law, second ed., pp.314-315, and cases there cited.

doctrine with a shift of the burden of proof from the plaintiff to the carrier in respect of the damage occurred both to passengers and to goods; they depart from the common law rules either in the classification of 'carriers' or in their liability principles.

Land transport by railways or motor-vehicles and sea transport by ships have some common features with transport by aircraft, so long as they are traffic facilities conducted by human activity. Accordingly, there is much similarity in regulations concerning their safe operations (e.g., regulations concerning dangerous goods and explosives). When there are no principles applicable to air law problems, the courts may proceed by analogy from cases relating to the operation of the various forms of land and water transport. Every such similarity and assimilation comes from the general nature of 'traffic'.

A number of analogies between maritime law and air law appear to exist not only in the terminology but also in the legal problems, such as, nationality of aircraft, documents carried in aircraft, legal status of aircraft-commander, rules of the air and air traffic control, etc. Subject matters governed by the fundamental principles of air law, e.g., trespass and nuisance in the airspace above private lands, or the rights of innocent passages in the foreign territorial airspace, are not governed or

only partly influenced by the analogy of maritime law. Legislation in respect of politico-economic aspects of the industry contains policies and principles different from those in the shipping industry. Some subjects mostly concerned with the legal status of aircraft in private law or in conflict of laws may well be regarded as similar to the law concerning ships. So, in the commercial dealings of aircraft, the introduction of a general recording system of documents of sale, &c., as in the case of ships, would be desirable, or the application of the 'law of the flag' analogous to that of ships would be in most conflict-of-laws cases the most satisfactory solution. However, the special conditions of air travel should be kept in mind even when the analogies are permitted. Take as an instance the subject of 'salvage' of or by aircraft at sea, and you will find different conditions governing maritime navigation and air navigation. An aircraft would unreasonably imperil itself if it attempted to land whether on sea or water to help another aircraft which has crash-landed, and assistance to another aircraft in the air is likewise almost impracticable. But merely by reporting the location of a crashed plane or one in trouble, and by circling or otherwise delaying its course in order to do this, an aircraft may run risks

and incur costs which could be regarded as the basis for a salvage type remuneration.

Probably, the applicability of the 'general average' principle in respect of carriers' liability in maritime law would be more illustrative of the relation between maritime law and air law. As often pointed out, the essence of carriage by air as compared with carriage by sea is speed and shortness of duration, and therefore the sense of joint liability during a voyage among the interests for the adventure of air carriage is less stronger than in carriage by sea. Navigation by sea in the past was a series of adventures caused by natural violence or attack of pirates. There is little adventure in that sense in the case of aviation, although the result of an aviation accident is often catastrophic. Carriage by air will be completed at the longest in a few days, and aircraft can take refuge more quickly in case of natural violence at the nearest airport. However, in some occasions a shortage of fuel or a heavy down-draft may cause a commander or a member of the crew of an aircraft

See Brussels Convention for the Unification of certain Rules relating to Assistance and Salvage of Aircraft or by Aircraft at Sea, 1938, Art. 2(3) and Art. 2(7).

to jettison the cargo overboard or destroy part of the aircraft for the purpose of saving the rest of the cargo or the aircraft itself. In practice, it will be a first consideration for an aircraft operator to save the aircraft itself within a short time of peril; the case of destruction of a part of aircraft is very rare, as it means in most cases the fall of the air-borne machine itself. Yet there might be such exceptional cases as jettison of cargo or fuel in which the principle of general average could be applied to aviation although the probability of such cases happening is not as great as in carriage by sea. Unless an air carrier is negligent in such cases, it cannot be said that the damage was caused wilfully by the carrier or his agents. He will be liable for the surface damage caused thereby, as the Conventions or statutes provide, 1 but the carrier's liability for damage caused to the jettisoned cargo to the consignor

The Rome Convention of 1933 provided in Art. 2(2) (a) that the damage caused by an aircraft in international flight to persons or property on the surface to give a right to compensation includes 'damage caused by an object of any kind falling from the aircraft, even in the event of the proper discharge of ballast or of jettison made in case of necessity'. In the new Rome Convention of 1952, this provision was omitted, but Art. 1 prescribing the fundamental principle of the operator's liability for ground damage which imposes an absolute liability except certain cases will cover the case of jettisoning.

is different from the liability to the third parties on the surface. If the owner of the damaged cargo, which was chosen fortuitously among several cargoes, can recover no contribution from the owners of the property saved from the risk it will be against one's sense of justice. we can see the ground on which the principle of general average should be applied in aviation. In the common law by which a few cases of carriage by air still remain governed, the applicability of the doctrine seems doubtful, particularly as to the common carrier as an insurer for the safe carriage of the goods. However, as mentioned before, the air carrier's status at common law as a common carrier is ambiguous, and it raises a difficult question whether the carrier's action of jettisoning cargo was caused by an 'act of God' (e.g., an unpredictable down-draft) so as to exempt him from the insurer's liability. The question has been raised, but not settled, as to whether by analogy carriers on land are entitled, if not to a common contribution in the nature of a general average, at least to compensation for expenses incurred by them about the preservation of the goods from extraordinary perils. However, it is another

Fletcher, op.cit., p.214.

matter whether the principle should be introduced into the present legal system of air law; the matter seems to depend upon the intention of the Legislature. It goes without saying that, if both of the parties want it, they can have a special contract to apply the general average principle in the carriage by air, or otherwise they can exclude any such ambiguity by express terms of contract providing for compensation against all risks from any cause whatsoever, probably with a certain limit of the value in air waybills. 1

The simple statement that maritime law also has a certain principle can never in itself be a sufficient ground for the similar subject in air law; in order to have any significance, it should be proven that the principle is a sound one in maritime law, and that the reasons why it is a sound principle apply also to aviation.²

Cf. e.g., Re California Eastern Airways, (1951) U.S.Av.R. 327, where the principles of general average could have been applied, but neither the carrier and the owner of the jettisoned cargo, nor the judges raised the question. The report of this case suggested the application of the general average principle.

H. Drion, Limitation of Liabilities in International Air Law, 1954, pp.13-14 referring to the maritime analogy in air law in respect of the limitation of air carrier's or operator's liability.

Substantial aspects of aviation sustaining the characteristics of air law principles require considerations quite different from sea navigation, and most of the legal problems arising from aviation are to be applied and solved both by their own policies of law and by their proper principles of law. Hence, the analogy of the maritime law has no general application to air law, although it has already been, and will in future be, found a convenient source of analogy in some cases. 1

A number of conceptional and terminological analogies may also exist between land traffic law and air law, but, apart from specialized technological differences, there are some fundamental differences of applicable principles, which need only to be briefly mentioned below. First, the legal status of airspace and problems connected with it are based upon principles and rules peculiar to air law which cannot be compared with those of road or railway both in the international or the domestic sphere. Secondly, the internationality of aviation resembles that of sea voyages rather than international railway or road carriage, and, as an aircraft has the legal quasi-personality

Cf. McNair, op.cit., p.233.

as with ships in international law, this demands considerations in conflict of laws different from those of land transport. Thirdly, special considerations based upon the nature of aviation (e.g., the possibility of an aerial collision happening between more than two aircraft in flight by a mere contact with slip-stream, etc. without any physical contact), and upon the social and economic position of this particular industry, are likely to influence most aspects of air law.

An emphasis should be put on the close relation, rather than comparison, between international law and air In accordance with the rapid expansion of intercourse between sovereign States, adjustments between differing national laws were required to facilitate such As aviation itself is a traffic facility intercourse. promoting and facilitating such intercourse, this tendency is so conspicuous in the field of civil aviation legislation. Particularly, with the internationalization of the individuals! life, international private air law which seeks to unify national law concerning private international aviation has gained in importance. International maritime law is still in most parts based upon maritime customs which have developed in the course of long usage by nation-States. There is no international

private law of road transport and little uniformity in matters of technical regulations and the conventions concerning transport by rail are predominantly regional. 1 Some provisions contained in the uniform air law relate necessarily to the unification of the conflict of laws, but most of them concern the substantive law. It should be noted, however, that since international law has no general international body to enforce it, the obligation to unify the domestic laws according to the convention and the right to claim that other party-States should alter their national laws according to the same convention is possessed by each sovereign State, while an individual can as a rule claim his right only on the basis of the resulting domestic law, not of the international law. Accordingly, domestic legislation implementing convention obligations in some form will be necessary for the effective force of such conventions in the domestic sphere. International air law is no exception thereto.

When flight in the air by means of aircraft had become practically possible, aviation was so new a phenomenon that there were no specific rules to be

Cf. O. Mance, International Road Transport, postal, electricity and miscellaneous question, 1947, p.19; R.L. Wedgewood, International Rail Transport, pp.25, 29.

applied thereto, and consequently the existing rules of common law, civil law, maritime law or international customs were applied directly or by analogy. It has now connections with almost every branch of law - international law, constitutional law, administrative law, conflict of laws, maritime law, laws of tort, laws of contract, etc. This is an evidence not only of the importance of aviation in our every-day life but also of the necessity of making the law more uniform. As the real importance of aviation lies in its promise, the specialization of this branch of law will further be facilitated in accordance with the complexity and development of aviation in the future; for example, the advent of super-sonic aeroplane has resulted in increasing damage problems caused by their noise, particularly around aerodromes where such aeroplanes land and take off.

'Air law' is sometimes called 'aviation law' in which topics are apt to be limited to legal problems arising from aircraft <u>flights</u> only. Wireless telegraphy, broadcasting and other forms of communication of man-made radiation in the air also concern the use of the air; earlier writers included legal questions connected with radio transmission which modern writers expressly exclude from the scope of their treaties on

'air law'. 1 It seems more adequate to employ the term 'aviation law' in its broader sense in the place of that misleading term, but the term 'air law' is now sanctioned by usage. 2 The present study is confined to 'civil' aviation, 3 and to air law in times of peace only.

However, we are concerned with this law in the special setting of Australian federalism, a system designed without regard for the special problems of aviation or air law, and so have also to consider how far human ingenuity has enabled some accommodation of these often conflicting basic influences to be established, how far one factor has distorted the other. We shall first examine the Australian Constitution which prescribes the respective legislative competences of Commonwealth and constituent States on aviation problems (Part I). Then, in subsequent Parts, we shall examine main heads of Australian air law with special reference to the interactions between this new branch of law and the

See, e.g. Hazeltine, The Law of the Air, 1911; Zollman, Law of the Air, 1927.

Shawcross and Beaumont, op.cit., pp.17-18.

In the ordinary sense, 'civil' aviation means the one not directly identified as military aviation (cf. J.P. Van Zandt, Civil Aviation and Peace, 1944, p.6.)

existing legal system under the Australian federal government. Such subjects include liberty to fly in relation to the legal status of airspace and in relation to the governmental regulations of air navigation (Part II), and contractual, delictual and criminal responsibilities arising from carriage by air, surface damage caused by aircraft and aircraft crimes (Part III). It should be noted that, in view of the absence of any consolidated works on air law in Australia, the present writer attempts to coordinate as much relevant subjects and problems as possible, but this object must yield preference to the above-mentioned main scheme of the thesis.

PART I

Aviation and the Australian Constitution

In a federal government, many problems in civil aviation legislation, as in many other fields, cannot be made clear without having regard to their constitutional aspects - the division of powers between the Federal Government and the constituent States. It is the object of this Part to inquire into the scope of the Commonwealth's legislative powers in respect of aviation, by reviewing the judicial trends or interpretative approaches of the Australian courts to various constitutional powers which have been, or will be, relied upon to justify Commonwealth's aviation legislation. It should be noted, however, that, owing largely to the meagreness of judicial precedents pertaining to the constitutional issues in this field, some deductive inferences from relevant subject-matters will be indispensable in order to locate aviation powers in the whole framework of the Australian Constitution.

Australia possesses a federal form of government, where the legislative powers given to the Commonwealth are limited and specifically enumerated in the

Constitution, the rest of powers remaining in principle vested in the six States. The subject of aviation is not mentioned in express terms in the Constitution, the framers of which did not foresee the novel transport activity by means of aeroplanes which was only achieved three years after the foundation of the Commonwealth. However, the provisions of the Constitution are not to be limited by the denotation in 1900 of the terms used in its various sections. Any British statute may properly be applied to new facts and new conditions if the words of the statute properly

The Commonwealth of Australia Constitution Act enacted by the United Kingdom Parliament received the Royal Assent on 9th July, 1900. A Proclamation was issued on 17th September, 1900, that on and after 1st January, 1901, the people of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia should be united in a Federal Commonwealth under the name of the Commonwealth of Australia. Before the passage of the Act, a draft Constitution was agreed by referendum by the people of the various States other than Western Australia which similarly agreed prior to Proclamation. As to the early constitutional history of Australia, see, A.C. Melbourne, Early Constitutional Development in Australia, 1963; Quick and Garran, The Annotated Constitution of the Australian Commonwealth, 1901.

A few aerodynamic experiments were being conducted by Lawrence Hargrave at the Sydney Observatory in the 1890's, but there is no evidence that the framers of the Constitution contemplated the subject of aviation in the Constitutional Debates. Cf. Hocking & Haddon-Cave, Air Transport in Australia, 1951, p.75; S. Brogden, History of Australian Aviation, 1960, pp.3-10.

construed are such as to include such facts and conditions, 1 and the Constitution is, <u>inter alia</u>, a British Statute. 2

Under the Constitution, the Commonwealth Parliament acquired legislative power to control aviation under sec.51(i) (trade and commerce with other countries and among the States), under sec.51(xxix) (external affairs), and under sec. 122 (Commonwealth Territories). In addition to these heads, it has incidental power to affect the subject-matter by reason of many other powers, e.g., sec.51(v) (postal, telegraphic, telephonic, and other like services), sec.51(vi) (the naval and military defence, &c.) sec.51(viii) (astronomical and meteorological observations), sec.51(ix) (quarantine), sec.51(xxvii) (immigration and emigration), sec.51(xxxvii) (matters referred to the Commonwealth Parliament by State Parliament), sec.51(xxxix) (incidental matters), sec.52 (places acquired by the Commonwealth for public purposes), etc.

R. v. Burgess; Ex parte Henry (1936), 55 C.L.R. at p.627, per Latham C.J.

Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (1920) 28 C.L.R. 129.

Amendment of the Constitution under sec. 128 could at any time have created a more specific and ample power, but that section requires approval of the majority of the people as a whole, and majorities of the people in a majority (four) of the States. This has proved a major obstacle to amendment. Another possible recourse is a reference of power to the Commonwealth by the State parliaments under sec.51(xxxvii), but this also has proved a weak road. References have been promised by all the State governments, but have never been carried into effect by all Parliaments.

Before examining the exact scope of these powers, it seems appropriate to make a brief account of the constitutional history of general aviation powers in chronological order.

The first Commonwealth statute applying to civil aviation was the <u>Air Navigation Act</u> 1920¹ which authorized regulations to give effect to the Paris Convention² of 1919 and for the control of air navigation

No.50 of 1920.

²

Convention for the Regulation of Aerial Navigation, signed on 13 October, 1919, at Paris, and entered into force on 11 July, 1922.

in the Commonwealth and the Territories. Prior to that date, there was practically no law in existence relating to aviation other than the police laws of the States. The 1920 Act was passed apparently in the belief that the State Parliaments would hand over legislative power to the Commonwealth, consequent to the resolution of State Premiers' Conference in May, 1920. Two States passed the Commonwealth Powers (Air Navigation) Acts substantially in accordance with the terms of the resolution, and another two States passed Acts on different lines. In the other two remaining States, bills in accordance with the terms of the resolution

Sec.4.

No Australian governments provided technical facilities or established administrative machinery for civil aviation until the end of 1921, and, in the meantime, any professed pilot, whether his qualification, was at liberty to fly and carry passengers in any machine capable of taking off. Cf. Hocking & Haddon-Cave, op.cit., p.1.

Cf. Report of the Royal Commission on the Constitution of the Commonwealth 1927, minutes of evidence, Part 2, p.270. μ

Queensland: Commonwealth Powers (Air Navigation) Act 1921 (No.30). Tasmania: Commonwealth Powers (Air Navigation)

Act 1920 (No.42).

Victoria: Commonwealth Powers (Air Navigation) Act 1920 (No. 3018). South Australia: Commonwealth Powers (Air Navigation) Act 1921 (No. 1469).

were introduced, but not passed. Only Tasmania brought its Act into operation. However, the federal Act commenced in relation to all the States and Territories on 28th March, 1921.

It was in 1929 that the Royal Commission on the Constitution reported in favour of a grant of power to the Commonwealth Parliament over air navigation and aircraft. All the expert witnesses who appeared before the Commission pointed out, in the light of their knowledge and experience of aviation, that the existing divergencies in State aviation laws, and the overlapping of Federal and State authority, were most undesirable. 1

At another Premiers! Conference in 1929 it was agreed that the Commonwealth Parliament should draft a model bill for submission to the States transferring full power to the Commonwealth Parliament to legislate with respect to aviation, but the matter was struck out of the preliminary agenda for the 1930 Conference. The matter was also discussed inconclusively at the Conference of Commonwealth and State Ministers in 1934. At a

Cf. Report of the Royal Commission on the Constitution of the Commonwealth 1927, minutes of evidence, Part 2, pp.161-173, 255-286; see esp. the statement by Captain G.F. <u>Hughes</u>, President of the Aero Club of N.S.W. (evidence, p.163; Report, pp.206-207).

Premiers' Conference in 1936 it was again agreed that the States should pass legislation to enable the Commonwealth to exercise general aviation power. 1

Then, the validity of the federal Act and the Air Navigation Regulations 2 made thereunder was successfully challenged in the High Court in R. v. Burgess; Ex parte Henry (the first Henry Case) in 1936, in which it was held, inter alia, that the Commonwealth Parliament had no general control over the subject-matter of civil aviation in the Commonwealth, and that the power to legislate with respect to external affairs did include the power to give effect to international treaties but the Regulations made under the Act were in conflict with provisions of the Convention so as to be unconstitutional. As a result of this decision, the Act was amended by omitting reference to the control of aviation generally throughout Australia and inserting in its stead the words - '(a) in relation to trade and commerce with other countries and among the States, and (b) within any

Cf. Report from the Joint Committee on Constitutional Review 1959, p.68.

S.R. 1921, No.33.

^{55°}C.L.R. 608.

Territory of the Commonwealth.' The amendment was held valid in R. v. Poole; Ex parte Henry (the second Henry Case) in 1939.

The Commonwealth Government (United Australia Party - Country Party) prepared the <u>Constitution Alteration</u>

(Aviation) Bill in 1936 which provided for the insertion in sec.51 of the Constitution after para. (vi) the following para.:- '(vi.A) Air Navigation and Aircraft'. The result of the referendum was a majority of the whole people but not a majority in four of the States, 2 so the proposal failed.

As a result of the aviation Conference of Commonwealth and State Ministers which was convened in April, 1937, all States agreed to enact in uniform terms State <u>Air</u>

Navigation Acts, which would in effect adopt the Commonwealth <u>Air Navigation Regulations</u> as State law. All States enacted subsequently such uniform legislation, 3 and

⁶¹ C.L.R. 634.

Voting at referendum, 53.56 per cent in favor of proposed law. Requisite majority was obtained in Victoria and Queensland. Cf. A.F. Davies, Australian Democracy, 1958, p.84.

N.S.W.: Air Navigation Act 1938 (No.9).

Vic.: Air Navigation Act 1937 (No.4502), as repealed and substituted by the Air Navigation Act 1958 (No.6197). Queensland: Air Navigation Act 1937 (No.8).

Queensland: Air Navigation Act 1937 (No.8). S.A.: Air Navigation Act 1937 (No.2352).

W.A.: Air Navigation Act 1937 (No.6).

Tas.: Air Navigation Act 1937 (No. 14).

therefore the Commonwealth Regulations applied practically to all air navigation within Australia. It is worthy of note that this uniformity was attained not by reference of powers to the Commonwealth Parliament but by the parallel uniform legislation by the States, so that the States could repeal or amend their legislation and even withdraw from this complementary and reciprocal regime. Until recently, this co-operation by the Commonwealth and the States has been the basis of the legal system of civil aviation in Australia.

In 1943, all States except Tasmania passed a statute, entitled the <u>Commonwealth Powers Act</u>, ¹ to refer certain matters (including 'air transport') to the Commonwealth Parliament until the expiration of five years after Australia should cease to be engaged in hostilities in World War 2. The Victoria Act was conditional on valid reference by all, so the Tasmanian failure involved also non-operation of the Victorian Act.

Following this, the Commonwealth Government

(Australian Labour Party) attempted another constitutional

N.S.W.: Commonwealth Powers Act 1943 (No.18), s.2(i). Q'ld.: Commonwealth Powers Act 1943 (No.19), s.2(i). S.A.: Commonwealth Powers Act 1943 (No.3), s.2(g). W.A.: Commonwealth Powers Act 1943 (No.4), s.2(h). Victorian Commonwealth Powers Act 1943.

amendment by introducing the <u>Constitutional Alteration</u>

(<u>Post-War Reconstruction and Democratic Rights</u>) <u>Bill</u> in

1944, which provided, <u>inter alia</u>, for the insertion in

sec.51 of the Constitution 'air transport'. The

referendum, however, failed to achieve a majority either

of the whole people or of the people by States. 1

Then, the Government proceeded to nationalize interState operators by enacting the Australian National
Airlines Act 1945² which established the Australian National
Airlines Commission to operate inter-State and territorial
services. However, in Australian National Airways Pty. Ltd.
v. Commonwealth³ (the A.N.A. Case) it was held by the Court
that certain provisions of the Act relating to licensing
machinery purporting to give a monopoly of inter-State
air transport to the Commission, a Commonwealth
instrumentality to operate national air services,

Voting at referendum, 45.99 per cent in favor of proposed law. Requisite majority was obtained in South Australia and Western Australia. Cf. also A.L.J. vol.16, 1943, at pp.157, 221, 323, and in particular the speech of the Attorney-General (Dr Evatt) in moving leave to introduce the Australian Constitution Alteration (War Aims and Reconstruction) Bill 1942, at p.160.

No.31 of 1945.

^{(1945) 71} C.L.R. 29; (leave to appeal to Privy Council refused) 71 C.L.R. 715.

contravened sec. 92 of the Constitution (i.e., freedom of inter-State trade and commerce). The Commonwealth Powers Acts 1943 enacted by New South Wales, Queensland, South Australia, and Western Australia mentioned above, expired on 2 September 1950, but in Queensland an Act to continue the reference to the Commonwealth Parliament of the matter of air transport was enacted in the same year. of Tasmania passed Commonwealth Powers (Air Transport) Act in 1952 to the same effect. It was in relation to the latter Act that the Court held later in 1964 that the Australian National Airlines Act gave to the Commission authority to establish and operate within Tasmania intra-State airline services without a licence under the provisions of the Tasmanian traffic legislation by virtue of the reference of aviation power to the Commonwealth: R. v. Public Vehicles Licensing Appeal Tribunal of Tasmania and Others; Ex parte Australian National Airways Pty. Ltd.

Commonwealth Powers (Air Transport) Act 1950 (No.2).

Commonwealth Powers (Air Transport) Act 1952 (No.46); it commenced on 2 April, 1959.

Traffic Act 1925-1961, as amended or as affected by the Transport Act 1938.

^{1964,} A.L.R. 918; 37 A.L.J.R. 503.

In 1959, the Joint Committee on Constitutional
Review, 1 recommending constitutional amendment vesting an
express power over aviation in the Commonwealth Parliament,
agreed with the view that since aircraft, irrespective of
whether they were engaged in intra-State or inter-State
flights, made use of the same facilities and air space, it
was altogether absurd that legal power should be determined
by the physical boundaries of States. But no step for
constitutional amendment as recommended by the Committee
has since been taken by the Commonwealth Government.

Although, by uniform State legislation in 1937, the Commonwealth Regulations practically applied to all air navigation within Australia, most States amended in rather different ways their uniform Acts or related transport legislation so as to retain a measure of politico-economic control over intra-State operations. This caused constitutional struggles between the Commonwealth and the States with respect to the licensing authority of air service operations within a State. Two recent cases, i.e., Airlines of New South Wales Pty. Ltd. v. New South Wales

Cf. Report from the Joint Committee on Constitutional Review, 1959, pp.65-71; see esp. p.69.

 $(\underline{\text{No.1}})^{1}$ and $(\underline{\text{No.2}})^{2}$ have had a direct bearing on this In the Airlines of N.S.W. Case (No.1), it was held that the States still had extensive powers in relation to aviation and that their legislation in fact still occupied much of the field. But the Court also suggested that the Commonwealth had power to move into much of the field then occupied by State Acts, either pursuant to the interstate trade and commerce power or pursuant to the external affairs power. Subsequently, the Commonwealth Government amended its regulations so as to apply the existing air navigation regulations as Commonwealth law to all classes of air navigation - international, inter-State and intra-State, and established a Commonwealth licensing system for intra-State air transport services. The validity of these sweeping Commonwealth regulations was tested before the Court in the Airlines of N.S.W. Case (No.2). The Court held by a majority opinion that, upon various legislative powers, the Commonwealth need no longer depend on constitutional authority ceded by the States to enforce air safety regulations on intra-State operators, but it also held that a State Act, which

³⁷ A.L.J.R. 399.

^{(1964–65) 38} A.L.J.R. 388.

required intra-State airline operators to have a State licence, was not inconsistent with the federal regulations. The constitutional dichotomy still remained insofar as politico-economic control over intra-State aviation is concerned. But it was an epoch-making decision in the constitutional history of Australian aviation, for at least as to safety factors, a constitutional system of aviation control depending on complementary legislation by the Commonwealth and the States which had operated for nearly 30 years was replaced by a system depending mainly on Commonwealth power.

CHAPTER II

Aviation as a Branch of 'Commerce'

By sec.51(i) of the Constitution, the Commonwealth Parliament has power to make laws for the peace, order, and good government of the Commonwealth with respect to 'trade and commerce with other countries, and among the States.'

In contrast with the U.S. Supreme Court's approaches in the interpretation of the federal commerce power, the Australian Court has taken 'commerce' as a 'legal' concept rather than a 'practical' one: It is plainly digested in the following view: 3

The distinction which is drawn between inter-State trade and the domestic trade of a State... may well be considered artificial and unsuitable to modern times. But it is a distinction adopted by the Constitution and it must be observed however much interdependence

The State Parliaments also have a concurrent power, preserved to them by sec. 107 of the Constitution (saving of power of State Parliaments), subject to territorial limitations, to make laws with respect to the same subject.

U.S. Constitution, Art.1, sec.8.

Wragg v. State of N.S.W. (1953) 88 C.L.R. at pp.385-386, per Dixon C.J.

may now exist between the two divisions of trade and commerce which the Constitution thus distinguishes...The economic interdependence of trade and commerce among the States with the domestic trade of a State cannot lead to a weakening of the legal distinction which the Constitution itself makes.

The doctrine of 'implied prohibitions' has been rejected by the High Court, and that of 'immunity of instrumentalities' accepted only in a very restricted form. To this extent, State 'reserved' powers have been left without explicit protection; they are open to potentially indefinite encroachment by federal law within the granted federal powers and their incidental penumbra. But on the other hand, neither have the Courts been at all ready to imply an exclusive quality for federal powers. The Court has persistently rejected arguments to attract federal control by virtue of the 'national' character of subject-matters, or by virtue of the social desirability or practical advantages of federal uniform regulation. The Court has been inclined

Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (1920) 28 C.L.R. 129.

As to the U.S. cases, see, e.g., Escanaba & L.M. Trans.
Co. v. Chicago, 107 U.S. 678, 2 S.Ct. 185, 188, 27 L.ed.442;
Gilman v. Philadelphia, 23 Wall 713, U.S.R.713. As to the
Australian cases, see, e.g., Newcastle and Hunter River
Steamship Co. Ltd. v. Attorney-General for the Commonwealth
(1921) 29 C.L.R. 357; R. v. Burgess; Ex parte Henry, (1936)
55 C.L.R. 608.

not to introduce considerations of de facto intermingling of national and local factors in the total economy into questions pertaining to the Australian 'federalism', and such intermingling is recognized when and only when - subjects directly falling within the scope of the federal commerce power happen to relate to intra-State trade and commerce as well. Moreover, the existence of this dichotomy is considered as making impossible any operation of the incidental power which would obliterate the distinction. Accordingly, the American doctrine of 'commingling' of inter-State and intra-State commerce has not been authoritatively adopted; its modified application to the realities of commerce activities has made the Australian position different from the U.S.'s not as a matter of degree but rather as a matter of basic principle.

The Court, in applying sec.109 of the Constitution,² evolved the doctrine known as the 'covering the field' - that is, once a law covering a certain subject-matter has

Wragg's Case, supra, at p.386, per Dixon C.J.

Sec.109: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

been passed by the Commonwealth Parliament under a legitimate power conferred by the Constitution, it confers supremacy upon the Commonwealth over State laws which will thus become inapplicable in proportion to the intention of the Commonwealth. However, this doctrine as such is not an original source of the legislative power, and its scope of application depends upon the scope of the principal power, thus putting the problem back in the interpretative approaches to the principal power itself.

With the recent expansion of Australian economy both in domestic and in foreign trade and commerce, more federal control has of necessity been placed on national commercial activity. At least insofar as aviation is concerned, the special position of the Australian economic geography in contrast with that of the United States, ¹ no

It is submitted that, in the United States, the small size and large number of the States and an economic situation in which inter-State economic activity is very much larger in volume than in Australia, in total and in proportion to intra-State activity, have together compelled the Courts to pay closer attention to the subject than in Australia (G. Sawer, Australian Constitutional Cases, third ed., pp.353-354). It may be that, as regards the utilization of rivers in Australia, some geographical and climatic factors, e.g., very few large navigable rivers running among the States and irregular rainfall on dry land throughout a year, have brought about the slightest awareness of the necessity of the 'commingling' doctrine.

longer appears to be a strong reason for the inapplicability of the American doctrines. The whole pattern of Australian domestic aviation is dominated by inter-State operations, 1 and international control has been more predominant than over any other forms of transport, owing mainly to the very nature of aviation -'internationality'. From an early stage of Australian aviation history, the development of aviation has been carried out with the strong guidance of the central government either by its financial subsidy to the industry or by its administrative control over aircraft and their operations. Various kinds of aviation facilities have been provided under that Government, and de-centralized administration can do more harm than good in this area. As compared with the use of the road, the highly technical control of air traffic must be integrated with important aerodromes as the cardinal points; these aerodromes are mostly owned or operated by

Exact data of the proportion of inter-State volumes of aircraft operations in the whole Australian aviation are not available, but, insofar as domestic air transport operations are concerned, the passenger short ton miles performed by the two biggest domestic air services, during 1963-1964 financial year, operating basically on inter-State routes occupies 80 per cent of the total air services (136.587 million miles). Cf. Fourth Annual Report by the Minister for Civil Aviation for year 1963-1964, Appendix 2.

the Commonwealth, and are scattered throughout the three million square miles of the continent, thus linking the net-like air-routes in the Australian air - a medium indispensable for inter-State and overseas air traffic as well as intra-State commerce by air.

Two other constitutional clauses are relevant to the federal commerce power in respect of aviation.

By sec.98 of the Constitution, the power of the Commonwealth Parliament to make laws with respect to trade and commerce 'extends to navigation and shipping', and to railways the property of any State. The meaning and scope of this provision has been discussed before the Court in many shipping cases, but the Court has been consistently of opinion, since the decision in S.S. Kalibia v. Wilson, that sec.98, being a mere explanatory provision, does not enlarge the ambit of the trade and commerce power conferred by sec.51(i). Hence, attempts to rely upon the proposition that the express 'extension' of the commerce power to 'navigation and shipping', considered as a distinct subject of legislation,

^{(1910) 11} C.L.R. 689.

See also Quick and Garran, The Annotated Constitution of the Australian Commonwealth, 1901, p.873.

provides the Commonwealth with the power to deal with 'intra-State' shipping have been unsuccessful.
Undoubtedly, this definition clause should now be read as if the subject of 'aviation' - a new traffic means which was advented after the date of the Constitution - were included in it. But it is unlikely that in that connection s.98 would be treated as obliterating the distinction between inter-Stateness and intra-Stateness inherent in s.51(i). This construction of sec.98, coupled with the limited scope of sec.51(i), stands in

Cf. Newcastle and Hunter River Steamship Co. Ltd. v. Attorney-General for Commonwealth, supra; Isaacs and Powers JJ.'s minority opinions in Australian Steamships v. Malcolm (1914) 19 C.L.R. 298, at pp.331 and 337, and R. v. Turner; Ex parte Marine Board of Hobart (1927) 39 C.L.R. 411, at pp.434-436, based upon historical context of sea commerce and good sense of the constitutional interpretation.

See E. Sikk, Commonwealth Legislative Power over Australian Coastal Shipping, 29 A.L.J., pp.104-108, arguing that until the date of operation of the Westminster Adoption Act, the Commonwealth had power to make laws with respect to intra-State shipping insofar as those laws could be described as a regulation of the coastal trade within the meaning of sec. 736 of the Merchant Shipping Act, 1894 The author of the article admits that the Commonwealth surrendered its power, if any, by adopting sec.5 of the Statute of Westminster, but suggests that the Commonwealth should resume the power by an appropriate repeal of the Statute of Westminster Adoption Act adopting sec.5, so that the Commonwealth Navigation Act 1912-1935 which was passed before the date of operation of the Adopting Act might be validated as suggested by a recourse to sec. 736.

sharp contrast to the U.S. position. There, even though no provision corresponding to sec.98 was contained in the Constitution, it was early established that the Congressional power over 'commerce' comprehends 'navigation' regarded as an inseparable subject of commerce. There also the nature of the air and airspace as a universal channel of communication has been emphasized; the Congressional power over navigation on navigable waters was given a very extensive interpretation on grounds connected with the practical necessities of sea and shipping, and similar grounds were even more cogent and readily applied in the aviation field.²

Gibbons v. Ogden (1824) 9 Wheat.1; Cooley v. Board of Port Wardens (1851) 12 How.299; The Lottawanna, 21 Wall 557.

See, esp. Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944) per Jackson J.; Re Veterans' Air Express Co., (1948) DC NJ. 76 F.Supp. 684; (CH) Aviation Cases 2, 14, 602-14, at 607. It was once urged in the United States that the power to control intra-State commerce in navigable waters, deriving from the provision vesting admiralty and maritime jurisdiction upon the federal courts (U.S. Constitution, Art.3, sec.2) under which Congress might pass regulatory acts to some extent could be made analogous to aviation. But the soundness of the analogy was seriously doubted in view of the decision that airplanes were not subject to maritime jurisdiction. Cf. A.L. Newman II, Aviation Law and the Constitution, Yale Law Journal, vol.39, 1929-1930, p.1114n. (continued on p. 52)

Sec.92 of the Constitution provides that 'on the imposition of uniform customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.' The federal commerce power has been analysed and expounded in connexion with sec.92 cases, which involve two important questions, viz., 'what is meant by "inter-State trade and commerce"?' and 'what constitutes an impairment of freedom in "inter-State trade and commerce"?' The first question will be taken up later when we examine the scope of sec.51(i). Various principles have been established by the Court with respect to the second question: two points appear to warrant mention here.

^{1 (}continued from p.51) Sec. 76(iii) of the Australian Constitution empowers the Commonwealth Parliament to make laws conferring original jurisdiction on the High Court in any matter of 'admiralty and maritime jurisdiction. This sub-section is construed to be limited in its operation to a grant of power to confer jurisdiction and an attempt in S.S. Kalibia v. Wilson, supra, to read it in the extended sense attributed to similar words in the United States as including a grant of legislative power relating to substantive law in admiralty and maritime matters has been rejected by the Court. Likewise, sec.5 of the Australian Constitution providing that 'the law of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth, is not a grant of power, but an extraterritorial extension of the operation of Commonwealth Acts, otherwise valid, to ships of the class mentioned. Cf. Wynes, The Legislative, Executive and Judicial Powers in Australia, third ed., p.89 and cases there cited.

First, it was arguable whether this clause does or does not bind the Commonwealth as well as the States; in McArthur (W. & A.) Ltd. v. Queensland, 1 it was held that the clause did not bind the Commonwealth, but since the decision of the Privy Council in James v. the Commonwealth the prevailing view has been that it does, unlike in the United States where the corresponding freedom is from State action only. The reason is the simple literal one that the federal commerce power as contained in sec.51(i) is expressly stated to be 'subject to this Constitution', of which sec.92 is part. In the U.S.A., the corresponding freedom is not express at all, but is an implication from the federal commerce power.

Secondly, in determining whether a law is invalidated by this immunity clause, the general test now adopted by the Court is that which was laid down by the Privy Council in Bank of N.S.W. v. Commonwealth³ (the Bank Nationalization Case) which substituted a new test for the one adopted by James' Case; the new test was reaffirmed in Hughes and

^{(1920) 28} C.L.R. 530.

⁽¹⁹³⁶⁾ A.C. 578; 55 C.L.R. 1.

^{(1948) 76} C.L.R. 1; (1949) 79 C.L.R. 497; (1950) A.C. 235.

Vale Pty. Ltd. v. N.S.W. which overruled earlier transport cases. The criteria are, first, whether the effect of the legislation is, in a particular respect, direct or remote, and, secondly, whether in its true character it imposes a burden or is merely regulatory. In applying these concepts, the Court has also attempted to analyse trade and commerce by reference to its essential characters or attributes, and its consequential, ancillary or incidental factors. Laws concerning those ancillary matters regulate commerce and are generally likely to be consistent with the freedom of trade, commerce and intercourse among the States, provided

⁽¹⁹⁵⁵⁾ A.C. 241; 93 C.L.R. 1.

E.g., O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (N.S.W.) (1935) 52 C.L.R. 189; Riverina

Transport Pty. Ltd. v. State of Victoria (1937) 57 C.L.R.

327; McCarter v. Brodie (1950) 80 C.L.R. 432.

Cf. Hughes and Vale Pty. Ltd. v. State of N.S.W. (No.2) (1955) 93 C.L.R. 127. The Court gave the following examples of those ancillary matters in the road transportation: 'The hours during which a journey is made, what equipment should be carried for emergency or for handling or securing the goods, the axle-weight or the wheel-weight of the laden vehicle, the relief on a long journey the driver should have, the height or width of the load, the number and position of lights to show the width or the overhang, the crowding of vehicles upon a given route incapable of carrying so many and the means and method of limiting the traffic, the relations within New South Wales of the carrier to the consignor and consignee, the records to be kept and documents to be used, the receipt, safe carriage and delivery of goods.' (at p.163).

that they are not used or do not operate to impede or restrict the activity itself.

Language similar to the above has always been used in the cases on sec.92. What distinguishes the Bank Nationalization Case and Hughes & Vale Case from the earlier transport cases is the point of view from which the notions of prohibition and regulation were approached. In the earlier cases, the approach was collectivist and concerned with the trade as a whole; consequences for individuals were regarded as 'incidental'. Under the new approach, the individual natural or legal person is regarded as having a right to engage in interstate trade and commerce, and laws which either stop him from doing so or impose burdens beyond the needs of reasonable regulation are prima facie invalid.

There has only been one aviation case having a <u>direct</u> bearing on this clause; it is the <u>A.N.A. Case</u>, where the question was whether the <u>Commonwealth Australian National</u> <u>Airlines Act</u> 1945, purporting to confer on the Commission, created under the Act to conduct inter-State and

Australian National Airways Pty. Ltd. v. Commonwealth (1945) 71 C.L.R. 29; 71 C.L.R. 715.

No.31 of 1945.

Territorial airline services for the transport by air for reward of passengers and goods, a monopoly in respect of such services, and the licensing regulation of the Air Navigation Regulations made under the Commonwealth Air Navigation Act 1920-1936, Good Commonwealth Air Navigation Act 1920-1936, Good Commonwealth Air Navigation Act 1920-1936, Good Commonwealth Air Navigation Act 1920-1936, Good Commonwealth Air Navigation Act 1920-1936, Good Commonwealth Air Navigation Act 1920-1936, Good Commonwealth Air Navigation Act 1920-1936, Good Commonwealth Air Navigation Act 1920-1936, Good Commonwealth Air Navigation Act 1920-1936, Good Commonwealth Air Navigation National Air Navigation National Air Navigation Act 1920-1936, Good Commonwealth Air Navigation National Air Navigation Navigation National Nation

^{&#}x27;Inter-State airline service' means a service providing for the transport by air, for reward, of passengers or goods and operating from one place in Australia to another place in Australia and having scheduled stopping places in two or more States; 'Territorial airline service' means a service (not being an inter-State airline service) providing for the transport by air, for reward, of passengers or goods and having a scheduled stopping place in a Territory of the Commonwealth (sec.4). If the service had scheduled stopping places in more than one State it would be an inter-State airline service and not a Territorial airline service (71 C.L.R. at p.64, per Latham C.J., and at p.102, per Williams J.)

S.R. 1937 No.81 - 1940 No.25. 3 No.50 of 1920 - No.93 of 1936.

^{&#}x27;Adequate airline service' means - (a) an inter-State airline service which is adequate to meet the needs of the public for inter-State transport by air between scheduled stopping places of the service; or (b) a Territorial airline service which is adequate to meet the needs of the public for transport by air between scheduled stopping places of the service of which at least one is within a Territory of the Commonwealth (sec.4).

the licensing authority should not issue a licence under the Regulations to any other person than the Commission unless the licensing authority was satisfied that, having regard to the airline licences operated by the Commission, the issue of a licence was necessary to meet the needs of the public with respect to inter-State airline services or territorial airline services (sec.47); and that a person should not enter into a contract for the transport of any person or goods in the course of any prescribed inter-State airline service or territorial airline service operated by any person other than a person holding an airline licence in respect of that service not being a licence which was inoperative by virtue of sec.46 of the Act (sec.49).

All of the Justices distinguished the earlier transport cases on the grounds that there was a great difference between co-ordination and regulation and simple prohibition, and held the monopolizing provisions invalid as contravening sec.92. With respect to the validity of the provisions of the Act monopolizing in the Commonwealth Territorial air services, more detailed discussions will be made later, ¹ and it is sufficient

See Chapter IV, post.

here to say that those provisions, insofar as they related to Territorial airline services, were held valid within the powers conferred by sec.122 of the Constitution.

Another sec.92 question in this case was whether reg.79(3) of Part VII of the <u>Air Navigation Regulations</u> was valid. Reg.79(3) provided that 'the Director-General may issue a licence (in these Regulations referred to as 'an airline licence') upon such conditions, in addition to compliance with these Regulations, as the Director-General considers necessary or he may refuse to issue the licence.' The effect of this provision was to set the Director-General absolutely at large, with the result that he could exercise his discretion upon any ground whatever. The vesting of such a discretion to control inter-State transportation was held by all Judges invalid as inconsistent with sec.92.

The A.N.A. Case was decided before the <u>Banking Case</u> and <u>Hughes and Vale Case (No.1)</u>. In effect, the Court's conclusion was no more than that absolute prohibition of inter-State commerce by air was not 'regulation' and was

Part VII applied to inter-State trade and commerce and to the Territories by virtue of reg.6.

⁷¹ C.L.R. at p.67, per Latham C.J.

therefore contrary to sec.92; nevertheless, an <u>obiter</u> dictum of Latham C.J. touched the core of the problem:

The Act is a prohibition...of such services, and that prohibition is quite independent of any considerations relating to safety, efficiency, air-worthiness, &c., which otherwise might have been relied upon as the basis of an argument that the statute regulated such services in the sense of introducing regular and orderly control into what otherwise might be unregulated, disorderly, possibly foolishly competitive, and therefore inefficient services. (Italics added)

Did this remark suggest the possible extent to which the Commonwealth could regulate the economic aspects of inter-State air transport by introducing a co-ordination and rationalization scheme, without infringing sec.92? If so, it might be criticized as having been affected by the principles of <u>earlier</u> transport cases, but it can be read as being quite consistent with the Privy Council's view in the <u>Banking Case</u> that, in considering the meaning of 'regulation', every case must be judged on its own facts and in its own setting of time and circumstances, in regard to some economic activities and at some stage of social development. However, the <u>Hughes and Vale</u> Cases and later transport cases established the more

⁷¹ C.L.R. at p.61.

⁷⁹ C.L.R. at pp.640-641.

As to these cases, see Wynes, op.cit., p.370, et seq.

restrictive view that any governmental control over the licensing system must be truly regulatory (e.g., safety considerations), and must not interfere with freedom to carry out the very activity constituting inter-State trade.

Since the decision in the A.N.A. Case, the federal licensing regulations, insofar as they relate to inter-State operations, have limited the Director-General's discretion to safety considerations. By the new regulations in 1964, federal licensing control was drastically extended to intra-State operations; the validity of this was upheld later, except for one purporting to give exclusive operation to federal licences. But the conditions to be imposed upon inter-State operators in the use of their aircraft, as distinct from right to perform the operation, are still limited to those relating to the safety of operations so as to accommodate the licensing system to sec. 92. An inevitable result is that, while the Director-General's discretion is limited only to safety considerations as to inter-State operations, it may not be so limited as to other classes

Airlines of N.S.W. v. State of N.S.W. (No.2), 38 A.L.J.R. 388.

Reg.199(2).

has there no direct operation. The conditions to be imposed upon purely intra-State services are limited to 'matters concerned with the safety, regularity and efficiency of air navigation and to no other matters'.

The words 'safety, regularity and efficiency of air navigation' were probably introduced in the domestic legislation pursuant to the obligation imposed by the Chicago Convention, but the Court, having construed the treaty words in a narrow sense and rejected the Commonwealth's intrusion into State commerce power, restricted those implicative expressions to the safety of flight operations.

In R. v. Anderson; Ex parte IPEC-Air Pty. Ltd., 2 where the company's application for permission to import five Douglous DC.4 aircraft to conduct an inter-State air freight service was refused by the Director-General of Civil Aviation, the company contended before the High Court inter alia that the refusal of permission involved a contravention of sec.92 of the Constitution. By reg.4(2) of the Customs (Prohibited Imports) Regulations made

Reg.199(4). 2 (1965) 39 A.L.J.R. 66.

under the Customs Act 1901-1963, the importation into Australia of the goods (specified in the Regulations) was prohibited unless the conditions, restrictions or requirements to the description of the goods including aircraft were complied with. It was specifically provided that the importer should produce to the Collector of Customs the permission in writing of the Director-General of Civil Aviation to import the goods. Apart from questions whether the refusal of the company's another application for a charter licence for its inter-State operations was valid under the licensing provisions of the Air Navigation Regulations, 2 and whether the refusal of permission was exercised within the scope of the Director-General's administrative functions, 3 the Court held per curiam that the connexion between the refusal of import permission and the prevention from engaging in inter-State trade was too remote to make the refusal obnoxious to sec.92 of the Constitution. According to the Court's opinion, the operation precluded by sec.92 is an operation with reference to or in consequence of or

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^{1901 (}No.6)-1963 (No.48).

Regs. 197 and 199(2).

See Chapter VII, post.

restricting or burdening something which itself forms part of inter-State trade, commerce or intercourse or in itself supplies some element or attribute essential to that conception; 1 it will not be enough that it affects something which, because it is sine qua non to the existence of some subject of freedom which sec.92 guarantees, has a consequential effect on what might otherwise have been done in inter-State trade. 2 The Director-General's action is a refusal to lift a prohibition upon the doing of something (importation) which is itself altogether apart from inter-State trade, and the conclusion would be the same even if it had been the imposition of a prohibition instead of a refusal to lift a prohibition. 3

One point to add to the effect of sec.92: - the question of 'border hopping' which is described as

³⁹ A.L.J.R. 66, at p.71, per <u>Kitto</u> J., at p.72, per <u>Taylor</u> and <u>Owen</u> JJ.

Grannall v. Marrickville Margarine Pty. Ltd. (1955) 93 C.L.R. 55, at p.78. See also Wragg v. N.S.W. (1953) 88 C.L.R. 353, at pp.71, 72, 78, 79.

³⁹ A.L.J.R. 66, at p.71, per <u>Kitto</u> J. <u>Taylor</u> and <u>Owen</u> JJ. referred to the point that it was not possible to impugn the regulation by an investigation of the reasons for its enactment or the motives which called it forth (at p.72).

'deviating from the normal course of journey in order to cross and then immediately recross a State border in the expectation, or hope, that this exercise will convert what would otherwise be an intra-State transaction into an inter-State one protected by sec.92 of the Constitution. 1 The question has been raised in relation to road transport cases, but, in view of the factual differences between the use of road and air, the problem in aviation will not take an identical form. A modern aircraft flies through the universal airspace which enables aircraft operations to deviate from the normal course with far more freedom than in road transport. An aircraft operates in the short duration of journey with tremendous speed, so that the crossing and recrossing of States' borders may be performed in the twinkling of an eye. Hence the test adopted by Harris v. Wagner to subdivide the whole journey into several sections is hardly applicable to aviation cases, where there seems to be only one question to satisfy

P. Brazil, Border Hopping and Section 92 of the Constitution, 34 A.L.J. p.77.

Naracoorte Co. Pty. Ltd. v. Butler (1956) 95 C.L.R. 455; Golden v. Hotchkiss (1959) 101 C.L.R. 568; Beach v. Wagner (1959) 101 C.L.R. 604; Harris v. Wagner (1959) 103 C.L.R. 452.

^{(1959) 103} C.L.R. 452.

common sense: Is the whole journey from the beginning to the end intra-State or inter-State? An air journey linking aerodromes of its departures and destination within a State, a part of which is performed merely by traversing over other State's territory, may generally be categorized as 'intra-State', except, perhaps, when the sole object of crossing and recrossing is also to carry out the operations, e.g., a sight-seeing flight. The rule of the road cases is that if the crossing and recrossing of the border is neither a necessary nor natural and appropriate means of carrying out the operation, nor an ordinary or usual incident of the operation, the carriage is not as a whole protected by sec. 92; this rule may well be applied by analogy to aviation, provided that what is necessary, natural, appropriate, etc., is determined in the light of factual circumstances of the aircraft operation. When the journey is interrupted by landing on an aerodrome outside the State where the places of the departure and destination locate, the question becomes The Commonwealth Civil Aviation (Carriers more complex. Liability) Act 1959-1962 applies to the carriage where,

No.2 of 1959, as amended by No.38 of 1962.

under a contract of carriage, the carriage is to begin and end in the one State or Territory of the Commonwealth (whether at the one place or not) but is to include a landing or landings at a place or places outside that State or Territory, and such a carriage is deemed to be carriage between the place where the carriage begins and that landing place, or such one of those landing places as is most distant from the place where the carriage begins, as the case may be. This means in turn that the Act (Part IV-Domestic Carriage) does not apply to carriage which has the place of departure and the place of destination in the same State but merely passes over the other State's or Territory's land. 2 In such a case, a contract of carriage including a landing place outside the State is a factor to determine its inter-State character, and likewise various other factors, e.g., fuel supplying, embarkation, disembarkation, etc., as well as 'necessary' and 'ordinary' factors, will become relevant. As to the operation by two different border hoppers, precedent is provided by a road case³ where it

Sec.27(3).

<u>Semble</u>, the scope of the Act could be extended to the border-hopping carriage for the sight-seeing purposes if so contracted by the parties. Cf. Chapter VI, <u>post</u>.

Naracoorte Co. Pty. Ltd. v. Butler (1956) 95 C.L.R. 455.

was held that such an operation of carriage performed by successive carriers was protected by sec.92.

Apart from those border hopping situations, the continuance of 'inter-State' commerce by air must also be determined by a number of factual factors; an air transport activity between two points within a State may in a particular instance be of an inter-State nature, 1 as for example, a successive carriage by several aircraft operators which is regarded by the parties as a single operation whether it has been agreed upon by a single contract or by two or more contracts, is of an inter-State nature, even if some part of the carriage is performed within a State. 2

'Aviation' as a subject of legislation includes various subject-matters relating not only to the business of carrying people and goods but also to aircraft, flying-personnel, and the equipment and service staff incidental thereto, - which together constitute the whole

Cf. McArthur's Case, supra, at p.549.

Sec.27(4) of the <u>Civil Aviation (Carriers' Liability) Act</u> 1959-1962, <u>supra</u>. Another example may be an air transport activity extending to two or more States where a part of the carriage is connected with other forms of transportation (e.g., road or railway) between places within a State, and the whole journey regarded by the parties as a single operation.

system of administration of civil aviation. The scope of such aviation matters to be dealt with by the federal legislature under sec.51(i) of the Constitution is determined by the test whether they are sufficiently connected with trade and commerce inter-State or overseas.

Again by contrast to the U.S. Supreme Court's standpoint that in cases where there is transportation the element of profit is not necessary in order to constitute 'commerce', 1 the Australian Court has attached great importance to the nature of movement of commodities for 'reward' or for 'profit'; behind this view exists a strong argument that the word 'intercourse' used in sec.92 is not to be found in sec.51(i), and therefore the federal commerce power does not include '(non-commercial) intercourse'. 2 However, the gap between the wide definition of the general concept of 'commerce' adopted early in McArthur's Case 3 and the tendency to

Cf. M. Ramaswamy, The Commerce Clause in the Constitution of the United States, pp.289-90.

Cf. P.D. Phillips, The Trade and Commerce Power; Essays on the Australian Constitution, second ed., 1961, Chapter V, p.134.

²⁸ C.L.R. at p.547. In this case, the meaning and content of the words 'trade and commerce' were defined broadly as 'the class of relations between mankind which the world calls "trade and commerce", and also as 'all the commercial dealing and all the accessory methods in fact adopted to initiate, continue, and effectuate the movement of persons and things, tangible or intangible, from State to State.'

associate commerce with pecuniary gain has been considerably reduced in the later judicial trend. was not until the A.N.A. Case in 1945 that the Court advanced the view that transportation (including transportation by air), for reward, itself was included in the category of 'commerce', as against the argument that transportation was only a means by which such commerce could be conducted. Dixon J. (as then he was) said that there was not much covered by the word 'intercourse' that fell outside the commerce power.2 But no judicial authority deals with the question whether transport activities unrelated to 'reward' (e.g. 'joy flying' by private aircraft) across the State borders should be included in inter-State 'commerce' as such. Although no question of the relation between 'commerce' and 'aviation' was directly raised in the first Henry Case, it was pointed out that the expression 'air navigation' covered a much wider field than the concept of 'trade

Cf. A.N.A. Case, supra, and Banking Case, supra.

⁷¹ C.L.R. at pp.81-83.

As to the U.S. cases on this point, see Phillips, op.cit., pp.133-4.

and commerce'. The A.N.A. Case made it clear only that the Commonwealth had power under the commerce power to create instrumentalities to conduct inter-State air services carrying persons and goods for reward, irrespective of the question whether the persons or goods carried were being or to be carried for the purposes of trade and commerce independently of the carriage itself. The Airlines of N.S.W. Case (No.2) is an authority for the general proposition that at least as to aviation regulations in the interests of air safety, all classes of aircraft operations came within the competence of the federal legislature. There are some uncertain areas; for example, a question arises as to whether the subject of liability of operators for ground damages is within the competence of the Commonwealth Parliament under the 'commerce' power, even in relation to interstate flight, since the regulation thereof would directly affect State competence over injured persons or damaged property. Meagreness of judicial authorities pertaining to aviation problems compels us to be speculative on this point, probably by referring to other 'commerce' cases and, in particular, transport cases, but, in view of the nature of

⁵⁵ C.L.R. at p.672, per Dixon J.

aviation as an independent branch of national economic activity having countless relations with almost every aspects of human life, in which highly technical and throughout control must be maintained in perfect order, any microscopic characterization of subject-matters arising from that activity would entail inefficiency in civil aviation development.

A grant of legislative power, as in sec.51(i), carries with it a grant of power over all matters ancillary and incidental to the subject-matter of the power. But constitutional prohibitions like sec.92, where freedom is guaranteed in respect only of acts, matters, or things which fall squarely within inter-State trade and commerce, has been interpreted as not having such a wide incidental scope. From this differing approach demanded by the different operative scope of sec.51(i) and sec.92, it would follow that the commencement, continuance and termination of the protection of sec.92 are not necessarily the same as those of the legislative reach of sec.51(i).

This has been recognized by the Court, and is reinforced either by the proper interpretation of the words 'with respect to', which is applicable only to sec.51(i), or by the restrictive interpretation of the unusual constitutional terms, 'absolutely free', used in sec.92. See, further, R. Anderson, Recent Trends in the Federal Commerce Power and Sec.92, A.L.J. vol.29, 1955-6, p.277; K.H. Bailey, Fifty Years of the Australian Constitution, 25 A.L.J., 1951-2, p.314.

The interpretative mode of the Australian Court to sec.51(i) problems has been to fix a central or essential concept of 'commerce' under the influence of sec.92, and include associated features to such an extent as are reasonably necessary for achieving the main object of the guarantee. But the scope of the federal commerce power depends largely upon the question how far those incidental or ancillary features of the inter-State and overseas commerce are to be included in the granted power. The effect of the incidental power conferred upon the Commonwealth Parliament by sec.51(xxxix) of the Constitution, whether it be regarded as being implied in the grant of power itself or conferred expressly under the placitum, operates in two inter-related aspects; one relates to the extent to which the main power can comprehend various subject-matters relevant to the main subject of the power, such as things or acts other than 'aviation' (e.g., sale of liquor' in aircraft or on aerodromes), and the other relates to the permeability of the power into 'intra-State' commerce fields.

A tendency to take a broad view of 'commerce' is shown by the Court's decisions in <u>Huddart Parker Ltd. v.</u>

<u>Commonwealth</u> (and following shipping workers' cases) and

^{(1931) 44} C.L.R. 492.

O'Sullivan v. Noarlunga Meat Ltd., 1 though by no means to the extent shown in the United States. 2 In the former case, a Commonwealth enactment giving preference to unionists among persons offering for work in loading or discharging cargo or fuel for the purpose of oversea or inter-State transport was held to be a law with respect to trade and commerce with other countries and among the States. In the latter case, the validity of the Commerce (Meat Export) Regulations of the Commonwealth, constituting an extremely elaborate and detailed set of requirements relating to site, materials of construction, arrangement, dimensions and many other items, which must be complied with before registration could be obtained of premises to be used for the slaughter of stock for export, was upheld under the federal commerce power.4 general conclusions may be drawn from these decisions. Firstly, they reject a restricted view based upon a

^{(1954) 92} C.L.R. 565.

As to the U.S. trend since 1936, see Phillips, op.cit., pp.137-8.

See, esp. <u>Dixon</u> J.'s view, 44 C.L.R. at pp.508-516.

See, esp. <u>Fullagar</u> J.'s view, 92 C.L.R. at pp.586-597.

See e.g., Starke J.'s view (a dissenting opinion) in the Huddart Parker Case, 44 C.L.R. at 507. It could be argued that the shipping case was influenced by the history of the Imperial Merchant Shipping Acts, for which there is no analogy in the aviation field.

sharp distinction between 'commerce', conceived solely as the movement of goods in an actual course of commercial operation, and acts, facts or things at stages before or after such operation begins or ends. Secondly, they establish that once a subject of law is treated as a part of commerce between States or with other countries, is objectively identified as being done or carried out for 'inter-State' or 'over-seas' commerce, then the subject is in its entirety open to the impact of Commonwealth law, irrespective of the relations which may exist between the subject and non-commercial matters, and even though the impact of Commonwealth law may be thought adverse to the In a more recent case,² commerce rather than beneficial. the Court was of opinion that the federal commerce power was not restricted to the protection or development of inter-State or overseas trade and commerce, or the benefit of those engaging therein, but extended, subject only to express limitations such as s.92, to forbidding inter-State or overseas trade or commerce itself or anything

Cf. <u>D'Emden v. Pedder</u> (1904) 1 C.L.R. at p.110: 'Every power and every control the denial of which would render the grant itself ineffective.'

Redfern v. Dunlop Rubber Australia Ltd. (1964) 37 A.L.J.R. 413.

occurring in or directly affecting such trade or commerce. 1

However, on the question of permeation of federal commerce power into intra-State commerce, the judicial trend to expansive interpretation is less marked.

Elements of the power are decomposed and characterized so as not to admit an indefinite pursuance of a constitutional power in a way which might threaten a predetermined federal distribution of competence. Aviation cases are no exceptions to this trend.

In 1934, one Henry Goya Henry was charged before a Court of Petty Sessions of N.S.W. on an information laid by an officer of the Civil Aviation Branch of the Department of Defence, that he flew in contravention of the Air Navigation Regulations without being licensed in the prescribed manner. His licence had been suspended by the civil aviation authorities two days previously for a period of 14 days. None of the flights went beyond a short distance from the Mascot Aerodrome, Sydney, N.S.W., nor beyond the boundaries of the State of N.S.W. He was convicted, and an appeal came before the High Court.

³⁷ A.L.J.R. at p.419, per Menzies J.

Although the arguments in this case centered mainly around questions of the external affairs power, which are discussed later, all of the Judges rejected the argument that Commonwealth aviation legislation, i.e. the Air Navigation Act 1920 and the Regulations made thereunder, purporting to control air navigation generally throughout the Commonwealth, could be supported under the federal commerce power. Having relied upon earlier shipping cases, the Court refused to introduce in aviation fields such considerations as 'wisdom', 'expedience', 'same air', 'commingling' or other similar notions, and put an emphasis upon the express constitutional distinction between the power over inter-State and overseas commerce and the power over intra-State commerce, however much inconvenience might be resulted from maintaining such The judgment of the case did not go further than this general proposition insofar as the commerce power was concerned; hence, much uncertainty remained as to the scope of federal commerce power in relation to aviation. Latham C.J. did not give a flat denial of the possibility of intermingling of the two divisions of trade and commerce; he said:2

See, Chapter III, <u>post</u>.

⁵⁵ C.L.R. at p.629.

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

A similar observation was made by <u>Evatt</u> and <u>McTiernan</u> JJ. in their joint judgment. ¹ It appears, however, that those remarks might well have been taken as much the same as the view that the domestic commerce of a State could be affected only to the extent necessary to make effectual the exercise of the federal power in relation to commerce among the States. The application of this view depends wholly upon how one sees what is the 'direct or proximate relationship' between inter-State aviation and intra-State aviation in the light of factual circumstances. Probably, it would have been still premature to talk about the complexity and integration of national economic activity as one can in the 1960's.

Therefore, it is desirable to repeat here what constitutes the concept of 'inter-State (or foreign)

⁵⁵ C.L.R. at p.677.

trade and commerce.' The concept grew out of a simple notion of 'crossing' of things or acts across the States' borders (or the Australian territorial limits). Australian Court defined adequately the term long ago in McArthur's Case: 1 'All the commercial dealing and all the accessory methods in fact adopted to initiate, continue, and effectuate the movement of persons and things, tangible and intangible, from State to State.' In the United States, the general concept of 'commerce' is not much different from the Australian one, but the judicial minds have at least since 1936 adopted a more practical approach to the basic concept. There, activities which may be intra-State in character when separately considered but have such a close and substantial relation to inter-State commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions are placed under the federal commerce power.² In determining such a 'close' and 'substantial' effect upon the inter-State 'commerce' grasped as a flow of acts, things, etc. among States which comprise every features affecting the stream

²⁸ C.L.R. at p.547.

Cf. e.g., Schechter Corporation v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947.

Relation Board v. Jones & Laughlin Steel Corporation, 1 took judicial notice of the magnitude of a steel enterprise in the light of the whole national economy, and upheld the validity of the provisions of the federal National Labor Relations Act which in effect safeguarded the right of the steel company's employees to self-organization and freedom in the choice of representatives for collective bargaining because of the serious effect upon inter-State commerce of a stoppage of those operations by industrial strife.

Similarly the aviation industry can be regarded as a complex whole whose key features are inter-State. The overwhelming volume of the international and inter-State air transport activities have prescribed the industry's pattern in Australia, to such an extent that operations on intra-State routes can be regarded as extension lines of such nation-wide air networks. Under such circumstances, passengers and cargo carried on intra-State routes may well be considered part of the flow of those coming from or destined for other States or overseas. As in many other

^{(1937) 301} U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352.

aviation countries, the restricted activities of aircraft manufacturing industry in Australia oblige the Australian airliners to depend on the overseas supply of aircraft designed and constructed by a small number of manufacturing countries, such as, U.S.A., U.K. and France; similarly with aircraft equipment and aircraft fuel. Intra-State operations must depend much on the facilities provided primarily for international and inter-State aviation purposes, which are owned, operated or heavily subsidized by the federal Government. Out of 11 domestic airline operators engaged either in inter-State or in intra-State services, only four companies are independent of the business organizations having a wide inter-State operations or the Commonwealth Government-owned establishment. But in the Airlines of N.S.W. Cases, discussed below, where the Commonwealth's competence on economic control over intra-State aviation was questioned, the Court did not take judicial notice of these practical features of 'commerce' by air in Australia. Instead it adhered to the long-established view that the economic interdependence of inter-State commerce with the intra-State commerce could not lead to a weakening of the constitutional dichotomy. Nor did the plaintiff base his arguments upon those facts, probably because he

despaired of the Court adopting such an argument in view of its traditional approach to the problem.

As a result of the decision in the first Henry Case, the Air Navigation Act was amended by omitting the words 'in the Commonwealth and the Territories' and inserting in their stead the words - '(a) in relation to trade and commerce with other countries and among the States, and (b) within any Territory of the Commonwealth! (sec. 4). The scope of the regulation-making power as defined in the Act has since been modified on several occasions, but the general proposition in respect of the federal commerce power which was established in 1936 has been maintained. The assumption was that any attempt to go beyond that limit would render a Commonwealth law ultra vires, unless supported by other legislative sources. In the meantime, uniform State legislation was adopted by the States' Parliaments so as to subject all air navigation within Australia to the Commonwealth Regulations. Because of the practical results of this co-operative system of Commonwealth and State legislative powers, the Commonwealth for long refrained from further testing of its constitutional powers in this field. At the time of enactment of the uniform State Air Navigation Acts the Commonwealth's requirements were limited to licensing of

personnel and airworthiness and registration of aircraft. When the Commonwealth amended its regulations to require a licence for air service operations, it became apparent that the formula of the uniform State Acts gave the Commonwealth administrative control over economic as well as safety aspects of intra-State operations. Because of the economic effect of air services on road and rail, some States took measures to retain their politico-economic control over intra-State air services operations either in the uniform Acts or related transport legislation. 2 In the Airlines of N.S.W. (No.1) Case, the question arose as to whether there was an inconsistency under sec. 109 of the Constitution between such a co-ordination legislation of a State and licensing provisions of the Commonwealth Regulations made under the Air Navigation Act 1920-1960.

Airlines of N.S.W., the plaintiff, owned beneficially by Ansett Transport Industries Ltd. running one of the two biggest domestic airliners (Ansett-A.N.A.) in Australia, were operating aircraft licensed by the

Cf. Poulton, Notes on Air Law, 1955, p.11.

As to those States' legislation, see Chapter VII, and Appendix II, post.

^{(1964) 37} A.L.J.R. 399.

Commissioner for Motor Transport for the carriage of passengers and goods upon routes within New South Wales, pursuant to the licensing provisions of the State Transport (Co-ordination) Act (N.S.W.) 1931-1956, which required, inter alia, any person who operated an aircraft 2 otherwise than in the course of and for the purposes of inter-State trade to hold a licence for the aircraft (sec. 12), and authorized the limitation of a licence to specified routes or a specified area (sec. 15). Additionally, the plaintiff was the holder of an 'airline licence' 3 issued by the Director-General of Civil Aviation pursuant to regs. 198 and 199 of the Commonwealth Air Navigation Regulations. Reg. 198 forbade the use of aircraft in regular public transport operations except under the authority of and in accordance with a licence (in the Regulations referred to an 'airline licence') issued by the Director-General. Reg. 199(2) provided: 'Where the proposed service is an interstate service, the Director-General shall issue an

No.32 of 1931 - No.16 of 1956.

^{&#}x27;Aircraft' was covered under the definition of 'motor vehicle' and 'public motor vehicle' (sec.3(1)).

The Commonwealth licence which was necessary for the inter-State journey contained a condition that the licence was issued subject to compliance with the provisions of the State transport legislation insofar as was applicable.

aerial work, charter or airline licence, as the case requires, unless the applicant has not complied with, or has not established that he is capable of complying during the currency of the licence with, the provisions of these Regulations, or of any direction or order given or made under these Regulations, relating to the safety of the operations.' In October, 1961, the State's Commissioner announced its decision to reallocate air routes within New South Wales to increase East-West Airlines' share of passenger traffic so as to reduce the plaintiff's share pro tanto. The plaintiff issued a summons in the High Court, seeking a declaration that it was entitled to carry on its services without obtaining a licence or permit under the State Act, and the dispute was referred to the Full High Court for decision.

The whole Court upheld the validity of the licensing provisions of the State Act as being not inconsistent with the Commonwealth legislation, on the grounds that the Commonwealth's licensing regulations were governed

by reg.6(1) (application of the Regulations) which did not generally apply to air navigation within a State, and therefore having no application to the use of aircraft in public transport operations within a State in intra-State air navigation outside 'controlled airspace'. The argument that the field to be occupied by the Commonwealth laws dealing with aviation was so wide that the operation of State laws in any way touching aircraft or their operational use for any purpose solely within the State might be excluded, was flatly rejected. In considering the more specific contention as to whether the provisions of the State Act were inconsistent with the provisions of the Commonwealth Regulations, pursuant to sec.109 of the Constitution, three Judges referred to the legislative

Reg.6(1): 'Subject to the Regulations the Regulations apply to and in relation to (a) international air navigation within Australian territory; (b) air navigation in relation to trade and commerce with other countries and among the States; (c) air navigation within the Territories; (d) air navigation to or from the Territories; and (e) air navigation in controlled airspace which directly affects, or which may endanger, the safety of persons or aircraft engaged in a class of air navigation specified in paragraph (a), (b) or (d) of this subregulation.'

^{&#}x27;Controlled airspace' was defined as meaning 'an airspace or an aerodrome and the airspace in its vicinity designated by the Director-General in pursuance of reg.95 of these Regulations.'

³⁷ A.L.J.R. at p.407, per Taylor J.

intention discoverable in the Commonwealth legislation, but they could not find it to be exclusive upon the matter of intra-State trade. However, the Court did not take the course of saying that if the Regulations did apply to intra-State air navigation, there would be an inconsistency between the Transport Co-ordination Act in relation to aircraft and the Regulations. Two important dicta were expressed with respect to the possibility of the Commonwealth's taking over legislative fields then retained by the States; one suggested the application of the external affairs power only, and the other mainly the application of the external affairs, commerce, and incidental powers. For the present purpose, the latter dictum by Windeyer J. deserves citation here:

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. The

³⁷ A.L.J.R. at p.407, per <u>Taylor</u> J.; at p.411, per <u>Menzies</u> J.; at p.412, per <u>Windeyer</u> J.

Cf. a review of the case made by Barwick C.J. in the Airlines of N.S.W. Case (No.2).

³⁷ A.L.J.R. at p.402, per <u>Dixon</u> J.

³⁷ A.L.J.R. at pp.411-412, per Windeyer J.

need for the Australian nation to perform its international obligations under treaties and conventions relating to air navigation, together with the trade and commerce power, suffice, in my view, to bring the subject within the legislative power of the national Parliament. Some ancillary matters involved in the effective control of air traffic fall also within the scope of other powers given by s.51 of the Constitution.... I see no reason for confining the interest and concern of the Commonwealth with air navigation to areas of the superincumbent air that have been declared to be controlled air space. As I see it, Commonwealth power extends to the control of the movement of all aircraft in all air space above Australia and its territories.... The proper regulation in the interests of safety of the operations of interstate and overseas airlines, and the due execution by Australia of the international obligations it has accepted, may well make it desirable that the one authority should exercise sole control of all movement of aircraft in the air and of matters connected with such movement, that is to say of all matters connected with how aircraft may be used.

A petition by Airlines of N.S.W. for special leave to appeal against the High Court decision was dismissed by the Judicial Committee of the Privy Council in July, 1964. In October, the Commonwealth Government amended the Regulations so as to apply them as Commonwealth law to all classes of air navigation - international, inter-State and intra-State, by adding to reg.6(1) a paragraph (f) which, in the context of the other paragraphs of that regulation as amended, purported to make the Regulations as a whole apply to intra-State air navigation. It also

established a Commonwealth licensing system including intra-State air transport services, by adding reg. 200B which purported to authorize a person holding an airline licence under the Regulations to conduct, in accordance with the licence and with the laws of the Commonwealth, the public air transport operations to which the licence referred, thus making such conduct of operations not unlawful by reason of anything in the laws of a State. Regs. 198 and 199 were made applicable to intra-State air transport services by force of reg.6(1)(f). Two other amendments were made to the regulations by the addition of two new regulations, reg. 320A and reg. 320B, which related respectively to landing and taking off on or from Commonwealth-owned aerodromes without the permission of the Director-General and to flight in controlled airspace without the like permission. Apparently, the Commonwealth Government relied heavily upon the implications in dicta, mentioned above, that suggested the Commonwealth could assume greater control of aviation. Immediately after this, the N.S.W. Government struck back with emergency legislation, i.e., the Air Transport Act 1964, amending the Transport Co-ordination Act by making that Act no longer applicable to carriage by air of passengers and goods, and by providing massive fines for

persons and companies conducting intra-State services without a N.S.W. Government licence. The State Act prohibited a person from the carriage by aircraft of passengers or goods for reward or in the course of business within N.S.W. unless (a) the aircraft was licensed under the Act, (b) the carrier was the holder of a licence, and (c) the carriage was over a route in respect of which the licence had been granted (sec. 3). It provided for the manner in which applications for licences might be made and the Commissioner for Motor Transport was authorized to grant or refuse any application for a licence (sec.5). In deciding whether to grant or refuse a licence and the conditions, if any, subject to which it should be granted, the Commissioner was directed to have regard to considerations concerned with the rationalization of transport services within the State (sec.6). The plaintiff's application for licences for its operations on a route between Sydney and Dubbo (N.S.W.) was refused under the State Act, while the East-West Airlines' application for federal licences for its operations on the same route was refused by the federal Director-General under the Commonwealth Act. Hence, the plaintiff commenced the suit before the Court, asking a declaration that the Commonwealth Regulations

and the State Act were inconsistent and the former prevailed: Airlines of N.S.W. (No.2) Case.

The Court examined at first the validity of the relevant provisions of the Commonwealth Regulations. Having found no need for any further answer in relation to reg. 6(1) than would be given in the answers in relation to other regulations, the Court held regs. 198, 199, 320A and 320B valid as applying to intra-State air navigation, and held reg. 200B invalid insofar as it purported by virtue of reg. 6(1) to apply to intra-State air navigation. The Court noted a functional difference between regs. 198 and 199, on the one hand, and reg. 200B on the other; namely that the former related to only 'the use of an aircraft when engaged in the carriage of passengers or goods between places', and the latter related to the 'source of authority of the carriage by aircraft of passengers and goods between places.' In upholding the validity of those licensing provisions of regs. 198 and 199, Barwick C.J. expressed the opinion that because of the inevitable impact of unsafe, irregular or inefficient air operations of an intra-State airline operator upon the safety of the air for inter-State and foreign trade and commerce by air, and upon the development of that trade and commerce, the Commonwealth system of licensing,

as itself a safety procedure and also a means of ensuring observance of other safety measures, could validly include in its operation intra-State commercial air transport operations and operators. Similar views giving much attention to the nature of air navigation in Australia in the modern age, were expressed by other Judges.

He upheld the validity of those provisions under the external affairs power, too, but found more ample legislative justification in the commerce power.

Kitto J. said: 'In respects which hardly need to be emphasised it is sui generis among methods of transport, and indeed among all forms of trade and commerce. speed at which modern aircraft move through the sky; their constant liability to sudden and wide deviation in flight by reason of mechanical or human deficiencies. the vagaries of the weather, the behaviour of other aircraft and other causes; the multiplicity of flights required to satisfy the demands of modern life; the multiplicity and interrelation of the routes to be served; all these matters and more combine to make air navigation in this country a complex of activities of such a kind that what happens at any given time and place in the course of an air operation close or distant in time or space. significance of distances, of geographical relationships, is necessarily different for a problem concerning air navigation than for a problem concerning any other form of transport ... (I) t is impossible to assume in advance that any impairment of the safety, regularity or 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. It follows from these considerations, in my opinion, 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, (continued on p.92)

Some Judges ascribed the legislative sources of regs. 198 and 199 either to the external affairs power or to the commerce power, and some to the commerce power only. Judge expressly suggested the possibility of 'intermingling' of inter-State and intra-State aviation which was suggested by Latham C.J. some 30 years before, and regarded the situation contemplated in this case as raising the same kind of problem. But this recognition of 'intermingling' does not go beyond air safety matters. Following the traditional mode of statutory interpretation, the Court does not admit the federal power's predominance over purely intra-State commercial activity. reasoning of the Court, it was one thing to say that the safety of inter-State and international commercial air transport cannot be secured without including intra-State commercial air activities within the operation of the safety measures, but it was quite another to say that the stimulation or authorization of intra-State commercial air services is in any sense a safety measure. A complete

^{1 (}continued from p.91) 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.' 38 A.L.J.R. at p.408.

³⁸ A.L.J.R. at p.429, per <u>Owen</u> J.

absence of intra-State air services might contribute to the safety, regularity and efficiency of other air navigation; so, too, might the restriction of intra-State services to those chosen by the Commonwealth to operate such services under Commonwealth control; however, to go further, and seek to add chosen intra-State air services to other air traffic is a matter outside Commonwealth constitutional power. Reg. 200B - the so called enabling provision giving positive authority was thus invalidated. It became apparent that, as a practical result of the co-existence of the valid Commonwealth's licensing regulations and the State Act, an airline operator must hold both authorities! licences to operate on intra-State routes, thus creating a situation of 'stalemate' or 'deadlock', whenever their respective licensing policies conflict each other. The answer of

See, e.g., Menzies J.'s opinion, 38 A.L.J.R. at pp.419-20.

The Court upheld the validyt of the Regulations requiring intra-State operators to hold federal permission or authority if they wished to use Commonwealth-owned aerodromes (reg.320A) and fly in Commonwealth-controlled airspace (reg.320B), of which we shall discuss respectively elsewhere in this Part, but it will be sufficient here to say that this may have the practical effect to authorize the Commonwealth licensing of nearly all intra-State airline operators only under those provisions because nearly all the intra-State services penetrate controlled airspace and need access to Commonwealth-owned aerodromes. See, Chapter IV, post.

the Court to such circumstances is a time-honoured one - a 'co-operation' of the federal and State Governments.

Since the fields covered by the federal and State laws were directed to <u>different</u> subjects, the Court plainly concluded that no provision of the <u>Air Transport Act</u> was inconsistent with such valid Commonwealth regulations within the meaning of sec.109 of the Constitution. The Chief Justice alone found inconsistency between the two sets of law on the ground that the Commonwealth expressed its intention to be the sole authority in the licensing of the use of aircraft in air operations in Australia, and therefore, in choosing to effect its control over the carriage of passengers and goods by air within the State by a system of licensing of aircraft for particular routes of particular operators, the State law was inconsistent with the federal law. This view rests on

Barwick C.J. said: 'Indeed, it would in my view be a strange conclusion that in setting up this licensing system as itself a safety measure, the Commonwealth merely intended to reserve to itself a veto on the choice by the State of the aircraft to be used by a particular operator in air operations, to make itself merely the final as distinct from the sole and exclusive authority to determine what aircraft should be used in public air transport operations. If the characteristics of aircraft and the identity of the operator and their inter-relationship are themselves safety factors in relation to the use of the air by interstate and foreign trade and commerce, it would be incongruous in my view (continued on p.95)

the difficulty of separating the field of a certain subject-matter from others when, as with aviation control, the subjects are closely correlated. Few aviation matters can be said to have no connexion with the safety of aircraft operations; hence the question of the extent to which the fields covered by federal safety law would override State aviation legislation presents an interesting problem which should be made clear henceforth by judicial authorities upon special facts. However, insofar as is maintained the view that the federal commerce power does not go further than regulating intra-State aviation in respect only of its safety aspects, and any economic control over that operation is ipso jure reserved to the State's constitutional power, the inconsistency argument is likely to have a limited scope, for the safety field to be occupied by the federal law remains in principle distinct from the politico-economic questions within State control.

The question of the Court's fundamental attitude to constitutional interpretation precedes that of

^{1 (}continued from p.94) that the suitability of the aircraft and the identity of the operator should be established as the result of compromise and accommodation between administrators subject to different ministerial control, one of whom is not necessarily concerned with the safety of the air.' 38 A.L.J.R. at p.399. See also P.H. Lane, The Airlines' Case, 39 A.L.J. 17.

inconsistency - the Court's attitude adhering to literality of the constitutional dichotomy, in spite of its awareness of the predominant necessity of federal control, even when, as this case in fact verified, situations imperilling safety, regularity and efficiency of aviation might be left unsolved. When 'literalism' in the interpretation of the Constitution, the nation's fundamental instrument of the political as well as legal nature, combines with a 'logic' containing a predetermined notion of the federal context, an insistence on perpetuating the constitutional balance as between the Commonwealth and the States, there will be little hope for the effective and elastic application of the Constitution to problems arising from the 'realities' of such 'commerce' activity as 'aviation' rapidly growing towards its conquest of time and space. Yet this logical block is not inevitable; the Constitution can be interpreted differently. The principles applied by the Supreme Court of the U.S.A. to their federal commerce are equally capable of application to the Australian document.

CHAPTER III

Aviation as a Subject of 'External Affairs'

By sec.51(xxix) of the Constitution, the Commonwealth Parliament has power to make laws with respect to 'external affairs'. The Commonwealth has tried to justify most of its aviation legislation either under sec.51(i) or under this section, but the reliance upon this power has been gaining in importance, partly because of the rapid development of international legislation in this field, and partly because, under this power, the Commonwealth may make laws not only with respect to 'international' aviation but also with respect to 'domestic' (including 'intra-State') aviation, pursuant to the international obligations imposed upon Australia, with a complete disregard of the constitutional dichotomy between inter-State and intra-State matters. It is not strange, therefore, that the meaning and scope of sec.51 (xxix) have been expounded by the Court mostly in relation to aviation cases.

See also sec.51(xxx) of the Constitution empowering the Commonwealth Parliament to make laws with respect to 'the relations of the Commonwealth with the islands of the Pacific.'

It was pointed out early in 1936 that the international personality of Australia had been recognized rather than created by the Statute of Westminster, 1 and that the relations contemplated by international conventions were not those of the States of Australia with other countries but those of Australia, including all the States, with other countries, all the State governments together having been unable to create a truly Australian right or obligation. 2 However, apart from such an implied principle, the Australian Constitution has no such explicit provision forbidding the component States from entering into obligations with foreign countries as the U.S. Constitution has; 3 hence, the States can enjoy some concurrent exercise of the external affairs authority, unless the subject is covered by a Commonwealth law or interfered with by some actual exercise of the Commonwealth authorities. For instance, a State Government may negotiate commercial dealings with a foreign country for the purchase of aircraft purported

^{1931, 22} Geo. V. c.4.

⁵⁵ C.L.R. at pp.635 and 645, per <u>Latham</u> C.J.; as to the historical development of the Australian status in the international society, see J.G. Starke, The Commonwealth in International Affairs (Essays on the Australian Constitution, second ed., - Chapter XIII).

U.S. Constitution, Art.1, sec.2.

to be used solely for intra-State aviation within the State on behalf of its agents or some private company, although the Commonwealth may by such measures as import restrictions under the <u>Customs Act</u> interfere with such a State's action. An interesting problem will arise as to whether the Commonwealth can interfere with the U.K. - (Australian) States relations under sec.51(xxix), but this is not the place to explore the question further. 1

A complex and rather theoretical problem of the relationship between international law and municipal law - a choice between dualism and monism, and (if the latter is preferred) a choice between the two sets of law in hierarchial order in law - is also outside the scope of the present study; suffice will it be to say here that, in general, the provisions of the international law must be given binding force in the national law by the appropriate method, for, borrowing the words used by Lord Atkin² there is a clear distinction in English law between 'formation' and 'performance' of international

Cf. G. Sawer, Australian Constitutional Law in relation to International Relation and International Law (not published yet).

Attorney-General for Canada v. Attorney-General for Ontario and Others, (1937) A.C. 326, at p.347, per Lord Atkin. Cf. McNair, Law of Treaties, 1961, pp.78, et seq.

obligations constituted by a treaty (comprising any agreement between two or more sovereign States). The necessity or mode of such an appropriate national legislation depends upon whether the international rule is a wellestablished customary law, or whether it affects the private rights of the subjects, involves any modification of the common or statute law, or has other nature. sharp contrast exists between the English common law rules and the U.S. law in this respect; in the United Kingdom, no treaty is self-executing, with a very limited class of exceptions.² It is to be observed that those English common law rules on the position of international law have been inherited by Australia, and, in the complete absence of any constitutional clause pertaining to that matter, they form part of law within the Australian federal government, where, as in other federal countries, the treaty-making power is generally vested in the Commonwealth Government while the legislative powers on the subjects of a treaty are divided as between the

In any case, it is a well-established international law rule that no State can plead a deficiency in its municipal law or organization against a claimant of a breach of treaty obligation or of a rule of customary international law.

McNair, Law of Treaties, p.81.

Commonwealth and the States. It is the purpose of the present study to inquire into the extent to which the Commonwealth constitutional power can carry out international obligations relating to aviation matters by entering the sphere of the State's legislatures.

It was in the <u>first Henry Case</u> in 1936 that the High Court established a rule that the 'external affairs' power involved the power to carry treaties into effect and extended far enough to bring within the scope of the powers of the Commonwealth Parliament subjects which, without a treaty, would have been beyond those powers.

Not until then was sec.51(xxix) in general, and in respect of aviation in particular, directly presented before the High Court. As has been mentioned before, the Court held in that case that the Commonwealth <u>Air Navigation</u>

<u>Act</u> 1920 (sec.4) and Regulations made thereunder for the general control of air navigation throughout the

It has been arguable whether the Commonwealth Parliament could bring into force international conventions or treaties relating to aviation by virtue of the external affairs power, as the Royal Commission on the Constitution reported in 1929 (see, Report of the Royal Commission on the Constitution, 1929, p.205). In Roche v. Kronheimer (1921), 29 C.L.R. 329, the majority of the High Court sustained the Treaty of Peace Act 1919-1920 under the defence power, except Higgins J. who was equally disposed to hold that it was valid under the power of the Commonwealth Parliament to legislate with reference to 'external affairs'.

Commonwealth could not be supported under the commerce power, and then the discussions turned to the examination of sec.51(xxix) as the only possible source of power to validate the Commonwealth aviation legislation.

The Court held that the power to legislate with respect to 'external affairs' was expressly conferred upon the Commonwealth Parliament by the Constitution, and therefore 'no question of interference with the rights of the States arises. 1 Hence, the contentions that the power should be limited either to some external aspect of other specific subject-matters of federal power, or to the extra-territorial extension of such other powers, were rejected. This meant that the central Government having power to control the two processes of 'formation' and 'performance' of international obligations could, in principle, extend its legislative power to any subject upon which it could make a treaty. But the precise limits thereof have not been defined clearly. Latham C.J. expressed a general view that there was a limitation upon the power - that the Executive Government and the Parliament of the Commonwealth were alike bound by the Constitution, as the power was expressly given 'subject

^{&#}x27;55 C.L.R. at p.636, per Latham C.J.

to this Constitution', and the Constitution could not be indirectly amended by means of an international agreement made by the Executive Government and subsequently adopted by Parliament. Laws made in pursuance thereof which dealt with matters expressly prohibited by the Constitution (e.g., sec.92) would likewise be invalid. In this respect only, there is a possibility for the Commonwealth to invoke a 'federal clause' as an excuse for failure to implement a treaty because of the municipal constitutional structure. The following three queries seem to cast some light on the precise scope of the power, as reasoned a posteriori from cases having a direct bearing on sec.51(xxix).

whether the power was limited to matters which in se concerned external relations or to matters which might properly be the subject matter of international agreement. It is to be noted that what was argued about is not the scope of the subject-matters to be negotiated or agreed with foreign countries by the Commonwealth Government on a diplomatic level, which is theoretically unlimited within a legitimate competence of the Executive Government

⁵⁵ C.L.R. at p.642.

under the Crown sovereignty, but the scope of those matters with respect to which the Commonwealth Parliament can attract the exercise of its legislative power under sec.51(xxix) of the federal Constitution. Dixon J. expressed a rather restricted view:

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. The limits of the power can only be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example. (Italics added)

⁵⁵ C.L.R. at p.669. Although Starke J. limited also the power to matters 'of sufficient international significance to make it a legitimate subject for international co-operation and agreement', the applicability of the power in this case was justified on a more broad criterion that the Convention recognized sovereignty of the contracting States in the airspace above their territories, conferred rights upon Australia and her citizens and assumed obligations in respect of airspace above Australia towards foreign powers or States and their nations. According to him, a law providing for the carrying out and giving effect to an international convention of this character concerned Australia's relations and intercourse with other Powers or States and the rights and obligations which resulted, and was thus a law for the peace, order and good government of the Commonwealth with respect to external affairs (55 C.L.R.) at pp. 660-665.

In this case, however, he recognized (as Latham C.J. did) the predominantly international character of 'aviation'. Evatt and McTiernan JJ., in their joint judgment, were more definite and sweeping. Upon the general view-point that, in consequence of the close connection between the nations of the world, and their recognition of a common interest, and of the necessity of co-operation in matters affecting social welfare, it was no longer possible to assert that there was any subject-matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute, or international agreement, they defined the scope of the power as follows: 3

It is not to be assumed that the legislative power over 'external affairs' is limited to the execution of treaties or conventions; and ... the Parliament may well be deemed competent to legislate for the carrying out of 'recommendations' as well as the 'draft international conventions' resolved upon by the International Labor Organization or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations. The power is a great and important one.

Latham C.J. maintained a view that it was impossible to say a priori that any subject was necessarily such that it could never properly be dealt with by international agreement (55 C.L.R. at p.641).

⁵⁵ C.L.R. at pp.680-681.

⁵⁵ C.L.R. at p.687.

This wide application of the power as to the subjectmatters of a treaty, etc., seems to come off victorious
in the long run with the rapid expansion of the scope of
international legislation under the impetus of the
internationalization of individuals' life in the world.
Sir Robert Garran, commenting on the case, said that
'attempts to define the proper limits of international
agreements are not likely to have much greater success'.

Later, Professor Sawer went further and said:²

An international agreement or understanding need not be in the precise and detailed form of a treaty or convention, and the Federal Parliament can honour obligations of conscience or of international solidarity which are conducive to an international relationship although not distinctly required by its terms.

A reasonable enlargement of the scope of subject-matters comprehended by the concept of 'external affairs' brings about a flexible interpretation of the 'form' of international agreements, and, as circumstances require, the power can be exercised in the complete absence of any such formal agreement. In R. v. Sharkey, 3 the Court

R.R. Garran, The Aviation Case, 10 A.L.J. 277, at p.299.

G. Sawer, Execution of Treaties by Legislation in the Commonwealth of Australia, 2 U.Q.L.J. 300.

^{(1949) 79} C.L.R. 121.

upheld unanimously the validity of sec. 24A of the Commonwealth Crimes Act 1 defining sedition under the external affairs power, because the relations between Australia and the other nations of the Commonwealth, though not embodied in formal agreements of any kind, were of such importance to the Australian Commonwealth that the protection of the constitutional structure of all the Dominions was a proper matter of interest to the Federal Parliament. It is submitted that Sloan v. Pollard could have been related to the external affairs In the Airlines of N.S.W. Case (No.2), in order to prove the validity of the new Commonwealth regulations applying Commonwealth's licensing system to all aircraft including aircraft operating in intra-State air transport services, the plaintiff relied upon, inter alia, Art. 37 of the Chicago Convention of 1944 requiring the unification of rules, regulations and practices of air navigation, which reads as follows:

^{1914-1946 (}No.12 of 1914 - No.77 of 1946).

^{(1947) 75} C.L.R. 445. The Court upheld a Commonwealth butter rationing regulation on the basis of the defence power alone, when the scheme was entered into in order to discharge agreements for the supply of food to the United Kingdom made in the closing stages of the Second World War.

G. Sawer, op.cit., p.301.

Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, proceedings, 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 ... (11 items of topics) ... and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

The international standards, &c. to be established from time to time by I.C.A.O. have no binding force in the strict sense of international law, and the contracting States need not comply with them <u>ipso jure</u>. They are different from similar provisions of the Paris Convention of 1919 which were completed by 8 Annexes which had the same effect, and came into force at the same time, as the Convention itself. In other words, the provisions of the Chicago Convention impose merely 'moral' obligations upon the contracting States so as to make them comply with those obligations 'to the greatest extent', in view of the fact that there still exist differences in the development in civil aviation among them. No Justice raised a doubt on this point; all assumed tacitly that the Commonwealth Parliament could lawfully carry out

Cf. Chapter VII, post.

those 'obligations', described as 'the benefit which the treaty or convention gives' (Barwick C.J.) or 'the Commonwealth promised collaboration' (Kitto J.), under sec.51(xxix) of the Constitution. Hence, the wider approach to the meaning of 'external affairs' seems to have been supported both by later decisions of the Court and by academic authorities.

Secondly, a question arises as to the manner in which the Commonwealth can carry out those obligations or requirements by its domestic legislation.

In the <u>first Henry Case</u>, all Justices were of opinion that the first part of sec.4 of the <u>Air Navigation Act</u>

1920 that empowered the Governor-General to make regulations for carrying out and giving effect to the Paris Convention was valid upon the aforesaid grounds, and then they examined whether the regulations purporting to be so made under the external affairs power were really regulations for that purpose. The majority of the Court applied the tests of 'substantial conformity', 'faithful pursuit' or 'strict conformity'. <u>Latham C.J.</u>, requiring substantial conformity, did not argue minor divergences, but referred to three matters of principle which were 'at the root of the Convention' but which were disregarded in the regulations. Those inconsistencies

were concerned with the definition of registrable nationals in the registration of aircraft, the exception of the application of the Convention, and the requirements of licensing of personnel of aircraft. 1 Dixon J.. requiring faithful pursuit, did not permit wide departure from the Convention, as illustrated in the inconsistency between the Convention and the regulations upon the same subjects discussed by the Chief Justice. 2 Evatt and McTiernan JJ., requiring strict conformity, illustrated meticulously various subjects which were required by the Convention to be enforced in the domestic laws, but which enforcement was not provided by the regulations, or which were dealt with in the regulations but were not required by the Convention, and they required complete observance (including even exact metric measurements) of the Convention. 3 Accordingly, the majority concluded that the whole of the regulations, being inseverable, was invalid, because they were not regulations made, as required by sec. 4 of the Act, for the purpose of carrying out and giving effect to the

⁵⁵ C.L.R. at pp.645-654.

⁵⁵ C.L.R. at pp.673-675.

⁵⁵ C.L.R. at pp.690-695.

Convention or any amendment thereof. Starke J.'s opinion was in substance based upon the widest approach on this point. Having examined the provisions laid down both in the Convention and the Regulations, he upheld their validity from the point of view of rendering them effective in all circumstances and conditions or giving the flexibility in administration that was desirable and even necessary in relation to the international agreement. He said: 2

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 constructed liberally, and much must necessarily be left to the discretion of the contracting States in framing legislation, or otherwise giving effect to the convention. For instance, general safety and other regulations may be necessary for supplementing the convention, and probably exemptions are legitimate where it appears unnecessary or undesirable that the provisions of the convention should apply ... A construction of the power that enables a ready application of the convention to various circumstances and conditions is preferable to one that insists upon an inflexible and rigid adherence to the stipulations of the convention. After all, we should remember that the power is conferred for the purpose of carrying out an international and not a mere local agreement. (Italics added)

⁵⁵ C.L.R. at pp.660-665.

⁵⁵ C.L.R. at pp.659-660.

In this connexion, the second Henry Case must be mentioned. The question in that case was whether a rule of the Commonwealth Air Navigation Regulations 2 providing that an aerodyne should not, except when departing or landing, fly over an aerodrome at a lower height than 2,300 feet, was authorized by the provisions of the Air Navigation Act 1920-1936 enabling the Governor-General to make regulations for the purpose of carrying out and giving effect to the Paris Convention and for the purpose of providing for the control of air navigation in relation to inter-State and foreign trade and commerce, and within any territory of the Commonwealth. Annex D to the Convention provided that 'subject to any special local regulations which may exist: (a) Flight over a landing area at a lower height than 700 metres is prohibited for aerodynes, save in the case of a departure or landing!, and in Annex A the expression 'landing area' meant the part of an aerodrome reserved for departures and landings of aircraft. On the other hand, 'aerodrome' was defined

R. v. Poole; ex parte Henry (1939) 61 C.L.R. 634.

S.R. 1937, No.81, rule 51(1) of the First Schedule.

After the first Henry Case, the Air Navigation Act 1936 was passed so as to amend sec. 4 of the original Act 1920.

in the regulations to include 'the landing area, neutral zone and building area' included within any defined ground used for the landing or departure of aircraft.

The defendant (one Henry Goya Henry) in the case flew over the neutral zone of the aerodrome at Mascot, N.S.W., at a lower height than 2,300 feet, but he was not either departing or landing. Latham C.J., applying a rigid test, considered that the rule could not be described as a regulation for giving effect to the provision of the Convention prohibiting flight over a landing area, because, according to the Convention, the landing area was part only of an aerodrome and therefore it was a different area from the neutral zone. But a majority of the Court (Rich, Starke, Evatt and McTiernan JJ.) held that the Commonwealth regulation was valid, upon the grounds that the Convention prescribed such height in respect of the landing areaalone 'subject to any special local regulations' and that, on the whole the correlation was substantial and the extension was not an improper mode of ensuring compliance. It was made clear that the regulations need not necessarily be a reproduction of the rules contained in the Convention; their substantial

⁶¹ C.L.R. at p.641.

accordance could be judged from the intention of the parties to the Convention or from the language used in the Convention. Dixon J. upheld the validity of the regulations under the commerce power, whose reasonings we will discuss in relation to the Commonwealth powers over Commonwealth-owned aerodromes at a later stage.

Starke J. adhered to the wider view which he expressed in the first Henry Case and, according to him, no more unpracticable tribunal could be imagined than a court of law for determining what regulations were desirable or necessary for carrying out an international air convention. Certainly aviation involves detailed governmental control of a highly technical nature, with problems of integration which must be left to experts.

Thirdly, in determining what may be enacted under the external affairs power, the content of the treaty or convention must be ascertained; probably, this question must precede the second question concerning the mode of implementation of international obligations, for the latter is, to a large extent, prescribed by what each individual Judge finds in a treaty or convention.

⁶¹ C.L.R. at p.644, per Rich J.

⁶¹ C.L.R. at pp.647-648.

Therefore, while all of the Justices followed the general test of 'faithful pursuit' in the Airlines of N.S.W. Case (No.2), their opinions as to the extent of international obligations imposed by the Chicago Convention were considerably divided. As has been mentioned before, one of the crucial questions in the case was whether the Commonwealth licensing regulations applying to all classes of aircraft and their operations (some based on safety, regularity, and efficiency considerations, and some based on purely economic ones) were authorized by the provisions of Art.37 and Annexes thereto, or by any other provision of the Convention. Barwick C.J. limited the extent of the obligation, particularly of Art.37, to the uniformity of national air safety regulations, as distinct from the encouragement of air transport operations or authorization of persons to carry them on. According to the Chief Justice, however, within this limitation the Convention should not be read narrowly, and the Commonwealth can carry out this obligation in advance by enacting all regulations which are appropriate to securing such uniformity. Thus, 'the securing of the benefit which the treaty or convention gives', which the Chief Justice added as an additional test to the traditional 'faithful pursuit' and might have been taken as suggesting a wide

application of the power, can only be workable within this limit. McTiernan, Menzies and Owen JJ. also found no provisions for licensing air transport operations in any Annex or in the Convention itself, but, as the Chief Justice did, upheld the validity of the licensing regulations of the use of all aircraft (regs. 198 and 199) as provisions adapted to carry out and give effect to In their opinions, no express and the Convention. precise undertaking by the Commonwealth to maintain control over every aircraft entering the airspace over Australia could be found either in the Convention itself or in any of the Annexes, but the scope of the Commonwealth's obligations was so wide that it would be a reasonable way for the Parliament to secure the fulfilment of Australia's international obligations to require owners of national aircraft to register them, to maintain them in a condition of airworthiness, not to use them except as authorized and, in using them, to comply with standards, procedures and practices as established under the Convention; furthermore, the licensing of persons to own, use and fly particular aircraft for particular purposes upon particular routes is a method Parliament might adopt of achieving the

foregoing ends. However, since no express obligation was imposed upon the contracting States to set up a system whereby all those who wished to conduct air services within their territories must obtain licences to do so, reg. 200B was invalid. Kitto, Windeyer and Taylor JJ., having found that none of the Annexes or Art.37 dealt with the subject of regular public transport operations, found also that the Convention did not empower Commonwealth to make the licensing regulations (including regs. 198, 199 and 200B) at all. Taylor J., rejecting the argument that there was a functional difference between regs. 198 and 199, on the one hand, and reg. 200B, on the other, invalidated all of the Commonwealth licensing regulations, whereas Kitto and Windeyer JJ. held regs. 198 and 199 valid under the federal commerce power.

See, e.g., Menzies J.'s opinion, 38 A.L.J.R. at pp. 417-418. Menzies J. specifically favored the remarks made by Starke J. in the first and second Henry Cases as to the scope of the external affairs power. Menzies J. pointed out that the provisions of the Convention were not confined to international civil aviation and international air transport services, that the 'air navigation' referred to in Art.37 was not confined either to aeronautics or to international air navigation, and that some of the 15 Annexes referred only to international civil aviation (e.g., Annex 6) but others were not so limited.

The judgments in the Airlines of N.S.W. Case (No.2) clearly show that the extent to which the Convention can be implemented varies largely with what one finds in a treaty or convention. In fact, the Australian Court has not been unwilling to take judicial notice of the 'situations' surrounding both international legislation and domestic enactments, even to such an extent that it often disregards a Parliamentary judgment, based upon the Executive's, of world 'situations' at a given point of time or its estimation of benefits to Australian external relations which are obtainable from a particular international agreement. The power is essentially a purposive and composite one, and there should be much room for the discretion of the rule-making authority to determine, in the particular case, what are the appropriate and effective means of carrying out and giving effect to the Convention. The incidental powers contained or carried with the federal powers which enable the Commonwealth to attain the end of the power most effectively are expressly given to the federal 'external affairs! power no less than to the commerce power.

The same question is raised as to the defence power of the Commonwealth Parliament; cf. Australian Communist Party v. Commonwealth (1951) 83 C.L.R.1, at pp.262-263, per Fullagar J.

The difficulty of ascertaining the real objective of the Convention and the scope of the corresponding domestic implementation thereof may be illustrated in the following example of an international air legislation. The Geneva Convention of 1948 concerning international recognition of rights in aircraft, which has not been ratified yet by Australia, does not impose upon the contracting States de jure obligation to maintain a public record in respect of proprietary rights in every national aircraft. But the assumption at the conclusion of the Convention was that the contracting States would themselves maintain a record in their own interest; in fact, unless a record is established most of the practicable objectives of the Convention will be lost. 'situation' as implied in the Convention should provide an ample justification for the Commonwealth to maintain a public record in respect of rights and interests in all Australian aircraft, if Australia ratified the Convention. A question arises as to how far and in what manner the Commonwealth can exercise the external affairs

The Convention was adopted on 19th June, 1948, and came into force between the U.S.A. and Mexico in 1950. The Commonwealth of Australia signed the Convention on 9 June, 1950, but has not ratified it as yet. See Appendix I, post.

power in carrying out this international requirement of 'maintenance of a public record', which could mean either the establishment of a recording system for purposes of private law (e.g., creation, validation, effects, priorities, etc. of recorded rights) or the mere keeping of a record with no function of 'recording' for such private law purposes. However, the Convention seems to be essentially one of 'recognition' which deals with 'conflict' problems, quite different from establishing a detailed recording system or defining exact consequences of recording which was at one time unsuccessfully drafted with the object of obligating the contracting States to set up a uniform recording system. Nevertheless, this implication from the legislative history of the Convention does not set the limit of possible Commonwealth domestic legislation; such legislation may be justified as implementing and supplementing the Convention so as to give the fullest effect to its application in Australia. It is on this point that 'common sense' takes an active part, and conduciveness to the purposes of an international agreement of a particular domestic

See, Wilberforce, The International Recognition of Rights in Aircraft, 2 I.L.Q., 1948-1949, p.426.

legislation is evaluated in accordance with the individuals' ideals for the political, economic and social situations surrounding acts or things as contemplated in the international agreement. In this particular instance, it seems that the Commonwealth can at least provide for the validity of such recorded rights in order to ensure faithfully the basic object of the Convention, i.e., 'reciprocal recognition' of recorded rights. If the Court in the Airlines of N.S.W. Case (No.2) looked upon the expression 'safety, regularity, and efficiency of air navigation' on a more broad perspective towards the most effective facilitation and improvement of air navigation as a whole, the decision might have been a different one.

There has been always an apprehension that, if the federal Parliament can legislate on <u>any</u> subject of international understanding, the general balance of constitutional power as between Commonwealth and States would be seriously modified. When <u>Dixon</u> J. (as then he was) tried to limit the power to matters indisputably international in character, or when <u>Latham</u> C.J. was afraid of an indirect amendment of the Constitution by means of an international agreement, they might have had such an apprehension. If, for example, the Commonwealth

Government entered into an agreement with a foreign country or with foreign countries to attain a rationalization or co-ordination of the domestic aviation in the territory of each party-State as a part of an international scheme as contemplated in the agreement, could the Commonwealth Parliament carry out this obligation merely by reason of its participation in that plan? Whether or not the Commonwealth should do so is a purely political matter, but there is no reason why the Commonwealth Parliament cannot implement the obligation whether it be in the form of a bilateral or multilateral agreement. Some limit is provided by the express constitutional prohibitions which will render a Commonwealth enactment contrary to them invalid, and/or by the Parliamentary refusal to give ratification thereto.

In connection with this question, there is a question of 'fraud on power' - a question as to whether the Commonwealth Government has made an international agreement in bad faith simply with the object of extending federal power. In the <u>first Henry Case</u>, three Judges (<u>Latham C.J.</u> and <u>Evatt</u> and <u>McTiernan JJ.</u>) raised this question, but found no such suggestion applied in the case. However, there would be little point of considering it, since, once the subject has a basis of the granted power, the

motive or wisdom of its actions should be left to the Parliament; this is particularly so in the case of a 'purposive' legislative power. It is submitted that there is a strong authority for the view that the King's representative must always be presumed to have acted in good faith. 1

Internationalization of individual's life is a notable tendency of the modern times. Aviation is a traffic medium of such an international cultural exchange, and, owing to its very nature of 'internationality', the industry itself has demanded a monistic control to such an extent as the domestic aviation law has developed under the strong influence of international legislation. Indeed, the writers on Air Law said, no other system of law has been so rapidly developed by sovereign States collaborating for national and international objects at the same time. Australia is a member-State of the Chicago Convention 1944, International Air Services Transit Agreement 1944, International Sanitary Convention 1933, Warsaw Convention 1929 (as amended by the Hague

G. Sawer, op.cit., p.299n, citing <u>Dixon</u> J.'s remark in the <u>Australian Communist Party Case</u> (83 C.L.R. at p.179).

Shawcross and Beaumont, Air Law, second ed., p.10.

Protocol 1955 and supplemented by the Guadalajara Convention 1961), Rome Convention 1952, and 26 bilateral arrangements exchanging traffic rights for scheduled international air services. In accordance with the complexity and development of air navigation in future, the international legislation with more variety of aviation subjects will occupy an important position in aviation In the United States, the treaty power was once relied upon to put the regulation of aeronautics in the hand of Congress, but the view that such legislation would be sustained under the commerce power finally prevailed. 1 In Australia where the federal commerce power has been construed narrowly, the external affairs power may well be regarded as a legislative source of a great potentiality for controlling domestic aviation by the 'permeation' of international law. A bold approach to the power is perhaps the quickest route to extension of Commonwealth authority in an area whose problems require centralised control.

Cf. A.L. Newman II, Aviation Law and the Constitution, Y.L.J. vol.39, 1929-1930, p.1114n.

CHAPTER IV

Aviation in relation to 'Commonwealth Territories' and 'Commonwealth Facilities'

1. Aviation within, to or from the 'Commonwealth Territories'

Under sec. 122 of the Constitution, the Commonwealth Parliament may make laws 'for the Government of any territory surrendered by any State 1 to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth'. The Territories of the Commonwealth include the Australian Capital Territory, the Northern Territory and Papua-New Guinea. 2

For the purpose of aviation, as the <u>Air Navigation</u>

<u>Act</u> 1920-1963³ defines, the Territory of the Commonwealth includes the territorial waters thereof and the airspace over any such Territory or territorial waters.

Sec.111 empowers the Parliament of a State to surrender any part of the State to the Commonwealth, whereupon it becomes subject to the exclusive jurisdiction of the Commonwealth.

Other Territories are Ashmore and Cartier Islands, Australian Antarctic Territory, Cocos (Keeling) Islands, Heard and McDonald Island, Norfolk Island, Christmas Island and Jervis Bay.

³ Sec.3(3).

Sec.26(1) of the Air Navigation Act empowers the Governor-General to make regulations '(c) in relation to air navigation within a Territory of the Commonwealth or to or from a Territory of the Commonwealth!. When the power was questioned in the A.N.A. Case, discussed below, 'Territorial airline services' was defined in the Australian National Airlines Act (C'th) 1945 as a service (not being an inter-State airline service) providing for the transport by air, for reward, of passengers or goods and having a scheduled stopping place in a Territory of the Commonwealth. As pointed out by Judges, such a Territorial service was either a service with all its stopping places in a Territory or Territories, or with stopping places in a Territory or Territories and also in a single State; if the service had scheduled stopping places in more than one State it would be an inter-State airline service and not a Territorial service. 2 This construction was primarily designed to escape from the application of sec. 92 (as in fact it was successful in that case), and is narrower than that with which we

Sec.4.

⁷¹ C.L.R. at p.64, per <u>Latham</u> C.J. and at p.102, per <u>Williams</u> J.

are going to discuss below in relation to the nature and scope of the 'Territorial aviation' power. The concept of 'Territorial aviation' for the present purpose is simply 'air navigation within the Territories,' and/or 'air navigation to or from the Territories', irrespective of whether it has stopping places in more than one State; this definition is in accord with the scope of the regulation-making power under the <u>Air Navigation Act</u> and the scope of application of the Regulations made thereunder.

In the <u>first Henry Case</u>, a general authority of the Commonwealth Parliament to legislate with respect to aircraft in the Territories of the Commonwealth was not questioned, and the Court simply assumed that it existed. In the <u>A.N.A. Case</u>, one of the questions was concerned with the validity of the provisions of the <u>Australian National Airlines Act</u> 1945 giving the Commonwealth air service a monopoly in Territorial air services, and therefore the relation between such Territorial aviation and sec.92, together with the nature of 'Territorial power' generally, was discussed. <u>Latham C.J.</u> said that the Commonwealth Parliament could make laws for the

See, e.g., 55 C.L.R. at p.675, per Dixon J.

government of any Territory as it thought fit: 1

The Commonwealth Parliament may make laws which completely control all matters within a Territory, and therefore can provide for a monopoly of air services and exclude all competition within a Territory. It can, as between Territory and Territory, establish complete control over air services because it can in each Territory control all landings and all departures and all other activities in relation to the services.

However, according to the Chief Justice, a law in respect of a Territory could perate only within the Territory and was capable of effect only as a territorial law: 2

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

A similar view denying Commonwealth power under sec. 122 to make laws having operation outside a Territory so as to bind a State was expressed by <u>Williams</u> J. Although the Court was unanimous in its conclusion holding the

⁷¹ C.L.R. at pp.62-63.

[~] Ibid.

³

⁷¹ C.L.R. at pp.102-103.

'Territorial aviation' provisions in the said Act valid, <u>Dixon</u> J. did not share the views just mentioned in respect of the nature and scope of sec.122. According to him, it was hard to see why sec.122 should be disjoined from the rest of the Constitution, and it was absurd to contemplate a central government with authority over a territory and yet without power to make laws, 'wherever its jurisdiction might run', for the establishment, maintenance and control of communications with the territory governed. 1

It is not intended here to inquire further into this constitutional controversy as to the relation of the power given by sec.122 to the remainder of the Constitution. However, on this point, Lamshed v. Lake seems to have established the view of Dixon J. while a minority adhered to the view that a law made under sec.122 could not be made operative within a State or as an attempt to

⁷¹ C.L.R. at pp.144-145.

Cf. Buchanan v. Commonwealth (1913) 16 C.L.R. 315;

R. v. Bernasconi (1915) 19 C.L.R. 629; Porter v. R. Ex parte

Yee (1956) 37 C.L.R. 432. See, also, H. Zelling, The

Territories of the Commonwealth, Essays on the Australian

Constitution, second ed., Chapter XII, and cases there

cited.

^{(1958) 99} C.L.R. 132.

impose a restraint on the constitutional powers of the States. As the case related to transportation by road between a Territory (the Northern Territory) and a State (South Australia), the decision given by the Court may well be applied by analogy to 'Territorial aviation' problems. The question was whether the Commonwealth Northern Territory (Administration) Act 1910-1955, providing that trade, commerce and intercourse between the Northern Territory and the States whether by internal carriage or ocean navigation should be absolutely free. 2 prevailed over the Road and Railway Transport Act 1930-1939 (S.A.)³ requiring for a licence to carry goods, by virtue of sec. 109 of the Constitution. The plaintiff's arguments that a law under sec. 122 could not operate outside that Territory and that it was not a law of the Commonwealth within the meaning of sec. 109 of the Constitution were rejected; instead, the Court said that 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

Cf. McTiernan and Williams JJ.'s views.

Sec.10.

⁾ Sec.14.

runs, and prevailed over an inconsistent State law. Some clauses of the Constitution may not be applicable to laws made under sec. 122 by the very nature of 'Territory', 2 but some clauses (e.g., sec.51(xxxix)) do apply to the power over 'Territory' regarded as an element of the whole organic body of the Commonwealth. Moreover, sec. 92 applies to trade, commerce and intercourse between two States during its passage through a Territory. It goes without saying that, a Territory being not a 'State', sec. 92 does not apply to trade and commerce as between a State and any adjoining Territory, or trade and commerce which passes through one State when proceeding from one Territory to another; hence, unless there is a valid law of the Commonwealth to the same effect as sec.92, 'there is no presumption which can be spelt out of the general nature of the Constitution in favour of free trade between States and adjoining territories. 4

⁹⁹ C.L.R. at p.141, per Dixon C.J.

Chapter I (Part V), most of Chapter V, and Chapter III, of the Constitution.

⁹⁹ C.L.R. at p.143, per <u>Dixon</u> C.J.

Zelling, op.cit., p.330.

Sec.26(4) of the Air Navigation Act provides that regulations affecting air navigation to or from the Northern Territory have effect notwithstanding sec. 10 of the Northern Territory (Administration) Act 1910-1959. Since the effect of sec.10 equivalent to sec.92 of the Constitution is created merely by a law of the Commonwealth and not by the Constitution, the Commonwealth is at liberty to override the effect of sec. 10 by its other legislation; hence, sec.26(4) is undoubtedly a valid provision. a constitutional problem arises, for 'air navigation to or from the Territory' is a broad concept comprising of passing through the Territory in the course of air navigation between two or more than two States, or passing through two or more than two States in the course of air navigation to or from the Territory. The application of sec.92 to the first category was pointed out by Dixon C.J. in Lamshed's Case. A flight merely passing through the airspace over the Northern Territory in the course of air navigation between two States, say, Brisbane (Q'1d) to Wyndham (W.A.), may be regarded as an 'inter-State' flight, for, the Territory in such a case is nothing but a border-line between Queensland and Western Australia for sec.92 purposes. How about an aircraft operating between the said cities which stops at Darwin in the

Northern Territory? The second category is, for example, air navigation from Sydney (N.S.W.) to Darwin or vice versa passing through the airspace over Queensland or stopping at Brisbane. Any such question must be solved in the light of facts and circumstances, and, in characterizing the operation so as to decide the applicability of sec. 92, similar considerations as in the border-hopping cases under that section may well be applied by analogy. It will depend upon whether the stopping at Darwin is for the purpose of non-traffic purpose or for traffic purpose, whether the goods or passengers are consigned or contracted from Brisbane to Wyndham, or whether the Sydney-Darwin flight having a stopping place at Brisbane is a necessary or an ordinary course of the business, etc. An interesting case was provided, when, pending the High Court's decision in the Airlines of N.S.W. Case (No.2), the company operated under the federal licence flights from Dubbo to Canberra, with the co-operation of Ansett-A.N.A. operating between Canberra and Sydney. Both companies are the subsidiaries of the Ansett Transport Industries Ltd., and the flights from Sydney to Dubbo or vice versa, the licences of which were otherwise refused by the N.S.W. State Act, were practically carried out via Canberra (The Australian

Capital Territory). It is an interesting problem whether the Airlines of N.S.W. alone could perform the whole journey from Sydney to Dubbo via Canberra, without a State licence merely by reason of its having a stopping place in the Commonwealth Territory.

Apart from aviation within a Territory over which the Commonwealth has a complete control, the scope of the power to legislate with respect to aviation to or from the Territory depends much upon what is fairly incidental to the exercise of the power to make laws for the government of the Territory, and every circumstances surrounding the special position of the Territory must be taken into account. The power over the Australian Capital Territory needs special considerations, for there is a question whether the source of power for laws for A.C.T. is sec.52(i) (seat of Government) or sec.122. Opinions are divided, but, it is sufficient to say, for the present purpose, that both powers are exclusive and plenary. The nature and scope of the Commonwealth power over 'Commonwealth Territories' will be discussed in more detail when we examine the power over 'places acquired by the Commonwealth' in relation to the Commonwealth-owned aerodromes.

Cf. Lamshed's Case, supra.

2. Aviation using the 'Commonwealth Facilities' Commonwealth Aerodromes

By sec.52(1) of the Constitution, the Commonwealth has an exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to the seat of the Commonwealth and 'all places acquired by the Commonwealth for public purposes'. With this must be read together sec.51(xxxi) providing that the Commonwealth Parliament has legislative power with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.' 1

The Commonwealth power to acquire land for aerodromes and to control those aerodromes flows from these constitutional clauses, and a large number of important aerodromes are now owned and operated by the Commonwealth.²

See also sec.85 of the Constitution, providing that all State property of any kind used exclusively in connection with departments of the public service transferred to the Commonwealth become vested in the Commonwealth which may also acquire property from the States, used, but not exclusively, in connection with such departments.

The number of aerodromes throughout Australia and its Territories at 30 th June, 1964, was 636. One hundred and twenty-five important aerodromes were owned by the Commonwealth and 511 by local authorities and private interests. Cf. Fourth Annual Civil Aviation Report, p.62.

The acquisition of land for, and administration of, such aerodromes is primarily placed under the statutory responsibility of the Department of Interior by virtue of the Lands Acquisition Act 1 and the Administrative Arrangements Order. Under the Air Navigation Regulations, the Minister for Civil Aviation is empowered to establish, provide, maintain and operate aerodromes, and the imposition of conditions of the use thereof is placed under the control and management of the Director-General. 2 Moreover, Commonwealth enactments relating to surface traffic or business concessions on or in such Commonwealth

Land Acquisition Act 1906-1936 was repealed by Land Acquisition Act 1955 (No.68)-1957 (No.4).

Sec. 26(1) of the Air Navigation Act 1920-1963 defining the scope of the Commonwealth regulation-making powers enumerates, after those relating to commerce, external affairs and Commonwealth Territories, power to make laws 'in relation to air navigation being regulation with respect to any other matter with respect to which the Parliament has power to make laws.' Sec. 26(2)(c) of the same Act prescribing in detail the subject-matters to be included in the Regulations without limiting the generality of the abovementioned regulation-making power provides for 'the establishment, maintenance, operation and use of aerodromes and air route and airway facilities and the licensing of aerodromes other than aerodromes maintained by the Commonwealth.' Under those provisions, the Air Navigation Regulations provide, inter alia, for the establishment, &c. of aerodromes (reg.82), licensing of aerodromes (reg.84) and authorization of places for use as aerodromes (reg. 85).

aerodromes 1 specifically vest the <u>administrative</u>
responsibility in the Department of Civil Aviation. But
our discussion here is confined to the Commonwealth
<u>legislative</u> power in relation to aerodromes so acquired,
whatever the administrative arrangements between the
Commonwealth governmental offices may be.

For the purpose of the <u>Air Navigation Regulations</u>, an 'aerodrome' is generally defined as 'an area of land or water (including any buildings, installations and equipment) established, licensed or approved under Part IX of these Regulations and intended for use either wholly or in part for the arrival, departure or movement of aircraft.' However, a clear distinction must be made between aerodromes acquired by the Commonwealth for public

Reg. 5(1).

Airports (Surface Traffic) Act 1960 (No.40), prescribing provisions for the control of surface traffic within Commonwealth aerodromes; Airports (Business Concessions) Act 1959 (No.89), aiming at facilitation of development of the business potential of airports of the Commonwealth so as to obtain the maximum economic return from land, terminal buildings and other facilities not required for operational purposes and to meet the requirements of the travelling public for goods and services. The Commonwealth has also enacted the Air Navigation (Charges) Act 1952 (No. 101)-1957 (No. 87), prescribing the charges payable, in accordance with the Schedules to the Act, in respect of the use by aircraft of aerodromes, air route and airway facilities, meteorological services and search and rescue services maintained, operated or provided by the Commonwealth. 2

purposes and aerodromes merely licensed or authorized by the Commonwealth, ownership or possessory interest of which is vested either in private persons or in local authorities. The term 'acquisition' in sec.51(xxxi) of the Constitution has been construed as including acquisition of possession as well as of full title; hence. in the Commonwealth enactments, concerning aerodromes, mentioned above, 'airport' includes an aerodrome owned or 'held under lease' by the Commonwealth. 2 We are here concerned only with such aerodromes, described as 'Commonwealth aerodromes.' The sources and scope of legislative power of the Commonwealth in relation to Commonwealth aerodromes is different from that which applies to aerodromes merely licensed or authorised by the Commonwealth. The power as to Commonwealth aerodromes flows directly from the common law of ownership of land, or from sec.52(i) derived from sec.51(xxxi) or sec.85 of the Constitution, while the power as to licensed or

See, e.g., <u>Minister for the Army v. Dalziel</u> (1944) 68 C.L.R. 261. Cf. R.W. Baker, The Compulsory Acquisition Powers of the Commonwealth, Essays on the Australian Constitution, second ed., Chapter VII, p.193, <u>et seq.</u> 2

Sec. 3(1) of the <u>Airports (Surface Traffic) Act</u> 1960. The term is defined in the same way in the <u>Airports</u> (Business Concessions) Act 1959.

authorized aerodromes stems from other legislative powers affecting aviation, such as, sec.51(i), sec.51(xxix) and in relation thereto sec.51(xxxix). The scope of the latter power <u>might</u> be confined to safety considerations to secure the regular passage of international, inter-State or Territorial air navigation on or around such aerodromes, but the former power goes further than that so as to authorize the Commonwealth to make laws as it thinks fit.

It should be noted, first, that an exclusive control over such aerodromes acquired by (or transferred to) the Commonwealth is not limited to their 'surface' but extends to the superincumbent 'airspace' as an inseparable concomitant of 'aerodrome'. In Commonwealth v. State of New South Wales, the Court held that all the lands acquired by the Commonwealth in N.S.W. either by the transfer of governmental departments under sec.85 or by the compulsory process under sec.51(xxxi) of the Constitution, including royal metals and other minerals therein, vested in the Commonwealth freed and discharged from all reservations, rights, royalties, conditions and obligations of any kind whatsoever to the State of N.S.W., subject to compensation provided pursuant to sec.85 of

^{(1920-23) 33} C.L.R.1.

the Constitution and by the Land Acquisition Act 1919, 1 respectively. As against the view that the royal metals in the subjacent strata were not used in connection with the Departments, Knox C.J. and Starke J., in their joint judgment, said that the strata in which the royal metals were alleged to exist were not segregated from the rest of land, and, in the absence of any allegation that any of the subjacent strata had been used for any other purpose, the land usque ad coelum et ad inferos was used exclusively in connection with the Departments. 2 In another passage dealing with lands alienated by the Crown, they construed the word 'land' defined in the Lands Acquisition Act in a wider sense, viz., 'that in respect of which you have a right from the centre of the earth to the heaven above. 13 Isaacs J. expressed a similar view, and said that no implied limitation could be placed on the fullest meaning that could be given to the word 'property' in secs.51(xxxi) and 85 of the Constitution and that the power of the Commonwealth Parliament to carry out 'public purposes' could not be effectively exercised unless the amplest

^{1906 (}No.13)-1912 (No.39).

³³ C.L.R. at p.20.

³³ C.L.R. at p.23.

connotation were attached to the word 'property'. Higgins J. dissented as to the inclusion of royal metals, basing his opinion on the principle of the Crown's prerogative privilege, but he agreed that the other minerals in the land passed with the land as 'incident' to the land. In any case, arguments relating to the Crown privilege of royal metals are irrelevant to our present purpose, because there has been no such a privilege in the airspace. 3

A question has arisen as to whether sec.52(1) of the Constitution confers a power to legislate generally for the government and administration of land within State boundaries acquired under sec.51(xxxi) or sec.85 by the Commonwealth, and as to the character of a State power over such places so acquired. Although little has been said authoritatively as to the nature of the Commonwealth power over such places, we eliminate the argument, from the beginning, that the legislation must be on the subject

³³ C.L.R. at p.37.

³³ C.L.R. at pp.56-7.

The Commonwealth's acquisition of land in a State for the purpose of aerodrome excludes therefore any State law vesting in the Crown or in the State under the Crown's authority the ownership of airspace above a certain height from the surface of all lands including aerodromes within the State, even if the State should enact legislation purporting to retain such control.

of such acquired places as 'places'; if so, the Commonwealth can legislate with respect to the 'seat of government! (contained also as a subject of Commonwealth legislative power in sec.52(1)) - the Australian Capital Territory - only as a geographical portion of land. Though subject to the Constitution, sec. 52(i) is a power for the peace, order and good government of the Commonwealth, and is supplemented by the incidental powers (at common law or under sec.51(xxxix)) to carry out everything incidental to the ends of the power. That sec.52(i) confers a general legislative power on the Commonwealth is beyond doubt. 2 However, as Professor Cowen observes, there are two differing views on the character of State power over such places, between which, he thinks, appropriate choice lies; one is the view of the majority of the Supreme Court of New South Wales in R. v. Bamford that exclusiveness of Commonwealth power allows State legislation to operate only within the

E.g., Wynes, op.cit., p.159.

As to a comment against such a limited view, see Z. Cowen, Alsatias For Jack Sheppards?: The Law in Federal Enclaves in Australia, 2 Melbourne University Law Review (formerly Les Judicatae) No.4, pp.469-71.

^{(1901) 1} N.S.W.R.337; 18 W.N. 294; 7 A.L.R. (C.N.) 89; see also, R. v. Thomson (1913) Q.S.R. 246; 7 Q.J.P.R. 154.

limits of sec. 108 of the Constitution. On this view, only the Commonwealth can make new law for such places. The other is the view that the exclusiveness of Commonwealth power under sec.52(i) depends upon the classification of the law as one made specifically with respect to that place, thus saving the validity of State laws operating generally throughout the geographical area of the State even though made after the federal acquisition, which are not bad for inconsistency under sec. 109. In Kingsford Smith Air Services Ltd. v. Garrison, 2 an action for damages was brought in the State Metropolitan District Court at Sydney based on the negligence of the defendant in the management and control of an aeroplane on the Kingsford Smith Aerodrome at Mascot, New South Wales, which had been acquired by the Commonwealth under the Land Acquisition Act 1906-34, pursuant to the authority of sec.51(xxxi) of the Constitution; the area was within the geographical boundaries of the jurisdiction of that Court as defined in State legislation. The defendant argued that the acquisition of the land by the Commonwealth removed it from the jurisdiction of the New South Wales

Cowen, op.cit., p.471.

^{(1938) 55} W.N. (N.S.W.) 122.

The District Court held that Bamford's Case was binding authority for the proposition that the Metropolitan District Court was a court of competent The question of importance underlying that jurisdiction. case was whether an aerodrome acquired by the Commonwealth became territory of the Commonwealth so as to exclude the operation of State laws; in other words, whether the Commonwealth obtained, not only proprietary but territorial rights in property acquired by it for public purposes. Commonwealth v. State of N.S.W. was distinguished on the ground that all that the High Court was considering in that case was the nature of the title and the extent of the estate which the Commonwealth had taken in the land in question. 1 Although the power to legislate conferred by sec. 122 (Commonwealth Territories) does not operate on land acquired under sec.51(xxxi) or sec.85,2 and even if the Commonwealth power over places acquired for the public purposes does not of itself have the territorial exclusiveness (as suggested by Bamford's Case and Kingsford's Case), the plenary nature and scope of the Commonwealth legislative power, as

⁵⁵ W.N. (N.S.W.) at p.123. 2 Cowen, op.cit., pp.456-7.

Commonwealth aerodromes so acquired will not be much different from its power over the Commonwealth Territories; State laws on any subject dealing with matters relating to such places will be over-ridden by the exercise of the Commonwealth's exclusive power under sec.52(i). Even if Professor Cowen's second proposition were accepted, the determination of the validity of a State law in the light of sec.109 must always depend upon the nature of the place acquired by the Commonwealth for the public purposes and the Commonwealth's intention in enacting its laws over such a place.

In the <u>second Henry Case</u>, <u>Dixon</u> J. (as then he was) held valid under the commerce power the Commonwealth regulations concerning flights on aerodromes which otherwise other members of the Court upheld under the external affairs power. He said: 1

But, in relation to aerodromes licensed for the landing and departure of aeroplanes upon journeys to other countries and among the States, there seems to be no reason why, independently of the Air Convention, a Commonwealth law should not validly be made forbidding flying at a low altitude over any part of the aerodrome. To fly low cross wind above the neutral zone is obviously dangerous to aeroplanes taking off

⁶¹ C.L.R. at p.650.

or landing. In my opinion Commonwealth law may keep an aerodrome in use for inter-State and oversea flying free of such dangers. Once an aerodrome is licensed for or otherwise devoted to the purposes of air navigation with other countries and among the States, the safety of the aerodrome becomes, I think, a matter falling within the Federal power.

It will be seen that he was referring to aerodromes generally irrespective of whether they were Commonwealth aerodromes or those merely licensed or authorized.

In the A.N.A. Case, Williams J., after having affirmed the sovereign rights of the States to co-ordinate traffic by rail or road without infringing sec.92 of the Constitution, expressed an important dictum: 1

So a State could, I should think, build a number of aerodromes, and provide that only aeroplanes which fulfilled certain conditions could use such aerodromes, or it could confine their use to aeroplanes owned by itself. Provided the conditions of use were nondiscriminatory and were unrelated to flying across the border, the legislation would not infringe s.92. It would be legislation regulating the use of a further facility for all trade and commerce provided by the State. And it would seem to follow that if the Commonwealth built aerodromes it could also pass non-discriminatory legislation regulating the use of such aerodromes, or confining their use to its own purposes ... (Italics added)

This raised an important question, viz., 'to what extent does the Commonwealth ownership of aerodromes (and

⁷¹ C.L.R. at pp.109-10.

facilities) enable the Commonwealth to control economic aspects of the operation of aircraft insofar as the operators use these facilities? According to him, the Commonwealth could exercise reasonable control over those facilities which it could itself provide to increase the flow of inter-State traffic by air. He did not mention sec.52(i), and moreover his remark might have been criticized as an argument based upon early transport cases, such as <u>Vizzard's Case</u> and analogous cases.²

The decision in the Airlines of N.S.W. Case (No.2) disclosed the Court's opinions in respect of some aspects of the extent of Commonwealth economic control over aircraft operations using the Commonwealth aerodromes and other facilities, since a question was directly raised as to the validity of the new federal regulations (reg.320A) requiring all aircraft operators including intra-State ones to hold federal permission if they wished to use Commonwealth aerodromes. Reg.320A reads:

⁷¹ C.L.R. at p.110.

See Chapter II, ante.

(1) On and after such date as is fixed by the Minister for the purposes of this regulation by notice in the Gazette, 1 an aircraft shall not land at or take-off from any place, being a place acquired by the Commonwealth for public purposes, except under the authority of, and in accordance with, a permit issued under this regulation by the Director-General. (2) The application of the last preceding sub-regulation is not limited by the operation of sub-regulation (1) of regulation 6 of these Regulations.

Barwick C.J., and <u>Kitto</u> and <u>Windeyer JJ.</u>, categorized reg.320A as an exercise of the power under sec.52(i)² of the Constitution, 'if for no other reason than that the Convention imposes upon the Commonwealth an obligation to create and maintain aerodromes,' as provided for in Art.28 of the Chicago Convention.³ Hence, 'the Commonwealth is both able to determine as a legislator and not merely as an owner of the land on which the aerodrome is located who shall and who shall not land or take-off so that no State law may prevent such landing or taking off.' However, the Chief Justice could not find any inconsistency

The date fixed was 10th October, 1964. See Commonwealth Gazette 1964, p.4003A.

This section was described in the Chief Justice's judgment as 's.51(i)' by mistake, 38 A.L.J.R. at p.394.

Art.28 provides for 'air navigation facilities and standard systems'.

³⁸ A.L.J.R. at p.394.

between the Commonwealth regulation and the Air Transport Act (N.S.W.) forbidding the carriage of passengers and goods by aircraft between places within the State, 'even though the Commonwealth-owned aerodromes may be the sole means of the taking off and the landing of commercial flights at these places, ''because 'the State Act does not purport to prevent permitted take-off or landing of aircraft but only the commercial carriage of passengers or goods by aircraft between places within New South Wales. 1 Kitto and Windeyer JJ. also rejected the inconsistency argument on the same ground as the Chief Justice's. 2 Taylor, Menzies and Owen JJ. did not mention the legislative source of reg. 320A but flatly asserted its validity and non-inconsistency with the State Act. 3 McTiernan J. based the legislative source of regs. 320A and 320B (controlled airspace) solely upon the provisions of

¹ Ibid.

²

³⁸ A.L.J.R. at p.410, per <u>Kitto</u> J.; at p.424, per <u>Windeyer</u> J.

Menzies J. expressed the same opinion as Barwick C.J., Kitto and Windeyer JJ. as to the inconsistency question, 38 A.L.J.R. at p.421.

the Convention, viz., Arts. 12 and 37(b) and (c), 1
Annexes 2 (Rules of the Air)² and 14 (Aerodromes), and
therefore regarded reg.320A as a valid exercise of the
Commonwealth power conferred by sec.26(1)(b) (and sec.
26(2)(c)) of the Air Navigation Act under the external
affairs power. In this case, however, where the external
affairs power was applied in a limited scope, the State
Act was, according to him, not inconsistent with the
federal regulation because the State Act was confined to
carriage of persons or goods between terminals, whereas
reg.320A related to the mere flight of aircraft.³

It is not clear from those judgments whether

Barwick C.J. and Windeyer J. considered the possibility

that Commonwealth control over Commonwealth aerodromes

would be exercised on economic or political as distinct

from safety grounds. Some of their dicta suggest that the

Commonwealth's power is limited to safety considerations

of aircraft operations in or around the vicinity of such

Art.12 (Rules of the Air), Art.37 (Adoption of international Standards and Procedures) - (b) (characteristics of airports and landing areas) (c) (rules of the air and air traffic control).

He referred this Annex as 'Annex 1' by mistake, 38 A.L.J.R. at p.404.

³⁸ A.L.J.R. at p.405.

aerodromes in the same manner as with respect to controlled airspace. Surely, however, the Commonwealth has an exclusive right to say that any one who enters the Commonwealth-owned aerodromes for whatever reasons must get permission from the Commonwealth authority. Perhaps these Justices would require, differing from Williams J. in the A.N.A. Case, that the observance of sec. 92 must be guaranteed with respect to 'inter-State' aviation. if reg. 320A is validly based upon sec. 52(i) and on such a base is interpreted as involving the economic aspects as well as safety control of aircraft operations, then the State Act should have treated as pro tanto inconsistent with the Commonwealth regulation; thus even upon the second proposition set out by Professor Cowen, the State law could not be saved insofar as it purported to authorize the carriage of passengers or goods on an intra-State route in which a Commonwealth aerodrome was to be used. If the Chief Justice and some other Judges admitted the relevance of sec.52(i) and yet did not find inconsistency between the two sets of law, they would have been playing with a 'theory', because, in view of the fact that every intra-State service in New South Wales

commences and terminates in Sydney, the whole scheme of co-ordination and rationalisation of intra-State air services, as embodied in the State Act, would be nullified if interfered with by the Commonwealth economic control over Commonwealth aerodromes. Apart from such an ambiguity of the Court's attitude, the counsel for the plaintiff could also have relied upon this constitutional clause as a substantive and enabling legislative source, instead of invoking it merely for the purpose of reinforcing his contention on the necessity of one authority of the whole aviation in Australia in general. Perhaps, the drafting of reg. 320A might have provided a better foundation for this argument if the Commonwealth had expressed an intention to exclude the operation of any inconsistent State law, by prohibiting the use of such aerodromes not merely as a temporary permission or authorization but as a licensing condition of air transport operations in their use thereof.

What is the scope of, or incidental to, the exercise of the power over such Commonwealth aerodromes is to be

The fact was presented before the Court by the plaintiff's counsel as evidence showing that a substantial portion of controlled airspace within New South Wales was used by intra-State flights.

decided upon considerations of the facts and the nature of an 'aerodrome', which involves complex technological factors. For effective control, the power must further be extended to adjoining airspace designated as 'controlled airspace'.

Commonwealth Controlled Airspace

The Commonwealth Air Navigation Regulations apply to and in relation to '(a) international air navigation within Australian territory; (b) air navigation in relation to trade and commerce with other countries and among the States; (c) air navigation within the Territories; (d) air navigation to or from the Territories; (da) air navigation in which a Commonwealth aircraft is engaged; (e) air navigation in controlled air space that is of a kind not specified in a preceding paragraph but directly affects, or may endanger, the safety of persons or aircraft engaged in - (i) air navigation of a kind specified in paragraph (a), (b), (d) or (da); or (ii) air navigation in which a military aircraft is engaged; and (f) on and after 10th October, 1964, all air navigation within Australian territory of a kind not specified in paragraph (a), (b), (c), (d) or (da). According to

Reg.6(1).

reg. 5(1), 'controlled airspace' means 'a control area or a control zone; 'control area' and 'control zone' are defined respectively as 'an airspace designated as a control area! and 'an airspace designated as a control zone' by the Director-General in pursuance of reg.95 of the Regulations. Reg. 95(1) provides that the Director-General may designate - (a) an aerodrome at which aerodrome control service is provided as a controlled aerodrome; (b) airspace that is within defined horizontal and vertical limits as a control area or a control zone; (c) airspace in respect of which flight information and alerting services are available as a flight information region; and (d) airspace in respect of which operational control service is provided as an operational control area. 2 It should be noted, however, that the notion of 'controlled airspace' is not a recent one, and, before the amendment of the Regulations in 1964 by which reg. 6(1) (da), (e)(ii) and (f) was inserted and reg.95 substituted,

^{&#}x27;Aerodrome control service' means 'an air traffic control service for aerodrome traffic'; 'aerodrome traffic' is defined as 'all traffic on the manoeuvring area of an aerodrome and all aircraft flying in the vicinity of an aerodrome.' Reg.5(1).

Reg. 95(2) imposes upon the Director-General an obligation to cause a notification of such designation to be published in a prescribed way.

the Regulations defined 'controlled airspace' as 'an airspace or an aerodrome and the airspace in its vicinity designated by the Director-General', in pursuance of reg.95 of the Regulations. Reg.95 provided then that the Director-General may designate - (a) airspace extending upwards from a specified height above the surface of the earth, as a control area; (b) airspace extending upwards from the surface of the earth as a control zone; and (c) an aerodrome and the airspace in its vicinity as a controlled aerodrome, and a control area, control zone or controlled aerodrome so designated is a controlled airspace.' Therefore, as compared with the previous concept of 'controlled airspace', the present definition does not necessarily include 'controlled aerodrome' which may, or may not, be designated as 'control area' or 'control zone'. In practice, however, 'controlled airspace' is a strip of airspace, stretched from and linking with important aerodromes designated as 'controlled aerodromes' where various control facilities (e.g., approach facilities, communication units, etc.) are provided. Reg. 320B, which was newly inserted by the 1964 amendment, provides:

On and after such date as is fixed by the Minister for the purpose of this regulation by notice in the Gazette, an aircraft shall not be flown in controlled airspace in the course of air navigation of a kind specified in paragraph (e) of sub-regulation (1) of regulation 6 of these Regulations except under the authority of, and in accordance with, a permit issued under this regulation by the Director-General.

In the <u>Airlines of N.S.W. Case (No.1)</u>, it was pointed out by the Court that, under the existing provisions of application of the Regulations (before 10th October, 1964), air navigation within a State 'but outside controlled airspace' which was in the course of intra-State trade was not governed by the Regulations except to the extent provided expressly or by necessary implication in particular regulations. In the <u>Airlines of N.S.W. Case (No.2)</u>, the validity of reg.320B was raised in the pleadings, but no doubt as to its validity, nor as to the validity of reg.6 and reg.320A, was raised by the defendant in the course of arguments before the Court; <u>Barwick C.J.</u>, and <u>Windeyer</u> and <u>McTiernan</u> JJ. specifically asserted its validity;

The date fixed was 10th October, 1964; see Commonwealth Gazette 1964, p.4003A.

Cf. e.g., 37 A.L.J.R. at p.403, per Dixon C.J.; at p.407, per Taylor J.; at p.410, per Menzies J.

undifferentiated control of this airspace was not, and indeed in my opinion could not be challenged; 1 McTiernan J. said that reg. 320B (and reg. 320A) could be supported in relation to intra-State flying by sec.26(1)(b)of the Air Navigation Act, i.e., the regulation-making power under the external affairs power to carry out the Chicago Convention and its Annexes. 2 It would follow that the Court found constitutional basis for reg. 6(1)(e) and reg. 320B in the federal commerce power, external affairs power or other legislative powers affecting aviation (e.g., defence power), as aided by incidental powers. Although some Judges (including the Chief Justice) thought that the Commonwealth could determine who should use controlled airspace in Australia, 3 the Court found that reg. 320B was not inconsistent with the State Air Transport Act which was confined in its application to carriage of persons or goods between terminals - the same ground as it relied on when denying inconsistency between reg. 320A and the State Act. As with the

³⁸ A.L.J.R. at p.394, per Barwick C.J.

³⁸ A.L.J.R. at p.404, per McTiernan J.

³⁸ A.L.J.R. at p.394, per Barwick C.J.; at p.424, per Windeyer J.

Commonwealth aerodromes, there remains a doubt as to whether the Director-General may apply economic policies in issuing a permit for the use of such controlled airspace. But, judging from the Court's view based upon the limited application of the commerce power and external affairs power, it seems unlikely that it would regard reg.320B as having any stronger application than the other control provisions.

In the United States, an argument favoring exclusive federal sovereignty of navigable airspace which was akin to the 'zone theory' was once advanced. It was in summary based upon the following reasons: As neither air navigation nor radio communication made substantial and continual use of airspace until the present century, no nation anywhere in the world had either by occupation or by need of protection acquired any domain in the upper airspace prior thereto. Accordingly, the United States did not acquire sovereignty in the upper airspace until long after the adoption of the Federal Constitution. The original colonies had no

The theory had been considered at one time in the international law aspect of the problem of sovereignty by Bluntschli, Holzendorff, Merignhac, Rivier, etc., until the theory of an unlimited height of sovereignty in the air prevailed.

Cf. F.P. Lee, The Air Domain of the United States, reprinted in Legislative History of the Air Commerce Act of 1926, prepared by the office of the legislative counsel and issued by the government, at 104.

domain in the upper airspace and it was not part of their territory when the Constitution was adopted. Moreover, after the adoption of the Constitution, no State could acquire territory in the airspace as this would amount to the acquisition of new or additional domain, a function vested solely in the Federal Government. The navigable airspace is hence the exclusive territory of the Federal Government, which thus has exclusive sovereignty (both external and internal) except as to an airspace stratum close to the surface. This stratum may be considered as that part of the airspace which since earliest times has been used by mankind in the construction of buildings and other such similar uses as are required by human dwellers on the earth's surface. It was part of the territory of the several States, subject to the same constitutional control by the Federal Government as exists over the lands and waters of State But all other airspace is Federal territory. territory.

Various criticisms were raised against this view; the view is apparently based upon the premise that airspace is a domain separate and distinct from the land beneath

J.C. Cooper, State Sovereignty vs. Federal Sovereignty of Navigable Airspace, J.A.L.C., vol.15, 1948, pp.27-38.

it, which is doubtful; it is also fairly obvious that the precise boundary between the surface airspace and the upper air strata will be difficult to determine. 2 result, this view based upon the historical argument denying State power has been disregarded, and it is established that the question how far the federal Government can exercise its jurisdiction within all strata of airspace depends wholly upon the scope of the enumerated In the Australian legislative powers in the Constitution. setting, as we see in more detail when we discuss the legal status of the Australian airspace elsewhere, 3 the physical boundaries of States have been more strongly stressed in relation to their respective legal powers in the airspace. However, the relation between Federal and State sovereignty in the airspace in Australia puts, as in the United States, the airspace over a State in the same legal and constitutional status as the lands and waters of that State; the countries differ in that the balance between

A.L. Newman II, opcit., pp.1121-2.

Ibid. 'Navigable airspace' was defined as the space above the minimum heights prescribed by regulations under the Civil Aeronautics Act, 1938, c.601.52, Stat.977, 49 U.S.C.401 et seq. See now the Federal Aviation Act, 1958, Aug.23, Public Law 85-726, 72 Stat.731.

See Chapter VI, post.

federal and State sovereignty in the airspace has undergone a change in the course of the constitutional interpretation of federal powers. In the United States, the federal Act early in 1938 broadened the term 'air commerce! to include 'any operation or navigation of aircraft which directly affects, or which may endanger safety in, inter-State, overseas, or foreign air commerce. This in turn has been interpreted in accordance with the expansive and practical approaches to 'commerce' problems adopted by the Supreme Court since Hence the American position of aviation control in airspace stands in sharp contrast to the Australian one, where the commingling of international and inter-State flights with intra-State flights has been recognized in the Airlines of N.S.W. Case (No.2) only with respect to safety matters affecting aircraft operations. Hence, the scope of the Commonwealth power over controlled airspace is largely prescribed by those main powers, and therefore depends finally upon what one finds in such powers as those with respect to overseas and inter-State 'commerce' or international 'obligation' in external relations. However, as shown above the approach to reg. 320A

Sec. 1 of the Civil Aeronautics Act, supra.

(aerodromes) is not the same as the approach to reg.320B (airspace), for the regulations rest on different legislative sources in the Constitution. But the two topics have a clear practical interrelation; it merits attention whether or how far the exclusive power over Commonwealth aerodromes can be extended to the use of controlled airspace adjoining the controlled aerodromes, and how far the area of this airspace may be extended.

Commonwealth Aircraft

The Commonwealth <u>Air Navigation Regulations</u> apply to air navigation in which a 'Commonwealth aircraft' is engaged. For the purpose of the Regulations, 'Commonwealth aircraft' is defined as 'an aircraft, other than military aircraft, that is in the possession or under the control of the Commonwealth or an authority of the Commonwealth (other than the Australian National Airlines Commission) or is being used wholly or principally for a purpose of the Commonwealth.' The constitutional basis of such

Reg.6(1), (da).

^{&#}x27;Military aircraft', in relation to Australian aircraft, means the aircraft of any part of the Defence Force, and includes any aircraft commanded by a member of that Force who is detailed for the purpose, and any aircraft being constructed for any part of the Defence Force (reg.5(1)).

Reg.5(1)

regulation of 'Commonwealth aircraft' is to be found in sec.51(xxxix) of the Constitution empowering the Commonwealth Parliament to make laws with respect to 'matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.' 1

The definition of 'Commonwealth aircraft' is twofold; it is either (a) an aircraft in the possession or under the control of the Commonwealth or an authority of the Commonwealth, or (b) an aircraft being used wholly or principally for a purpose of the Commonwealth. The Chicago Convention on international civil aviation does not apply to 'State aircraft' which are defined as limited to aircraft engaged in military, police and customs services. In Australia, however, 'State aircraft' are defined only as 'military aircraft' and there appear to be as yet no Australian aircraft used in customs or police services. Prior to the express inclusion of 'Commonwealth aircraft' in the application of the Air Navigation Regulations in 1964, aircraft owned by the departments of Commonwealth

Under this constitutional power, sec.26(1)(e) of the <u>Air Navigation Act</u> 1920-1963 authorizes the making of regulations with respect to any other matter with respect to which the Parliament has power to make laws.

Government, such as, the Bureau of Mineral Resources, the Commonwealth Scientific & Industrial Research Organization (C.S.I.R.O.) and the Department of Civil Aviation, had been registered as ordinary civil aircraft and the provisions of the Chicago Convention and the Air Navigation Regulations applied to them within the scope of application of the Regulations. The present Regulations separate 'Commonwealth aircraft' from ordinary civil aircraft, and apply to any kind of air navigation in which 'Commonwealth aircraft' are engaged irrespective of whether it be international, inter-State, Territorial, or intra-State.

The definition of Commonwealth aircraft probably enables us to neglect a problem which might otherwise arise, namely whether the authority operating an aircraft is 'under the shield of the Crown'. The tests for that

The information was obtained from Dr <u>Poulton</u>, then Assistant Director-General of the Commonwealth Department of Civil Aviation.

As to the meaning of the expression 'shield of the Crown', see G. Sawer, Shield of the Crown Revisited, 1 M.U.L.R.2, p.137. Crown privileges at common law include, immunity from the operation of statutes, immunity from taxation, immunity from suit in the courts save with the Monarch's consent, special advantages in litigation such as immunity from discovery and interrogatories, advantages in style and order of pleading and immunity from execution of judgments, etc. (ibid.)

relationship have been much disputed, 1 and indeed the whole concept has been criticised as inappropriate to the circumstances of modern government. 2 But the numerous and conflicting cases agree on one point; if a particular statute adopts a particular conception of the type of governmental authority or organization with which it is concerned, then the general concept of 'shield of the Crown', depending on implications drawn mainly from the degree of Ministerial control over an authority, has no application. If the definition had stopped at 'possession or ... control of the Commonwealth', then we might have been involved in deciding whether possession or control by a particular authority (e.g. the Snowy Mountains Authority)³

As to discussions on the decided cases, see, e.g. W. Friedmann and D.G. Benjafield, Principles of Australian Administrative Law, second ed., pp. 76, et seq.; Sawer, op.cit., pp. 137, et seq.

Professor <u>Sawer</u> in his work, <u>supra</u>, advances his arguments on the application of 'the shield of the Crown' as restricted as possible, and considers that incorporation of an authority should be sufficient to remove it for all purposes from 'under the shield'.

The Commonwealth Government established the Snowy Mountains Authority, and empowered it to generate and supply electricity by means of hydroelectric works in the Snowy Mountain Area. The Snowy Mountains Council, established under the terms of the Agreement (between the States of New South Wales and Victoria and the Commonwealth) and consisting of representatives of the Commonwealth, the Authority and the two States, directs and controls the operation and maintenance of the permanent works of the Authority and the allocation of loads to generating stations.

was such control and this might in turn have involved shield of the Crown! difficulties. Actually most of the Commonwealth authorities which do possess or control aircraft are beyond question departments of the central government under Ministerial control and clearly under the shield of the Crown, such as the Department of Supply and the Department of Civil Aviation. But in any event the definition refers also to possession etc. by an authority of the Commonwealth, and this would probably include any authority set up under federal legislation such as the Snowy Mountains Authority, and the Reserve Bank, even if not in other respects 'under the shield'. Finally the definition even more widely includes 'used wholly or principally for the purpose of the Commonwealth. This phrase is likely, as in the case of the 'purposes of the Commonwealth under sec. 81 of the Constitution to apply to any use deriving constitutional validity from the Constitution or from laws made thereunder.

See, Attorney-General (Vict.) v. Commonwealth (1945) 71 C.L.R. 237. Sec.81 of the Constitution provides: 'All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.'

It should be remarked in passing that we are concerned with the conception of 'Commonwealth aircraft' only in so far as this concept affects the ambit of Commonwealth power to regulate aviation matters. different considerations arise if it is sought to make the Commonwealth a defendant in an action arising out of the navigation of a 'Commonwealth aircraft' as above defined, at the suit of some person injured in consequence of that navigation. Sec. 56 of the Commonwealth Judiciary Act makes the Commonwealth liable in tort, and probably this would extend to claims for damage by aircraft even though the basis of such a claim should be one of the statutes now governing such claims in Australia. In this context, however, the question whether the Commonwealth aircraft was operated by the Crown or by an authority under the shield of the Crown would arise, because unless such operation could be established, the 'Commonwealth', i.e. the Crown in right of the Commonwealth, would not be an appropriate Furthermore, in such an action, whether against defendant. the Commonwealth or against a Commonwealth authority not under the schield of the Crown, the further question could arise whether the person operating the aircraft was doing

No.6 of 1903, as amended.

so in the exercise of an independent discretion. But these questions do not enter into the consideration of the scope of the legislative power over 'Commonwealth aircraft'.

What, then, is the extent to which Commonwealth legislative power may support the regulation of various aviation matters arising from operations by such aircraft? This is mainly a matter of constitutional interpretation of sec.51(xxxix), combined with various legislative powers (e.g. posts, external affairs) and/or with the general executive power in sec.61 of the Constitution. express omission of the Australian National Airlines Commission from 'an authority of the Commonwealth' in respect of the application of the Regulations to !Commonwealth aircraft' raises a special problem. At present the Air Navigation Regulations, so far as applicable, apply to and in relation to the Commission in the same manner as they apply to ordinary civil aircraft and their operations.2 It is doubtful whether the Commission shares in the benefit of the shield of the Crown, but it is certainly an

Cf. Friedmann and Benjafield, op.cit., pp.105-6.

Sec.29 of the Australian National Airlines Act 1945-61.

As to the organization and constitution of the Commission, see Appendix III, post.

'authority' of the Commonwealth as its instrumentality or agent, and aircraft owned and operated by the Commission are under the same authority. Hence, a question arises as to whether the Commonwealth is competent to authorise Commission activities within a purely intra-State field, without relying on the State's permission, by virtue of a claimed plenary power over 'Commonwealth aircraft'.

Windeyer J.'s dictum in the Airlines of N.S.W. Case (No.2) deserves citation here:

Whether on some other ground than the supposed integration of inter-State and intra-State commerce the Commonwealth could directly or by an agent of its creation enter the field of intra-State air navigation is a matter on which I express no opinion.

The dictum does not give any clue to answer the question, but it may suggest that, if the Commission is reorganized so as to put it under a sufficient authority or control of the Government of the Commonwealth, the establishment and operation of such a Commonwealth instrumentality may well be justified under the incidental power of the executive Government, as distinct from the federal commerce power. In Helicopter Utilities Pty. Ltd. v. Australian National Airlines Commission, 2 the plaintiff company

³⁸ A.L.J.R. at p.422. 2 (1962) N.S.W.R. 747.

moved for an interlocutory injunction restraining defendant from chartering to the Commonwealth certain helicopters and crews for about eighty days for use by a research expedition to the Antarctic conducted under the control of the Department of External Affairs. ground for the relief claimed by the plaintiff was that the Commission's proposed conduct was ultra vires the powers it possessed under the Australian National Airlines Act 1945-59, which were to do all that was necessary or convenient to be done for, or incidental to, or in connection with... operation by it of airline services for the transport of passengers and goods by air. The Supreme Court of New South Wales held that the chartering of helicopters for an expedition of eighty days! duration was not part of the conduct of an airline service within the meaning of the Act, because the phrase 'airline service' where used in that Act connoted scheduled airline service. The Commission was set up under the commerce power, and its powers and functions are largely prescribed by that power. The decision implied that Commonwealth could have vested in the Commission a general power and function to provide services for the Government of the Commonwealth,

Sec.19(1).

but had not in fact done so. The only question was as to the scope of the Act, not of the Constitutional power. Probably, however, the answer to this problem would turn on more general questions as to the scope of federal It is reasonably well settled, at least by implication, that the Commonwealth has no general power to engage in trades or businesses, and this would include an airline business. Probably the appropriation power (sec.81) provides no basis for first setting up an intra-State air service and then claiming a power to regulate it. Hence the Commonwealth would be driven to seeking some more specific basis for its activity, and this brings us back to inter-State and foreign commerce, convention obligations, defence &c. On this reasoning, it is also possible that the definition of 'Commonwealth aircraft' results in a claim to greater power than the Commonwealth has, unless

It is unlikely that <u>Windeyer</u> J. in his <u>dictum</u>, mentioned above, considered that the Commonwealth could generally do this, but there are some border-line cases, such as, <u>Attorney-General for Victoria v. The Commonwealth</u> (<u>Clothing Factory Case</u>) (1934-35) 52 C.L.R. 533. If, for instance, the Commonwealth runs a special air transport operation in accordance with the Commonwealth's time schedules between places within Australia originally for the purpose of carrying governmental officers who are engaged in the Commonwealth businesses, and, in the course of such transport practices, offers vacant seats to ordinary civilians on reasonable fares, the Court may regard it as incidental to the administrative functions of the Executive.

it is 'read down' by inserting 'in pursuance of a constitutional power of the Commonwealth' before 'or' at the end of (a). In other words, mere de facto possession or control by Commonwealth officers will not be sufficient.

The Commonwealth has enacted the <u>Air Accidents</u>

(Commonwealth Liability) Act 1963¹ establishing a

Legislative scheme for payments to the dependants of a

person who is killed or injured in an air accident while

travelling as a passenger on Commonwealth business or at

Commonwealth expense, either in carriage in 'aircraft

operated by the Commonwealth or Commonwealth authority',

or in carriage in aircraft not so operated (e.g., private

airlines). As the Commission's liability is regulated

under the Commonwealth <u>Civil Aviation (Carriers'</u>

<u>Liability) Act</u> 1959-62,² the <u>Air Accidents Act</u> 1963 does

not apply to the carriage in aircraft operated by the

Commission.³

With respect to the question of the third party ground damages caused by Commonwealth aircraft, the subject may not be regarded as being within the powers conferred to

No.74 of 1963.

No.2 of 1959 - No.38 of 1962.

See Chapter VIII, post.

the Commonwealth Parliament, for it involves the third party within the jurisdiction of States. However, for the effective exercise of the Commonwealth governmental functions, the subject should fall within sec.51(xxxix) of the Constitution. Crown immunity problems are relevant to this legal relation.

In the Commonwealth <u>Crimes (Aircraft) Act</u> 1963¹ providing in effect that any act, which would be an offence against the laws of the Australian Capital Territory if it took place there, is an offence against the Act if committed on board an aircraft to which the Act applies, ² 'Commonwealth aircraft' is defined in the similar terms as in the <u>Air Navigation Regulations</u>, but not specifically excluding the Commission's aircraft. The Act applies generally to such Commonwealth aircraft when engaged in <u>any</u> flight.

No.64 of 1963.

See Chapter X, post.

CHAPTER V

Aviation and Miscellaneous Constitutional Powers

There are many other constitutional powers allowing the Commonwealth Parliament to enact legislation for the purpose of controlling aviation; most, if not all, powers enumerated in sec. 51 of the Constitution other than those discussed above relate indirectly to aviation, e.g., postal, telegraphic, telephonic, and other like services; lighthouses, lightships, beacons and buoys; astronomical and meteorological observations; quarantine; etc. Among them we shall briefly discuss below the following four subjects of importance: defence, recognition and enforcement of laws, &c. of States (full faith and credit), reference to State (aviation) powers to the Commonwealth, and incidental matters.

Defence

By sec. 51(vi) of the Constitution, the Commonwealth Parliament has power to make laws for the peace, order, and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

With this section should be read many other constitutional clauses relating to defence, 1 but, for the present purpose, it is enough to say that sec.114 forbidding a State to raise or maintain any naval or military force without the consent of the Commonwealth Parliament, together with sec. 52(ii) empowering the Parliament to make laws exclusively with respect to matters relating to transferred departments, makes the defence power of the Commonwealth exclusive. 2

Sec. 51(xxxii) authorizes the Parliament to make laws with respect to the control of railways with respect to transport for the naval and military purposes of the Commonwealth. Sec. 69 transfers the department of 'naval and military defence' to the Commonwealth. Sec. 70 transfers from the States to the Commonwealth Executive Government all powers and functions relating to matters passing to the latter under the Constitution. Sec. 119 imposes upon the Commonwealth an obligation to protect the States against invasion and, on the application of the Executive Government of a State, against domestic violence.

Cf. Joseph v. Colonial Treasurer (N.S.W.) (1918) 25
C.L.R. 46. But, in Carter v. Egg & Egg Pulp Marketing
Board (1942) 66 C.L.R. 557, it was held that the power was
not necessarily exclusive. The 'non-exclusiveness' becomes
relevant when, in time of war or in time towards war,
Commonwealth defence laws affect various aspects of State
laws. It is argued that the defence power is not exclusive
of the States' power, in respect of subjects not of
themselves within the matters which 'because of their
nature' are within the power, and that in respect of laws
with the direct and immediate object of naval and military
defence, the Commonwealth power is in virtue of its nature
exclusive (Wynes, op.cit., pp.255-56). But, in the abovementioned 'situation', it is extremely hard to judge what
is by its nature within the power.

It is not a primary object here to discuss in detail the nature and scope of the defence power in the Constitution, as our subject is not 'military' aviation but limited to 'civil' aviation. But there are problems as to how far the Commonwealth can extend its legislative and executive powers to the field of civil aviation in connection with and through its regulation of defence matters. Intermingling phases of civil aviation and military activities exist in a number of cases, as for example, in the use of airspace where some military training is to be performed, or in the regulation of flight rules or communication systems in airspace over or around an aerodrome used both for civil aviation and for military purposes.

It was once asked whether the power to make laws for the naval and military defence included defence by air, but any such doubt has been ignored in practice, and, in Farey v. Burvett¹ and Pirrie v. McFarlane,² the existence of the legislative power in respect of air navigation for purposes of defence was assumed by the Court.³ Unlike

^{(1916) 21} C.L.R. 433.

^{(1925) 36} C.L.R. 170.

Cf. Report of the Royal Commission on the Constitution (1929); Comments in the Public Acts of Queensland (Reprint), 1828-1936, vol.1, p.350.

most other powers conferred by sec. 51 of the Constitution, a law with respect to the defence of the Commonwealth is, on the authorities, an expression which seems rather to treat defence or war as the purpose to which the legislation must be addressed. In times of peace, however, the address of the legislation is not conspicuous enough to make it easy to measure the practical effect of its operation for aiding defence. What a particular defence law should effect in times of peace may well be summarized by Fullagar J.'s remark in the Australian Communist Party Case, 2 viz., the primary aspect of defence - direct and immediate naval and military defence. 3 This 'primary aspect' of defence will certainly include various aspects of military aviation, and these cannot be segregated from those of civil aviation, owing to the very nature of 'aviation'. Many aspects of the Air Forces are now regulated by the Air Force Regulations made under the Air Force Act 1923-56. The Air Force Regulations

See, Stenhouse v. Coleman (1945) 69 C.L.R. 457, per Dixon J.

Australian Communist Party v. Commonwealth (1951) 83 C.L.R. 1.

⁸³ C.L.R. at pp.253-54, per Fullagar J.

The Air Force (Canteens) Regulations, Air Force Courts of Inquiry Regulations and Air Force (Women's Services) Regulations are also set up under the Act.

deal with various aspects of the Air Forces; general powers for air defence purposes vested in the Governor-General are defined, and these empower him to do all matters and things deemed by him to be necessary or desirable for the efficient defence and protection of the Commonwealth or of any State. Taking as an example the regulation of Air Force flying, it is to be observed that the regulations are expressed in more general terms than are used in relation to civil aviation, because of the essential nature of military operations which requires freedom of movement and system flexibility; hence, the flight rules are governed by two different sources of legislative power, and consequently there is much duplication of provisions on similar subjects as between civil aviation legislation and military aviation legislation. Obviously, it goes too far to say that most, if not all, features of civil aviation should be regarded as being 'with respect to' defence because the same air is used by the same type of traffic means or because civil aviation provides a potential source of wartime air Therefore, in practice, co-ordination between military and civil aviation authorities is important. The Air Navigation Regulations (reg. 7(2)) provide that

Reg. 11.

the Director-General shall maintain close liaison with
the Department of Air in matters of common interest. In
the 'Joint Aviation Standards and Procedures', all
portions of airspace are recorded, and a set of common
or compatible operating procedures for the integration of
military and civil air activities is prescribed. Such
co-ordination is also extended to navigational aids and
communication systems.

The activities of 'space exploitation' deserve special mention. There is no specific power conferred upon the Commonwealth Parliament in respect of 'space exploitation' by the Constitution, but, as in the case of 'air navigation', there are several constitutional powers relating to the subject, e.g., the external affairs power (exercised in agreements between Australia and U.S.A. for a co-operative programme of space vehicle tracking

As to the relation between civil aviation and military aviation, the First Civil Aviation Report 1960-61 (prepared by the Minister for Civil Aviation) says: 'The need for expanding volume of controlled airspace to accommodate growing civil aviation traffic and the types of aircraft now operating is often in direct conflict with the training and other requirements of defence.... If the defence forces are to discharge their responsibilities in war they must, in peace time, have airspace available in which they can carry out random operations and move freely about the Sections must be set aside for air firing, weapons experiments, aerial research, explosives manufacture and such like. On the other hand, civil aviation requires airspace for the safe and orderly movement of aircraft, and in addition for civil flying training and for light aircraft operations. (At p.65).

and space communications), 1 Also, the Commonwealth Parliament has exclusive legislative power in respect of space activities specifically related to defence. Governor-General as the Queen's representative is commander in chief of the naval and military forces of the Commonwealth; the Minister for Supply administers the Department of Supply which, as one of its functions, is responsible for the defence research and development. The Research and Development Branch under the control of the Chief Scientist is responsible for research and scientific development in relation to war materiel. The Weapons Research Establishment, one of the establishments in the Branch, deals with 'space exploitation'. Airspace may be reserved permanently or intermittently, not only for military or civil flight control or for weapons and missile testing, etc., but also for flight of such space vehicles. Therefore, representatives of the principal users of airspace, the Department of Civil Aviation and Supply and the Defence group of Departments have established 'Air Co-ordinating Committee' for this purpose. 3

Cf. Year Book of the Commonwealth of Australia, no.47, 1961, pp.1101-2.

Ibid.

First Civil Aviation Report, supra, p.65.

The determination of the ambit of the defence power at a given point of time is the situation, however it may have been brought about, in which Australia finds itself at that time. As a transition of the situation towards war occurs, the 'purpose' approach results in more and more activities coming within the scope of the defence power until the power reaches its maximum extent in time of active war. There seems to be an inverse proportion relation between 'substance' and 'purpose' approaches - that is, 'substance' becomes vague according to the change of situation towards war and 'purpose' becomes less important in peace situation. The difficulty in ascertaining the possibility of aiding defence is reflected in the phrases which occur in the cases -'real connection', 'directness', 'reasonableness', 'nebulosity', 'substance'. This is at the same time the process of expansion of the concept of 'purpose', from the slightest possibility to the greatest of aiding The Court has taken judicial notice of current defence. international situations and by reference to them it examines the constitutionality of a defence law. in view of the intricately 'purposive' nature of the power, it would be more desirable if, in time of war or

⁸³ C.L.R. at p.274, per Kitto J.

in situation towards war, a judgment on the Australian position in international affairs and the estimation of possibility of aiding defence of Australia based upon that very judgment were left in greater degree to the Parliament. It is likely that as war approaches, 'inescapable military implications in civil aviation' might well lead the Commonwealth, for practical purposes, to a unified government in respect of its control over aviation industry in Australia.

Full Faith and Credit

Aviation raises many difficult problems of private international law, because aircraft traverse national borders at extremely high speed and in a short time have a relation with many different countries and legal systems. Hence it is often difficult to determine applicable law or jurisdiction to govern crimes, torts or other wrongs on board, or connected with, aircraft or collisions between different aircraft, and between aircraft and other objects or legal transactions, births, deaths and

As to this point, and various aspects of the defence power, see G. Sawer, The Defence Power of the Commonwealth in Time of War, 20 A.L.J. at p.269, et seq.

J.P. Van Zandt, Civil Aviation and Peace, Volume II of a series under the general title: America faces the air age; 1944, pp.1-5.

marriages, which may take place in aircraft or legal transactions concerning aircraft as such or carriers' liability to damages to passengers or goods, and so on.

As in the United States, problems of private international law arise in Australia at two levels, inter-State and international, and it is on their inter-State aspects that the Constitution confers upon the Commonwealth Parliament powers which may help to solve these problems. So far as matters within Australia are concerned, private international law problems will disappear in matters governed by uniform federal law enacted under specific legislative powers (e.g., inter-State commerce). But where State laws apply, the Commonwealth may still be able to exercise some control under sec. 51(xxiv), sec. 51(xxv) and sec. 118, known as 'full faith and credit' powers. Sec. 51(xxiv) empowers the Parliament to make laws with respect to 'the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the Courts of the States, and sec. 51(xxv) with respect to the recognition of the laws, the public Acts and records, and the judicial proceedings of the States. the implementing powers of a general constitutional obligation set out in sec. 118 which provides that 'full faith and credit shall be given, throughout the

Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State!. In the United States Constitution from which the Australian 'full faith and credit' provisions are derived, both the constitutional mandate and the powers implementing it are given in the same clause. The Australian provisions are separated, and they are more explicit as to what federal legislature may do by way of prescribing the effect in other States of judgments, laws, etc. of a State. However, the operative scope and effect of these constitutional powers has not been fully discussed in Australia, and it is pointed out that there is a 'disappointing lack of awareness' that the particular problem has an inter-State rather than an international

Art.IV, sec. 1; the section reads: 'Full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, records and proceedings shall be proved, and the effect thereof'.

W.W. Cook, The Powers of Congress under the Full Faith and Credit Clause, 1919, 28 Y.L.J. p.426.

Major works on this subject are Z. Cowen, Full Faith and Credit: the Australian Experience, Essays on the Australian Constitution, second ed., p.293 (the same article is published in Res Judicatae (now Melbourne University Law Review), 1952, p.27). See also Cowen, American-Australian Private International Law, 1957. E.I. Sykes, Full Faith and Credit - Further Reflections, 6 Res Judicatae, 1954, p.353. As to the other works on specific subjects, see Wynes, op.cit., p.227n.

character, due largely to the fact that Australian courts have followed English authority even to the extent of overlooking the constitutional obligation to accord full faith and credit. Therefore, it is necessary for us to review the problems involved in the 'full faith and credit' powers in order to find guiding principles for the solution of various private international law questions arising from aviation activities within Australia. However, in the absence of direct authorities on this problem, our discussion will necessarily be speculative.

In <u>Harris v. Harris</u>, ² the Supreme Court of Victoria held that a decree of divorce pronounced by the Supreme Court of New South Wales and having final and conclusive force in New South Wales would be recognized as valid in Victoria and could not be challenged in Victoria on the ground that it had been pronounced without jurisdiction, by virtue of sec. 18 of the <u>State and Territorial Laws and Record Recognition Act</u> (C'th) 1901-28. It was mentioned by the Court (<u>Fullagar</u> J. sitting alone) that a judgment of an inferior Court of a State, having been

Cowen, American-Australian Private International Law, p.10.

⁽¹⁹⁴⁷⁾ V.L.R. 44.

No.11 of 1901.

open to challenge 'at home' for want of jurisdiction, would seem to be equally open to challenge on that ground in a sister-State. That the implied prohibitions in Commonwealth-State relations had been rejected since the decision of Engineers' Case was mentioned as a ground of denial of reliance on American cases. In the United States, some exceptions (e.g., jurisdiction) to the operation of full faith and credit are permitted insofar as they are based upon the States' reserved sovereignties. Apparently, the Judge took a fairly literal approach to the construction of sec. 18 of the Act, which read:

All public acts, records, and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken.

Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. (1920) 28 C.L.R. 129.

This literal approach is also a wider approach to the ratio decidendi of Engineers' Case, and, in the absence of such a constitutional restrictions as the due process clause in the U.S. Constitution, the full faith and credit clause in the Australian Constitution may dictate that a judgment having final and conclusive force in the original

In a narrow approach to the ratio decidendi of Engineers! Case, it was concerned solely upon the question of the distribution of powers between Commonwealth and States; on that question, the case decided that no assumption about the area of State power should be made before construing the express grants of the Commonwealth. The same approach can be made to constitutional guarantees and prohibitions. For example, it could be said that when interpreting sec. 92, no assumptions should be made about the likely area of control over trade and commerce which governments, whether federal or State, were intended to retain. Similarly, it could be said that sec. 118 should be interpreted without any assumption about the extent to which Commonwealth or States should be free to qualify within their respective powers. But Engineers! Case did not in terms deal with any guarantee or prohibition question and in fact when dealing with such questions the Courts have tended to make assumptions about the kind of powers intended to be left unaffected - a balancing To that extent, Fullagar J.'s references to Engineers Case in Harris Case are open to criticism. However, there was a wider premise in the reasoning in Engineers' Case, to the effect that the Court should go as far as it can with literal interpretation, before resorting to assumptions or material outside the text of This wider doctrine certainly does not the Constitution. have the force of the narrower rule about Commonwealth-State powers, but it does have some force; the literal approach has been adopted fairly consistently by many if not most of the Justices - e.g., Latham C.J. To that extent, Fullagar J. was justified in saying that a fairly literal approach to sec. 118 is more consistent with Engineers! Case than an approach which depends on assumptions about the area of State sovereignty.

State should be recognized and cannot be challenged in other States on the ground that it had been pronounced without jurisdiction, if that objection was no longer open in the State or origin.

exceptions to this constitutional requirement are to be admitted to various kinds of judgments of sister-States. In the Service and Execution of Process Act (C'th), 1 provisions are set out in Part IV for the registration and enforcement of judgments of courts of record. In view of the wide meaning of 'judgment' therein defined, it may be that there are few exceptions to the operation of the constitutional clause in respect of judgments. In the United States, exceptions are admitted in accordance with the nature and kinds of judgments. It is contended that the structure of the Commonwealth Act is built on the assumption that full faith and credit does not compel or authorize the direct execution of a sister-State judgment. Part V of the Act deals with a power to make

No.5 of 1901.

²

For example, judgments of a penal nature or not final are generally regarded as exceptions. Judgments on taxation liability or not for a sum of money are not exceptions thereto. Cf. Sykes, op.cit., p.354, et seq., and cases there cited.

³ Sykes, op.cit., p.367.

rules of court to carry into effect the provisions of the Act, both as to the service of process and as to the enforcement of judgments, and this rule-making power is vested in the Supreme Court of each State, or such of the judges as may make rules of court in other cases. Therefore, there may be varying procedural requirements as between the States. In addition to this, the Act expressly requires that the practice and procedure of the State in which the process is issued or in which the service is effected or the execution is enforced respectively shall apply as far as practicable, 'until such rules have been made, and as far as any made do not provide for the circumstances of any particular case. It is a matter for consideration whether a federal law can deal with a State power to make rules of court in the light of the decision rendered in Le Mesurier v. Conner, 2 its constitutionality depending necessarily upon the nature and scope of the incidental powers of the Commonwealth powers. But, if it is the intention of the federal statute based upon sec. 51(xxiv) of the Constitution that a judgment duly rendered in one State may be enforced in other States without suing on it and

Sec. 27(2). 2 (1920) 42 C.L.R. 481.

obtaining a new judgment, the forum's procedure for giving effect to judgments from another State would surely be within Commonwealth incidental power; otherwise, rules imposed by the forum may create such burdens as to nullify the objects of the federal statute.

More difficult problems arise in cases relating to the conflict of laws as to rights not based on judgments, i.e., rights which have not matured into final judgments. In Merwin Pastoral Co. Pty. Ltd. v. Moolpa Pastoral Co. Pty. Ltd., the High Court held that the constitutional mandate to accord full faith and credit would, in appropriate cases, deny power to a forum to refuse to give effect to the statutory law of another State on

¹ In McNamara v. Miller (1902) 28 V.L.R. 327, the Supreme Court of Victoria held that where a judgment had been obtained in another State of the Commonwealth (i.e., Tasmania) and had been registered in Victoria under Part IV of the Service and Execution of Process Act 1901 (C'th), the judgment creditor could not proceed by summons under the Imprisonment of Fraudulent Debtors Act 1890 (S.A.) to have the debtor examined under that Act, nor had the Court any jurisdiction to entertain such a summons. It was contended that the power given by the Commonwealth Constitution (sec.51(xxiv)) only had relation to the service and execution of judgments, and under the constitutional section the Parliament had only made provision for enforcing judgments. The Court (Hodges J. sitting alone) upheld this contention, and said that 'it certainly would be a curious thing if this Court had jurisdiction to punish for a criminal or quasi-criminal offence committed in Tasmania or in any other State of the Commonwealth. (28 V.L.R. 331). Factual backgrounds of this case are not clear from the Case Report, but a question remains as to whether the Commonwealth Parliament can give such a jurisdiction to State Courts.

^{(1933) 48} C.L.R. 565.

'public policy' reasons. The question before the Court was whether, notwithstanding the provisions of the Moratorium Act 1930-31 (N.S.W.), the liability of the purchaser for instalments of purchase money and interest payable under a contract for the sale of a pastoral property, together with the livestock thereon, situated in New South Wales remains enforceable in the Supreme The decision of the Court was mainly Court of Victoria. concerned with the question which law was the governing or proper law of the contract sued upon - the law of New South Wales or the law of Victoria - in accordance with the common law rules of private international law. Court incidentally invoked sec. 118 as prohibiting a refusal by the courts of one State to give effect to a substantive defence under the applicable law of another State. It is submitted, however, that the discussion in that case was too brief to justify a general proposition that the doctrine of public policy could never be invoked within the area in which the Australian full faith and credit clause operated.2

⁴⁸ C.L.R. at p.577, per Rich and Dixon JJ., in a joint judgment; at p.588, per Evatt J., citing Bradford Electric Light Co. v. Clapper (1932) 286 U.S. 145, at p.160. Obviously, those Judges considered the full faith and credit clause not merely as an evidential clause but also as a substantive clause.

Cowen, Full Faith and Credit, supra, p.305.

Questions as to full faith and credit for 'foreign law' may arise in two forms: one arises when an occurrence has taken place in one State, and in a second State an action is brought to enforce the resulting cause of action, or legal interests other than cause of action. In various cases, such as, cases on tort, stockholders, statutory successors or mortgage, the Supreme Court of the United States, applying the full faith and credit clause, held that the law of another state should be given effect by the forum. The test applied there in such cases is the principle of balancing the governmental interests of the two competing States in the subject of the litigation. 2 However, the general principle that some aspects of foreign cases are to be governed by the local law of the forum, as when it would be impracticable or seriously inconvenient to use the foreign law, is not destroyed by the full faith and credit clause. 3 But

As to these American cases, see E.E. Cheatham, Federal Control of Conflicts of Law, Selected Readings on Conflict of Laws, Association of American Law Schools, p.261, et seq. For example, in a tort case (Hughes v. Fetter (1951) 341 U.S. 609), the majority of the Supreme Court held that the State A's statutory policy prohibiting the enforcement of death claims under the statutes of State B where the actual death occurred was contrary to the national policy of the full faith and credit clause.

Cf. 134 A.L.R. 1472, and cases there cited. 3
Cheatham, op.cit., pp.264-5.

grievous misapplication of the law of the forum may be prevented, and the assertion by the forum that a particular aspect of a case is a matter of procedure or remedy to be governed by the law of the forum is not conclusive; the classification is subject to review, and a seriously erroneous classification by the forum may be violation of the Constitution. It is pointed out, therefore, that the

An Australian case on this point is In re Commonwealth Agricultural Service Engineers Ltd. (1927-28) S.A.S.R. 342. The facts of the case so far as pertinent for the present purpose were as follows: C.A.S.E. Ltd., a company incorporated in South Australia, went into voluntary liquidation in South Australia; the Company had given a debenture over its assets, including property situated in Queensland; the debenture was registered in accordance with South Australian law, but was not registered in Queensland; the effect of the Queensland law was to invalidate unregistered debentures as a security against the liquidator It was contended on behalf of the Queensland and creditors. creditors that the Bank's charge was invalid under Queensland law, and the Queensland creditors had priority against the local assets; that the debenture was never registered in Queensland, and if the Queensland law was not complied with the debenture was void against them; and that the rights given under the Queensland Acts were substantive, not procedural, and therefore the Court was bound to give full effect to Queensland law. Napier J. delivered the following judgment: I am unable to follow The effect of sec. 118 has yet to be this argument. determined. It may well be that this Court is required to take judicial notice of the Statute law of Queensland, and that the principles upon which that law is to be recognized and applied are to be regarded as binding, not merely as a matter of comity, but as the law of this State prescribed But the section has for that purpose by the Constitution. no further application for the purpose of this case. distributing the fund which has been placed under our control, we are bound to apply the law in force in this (cont. next page)

English common law rule of tort in the conflict of laws cannot be reconciled with the obligations of full faith and credit, because the English law admits the notion of an entirely free and unrestricted competence for the forum. Again, upon Fullagar J.'s standpoint, the Australian clause may impose upon the forum a more rigid adherence to the constitutional mandate to give effect to foreign law, but in the case of the conflict of laws as to rights, as distinct from judgments, a rigid and literal enforcement of the clause without regard to the forum's laws would lead to the absurd result that wherever a conflict arises the law of each State must be enforced in its own courts. The second question arises when a choice of the applicable law must be made in an ambiguous

Cowen, op.cit., p.325.

^{1 (}cont.) State. The Statute law of Queensland has to be recognized and applied where it is relevant. It may be relevant for the purpose of ascertaining the state of the property available for distribution, but it cannot affect the process Subject to the Constitution, the of distribution. Parliament of each State has plenary power over all persons and things within its territory and over the actions of its Court and officers. If any substantive right of interest has been created, or property has been held or applied under the authority of the Queensland Statute law, we should recognize the accomplished fact, and distribute what remains; but otherwise the Queensland Statute is not addressed to this Court, and is irrelevant for the present purpose: (at p.346). In Napier J's opinion, the Queensland Statute, which merely invalidated the debenture as 'against the liquidator and any creditor!, did not create any substantive interest in the property of the Company. rest of the Court members agreed with this view.

situation, as when an occurrence sued on has elements in two or more States - the most complex field in the federal control of conflict of laws. Does the constitutional requirement of full faith and credit extend to the further question, 'to which laws shall full faith and credit be given?' From the viewpoint of the Commonwealth <u>legislative</u> power, with which we are concerned here, the question is whether the Parliament can designate under sec. 51(xxv) a certain State law, which has been duly authenticated and conforms to conditions prescribed by the Parliament, as a proper law or governing law in appropriate conflictual cases and direct that it be recognized in preference to other States laws.

It has been argued that the mandate of full faith and credit must be subject to one important limiting implication, viz., that full faith and credit is given only to a judgment or Act which conforms to the common law categories of private international law whether these be choice of law categories or jurisdictional ones. Merwin's Case does not go beyond this proposition. There is theoretical and practical uniformity in the six State sets of rules of private international law as well as in

This view is maintained by Dr <u>Sykes</u> (op.cit., p.363).

their substantive bodies of common law; controversies as to these common law rules can be finally settled in the High Court - a single mational court of general appeal from the States courts in all cases and in all fields.

'Common law' is included within the operative scope of the full faith and credit clause, and this leads us to a paradoxical position where such identical conflict of law rules themselves are also a part of 'laws' of the States to which the constitutional mandate is addressed; hence, mere solution by the usual rules of conflict of laws irrespective of the interests of the Federation may be quite in accord with the constitutional mandate.

Moreover, a State A may be required by the constitutional clause to recognize the law of State B, which nevertheless

In the United States where the constitutional clause refers only to public acts, records and judicial proceedings, it is not clear whether there existed an obligation to accord full faith and credit to common law rules. Professor Cook considered it negatively in 1919, but Jackson and Cheatham consider affirmatively. Cheatham has declined to accept the view that federal control extends only to statutues but not to common law and administrative regulation, on the ground that it would be a serious breach in the constitutional system of the United States if the protection given in inter-State matters were wholly dependent on the formal nature of the State law involved. (Cook, op.cit., p.434n; R.H. Jackson, Full Faith and Credit - The Lawyer's Clause of the Constitution, Selected Readings of Conflict of Laws, Association of American Law Schools, 1956, p.238; Cheatham, Federal Control of Conflict of Law, supra position in Australia is more certain, because the express reference to 'laws' in sec. 118 and sec. 51(xxv) imposes an obligation to accord full faith and credit to common law rules.

transfers the case to the law of State A - renvoi. the argument based on the existence of identical common law rules among the States has a fatal defect - that it ignores the true requirement of the constitutional mandate to require the forum to recognize the proper law of the sister-States only after full consideration of the competing interests and factual relations. selection of proper law in common law rules precedes the constitutional mandate, then it makes the constitutional requirement in the Federation subject to principles adopted by State sovereignty. Those principles may at a particular time be uniform common law, but there is always a possibility that a State will alter its domestic laws (including rules of the conflict of laws) by legislative act and adopt a new basis of choice or jurisdiction, insofar as such alteration is not contrary to the Constitution. Differences between the substantive laws

The degree of connection with the territory of a State which a statute must have in order to make it a law for the peace, welfare and good government of the State has not been finally decided, and the mere presence of one extra-territorial element in a statute does not lead to invalidity if other elements in the statute are related to the territory of the State. For example, with respect to acts performed abroad, a State legislature can penalize entry into the territory after the commission of an act abroad and by this technique of draftmanship overcome the obstacle presented by Macleod v. Attorney-General for N.S.W. (cont. next page)

as well as rules of the conflict of laws of the competing States also may increase, and the recourse to public policies or State interests by the forum become more frequent. Mr Justice <u>Jackson's</u> words¹ remind us that there is a fundamental difference between common law rules and the constitutional requirement in their solution of conflictual cases.

Sec. 51(xxv) is an implementing legislative power of the constitutional obligation of sec. 118, as the U.S. Constitution provides together the obligation of recognition of States' Acts, records, etc., and the effect thereof. It is said that the Commonwealth power under sec. 51(xxv), being limited to 'recognition', can do no more than prescribe the manner of proof and effect of recognition, defining how far such recognition shall be effective, subject to sec. 118. However, in spite

^{1 (}cont.)
(1891, A.C. 455), in which it was held by the Privy Council that a bigamy provision of a New South Wales statute did not extend to marriages contracted by residents of the colony while abroad. Moreover, the Imperial Parliament can confer power of an extra-territorial nature (cf. R.D. Lumb, The Constitutions of the Australian States, Univ. of Q'ld. Press, pp.77-8).

^{&#}x27;While common law rules may provide analogies, they do not always point the answer to full faith and credit problem, and indeed proceed on contrary basic assumptions' (Columbia Law Review, vol.45, p.23).

Wynes, op.cit., p.223.

of no judicial authority and such narrow approaches taken by commentators, it would follow from the foregoing discussion that the Parliament can in principle exercise its legislative control over any subject in the choiceof-law fields as a policy-maker in weighing the interests of competing States; the real requirement of 'full faith and credit! under the Constitution extends to a question, 'how (or, to which statute, etc.) shall full faith and credit be given? The Commonwealth Parliament is empowered to make laws 'with respect to' the enumerated powers including sec. 51(xxy) (and sec. 51(xxiy)), and is armed with all necessary powers to most effectively carry out those main powers. The term 'with respect to' should not be underestimated, and the Commonwealth 'full faith and credit' powers would have much wider application than the similar clause in the United States Constitution. Although our conclusion may bring about a very sweeping effect to Commonwealth-State relations, it is a possible meaning and quite in accord with the nature of the full faith and credit clause in the Australian Constitution.

The interpretation of the term has been a subject of various judicial opinions in the High Court. But, see <u>Higgins</u> J's wide interpretation in <u>McArthur's Case</u> (1920) 28 C.L.R., at p.564.

However, precise limits of the power have not been made clear; even in the United States, only judicial interferences with the choice-of-law problems have so far thrown light upon some aspects of such a federal control, leaving in most cases a wide area of freedom to States in choice of law. Probably, the full faith and credit clause can be more adequately invoked to prevent judicial interferences where the precise factual situation is evident, than in the case of legislative activity which is inevitably in the form of general provisions without clear factual reference. In any case, federal legislation cannot be exercised in a broad way as now provided for in sec. 18 of the State and Territorial Laws and Record

See, Cheatham, op.cit., pp.266-70. For example, in a fraternal insurance certificate case (e.g., Modern Woodmen of America v. Mixer (1925) 267 U.S. 544, 551; 45 Sup. Ct., 389; 69 L.Ed., 783), when a provision of the association's constitution and by-laws was valid under the law of the home State of the association but was invalid under the law of the second State where the certificate was issued and the beneficiary resided, the beneficiary claimed that his rights should be determined by the law of his State where the certificate was issued. The Supreme Court held that the use of the law of the home State was compelled by the full faith and credit clause. In several workmen's compensation cases, the Supreme Court of the U.S.A. faced the necessity of some accommodation of the conflictual interests of the two States and used the test of 'governmental interests' in making the adjustment. important point is that, in so doing, not the technical conflict of laws concepts but sociological considerations of threatened poverty and public support were stressed.

Recognition Act. The Commonwealth legislative control in this field must deal with 'conflict of laws' as distinct from interference with substantive laws; accordingly, the power can direct a State law to be recognized and adopted but cannot prescribe the contents of the law so adopted a point of great nicety, because it is not always obvious how far such a federal designation of the proper law or governing law affects the substantive aspects of the State laws. There is some room for the operation of sec. 109 of the Constitution. When or in what subjects such a legislative interference should be made is a matter entirely depending upon the discretion of the Parliament, but prompt action by the Parliament will be necessary in the field of 'aviation' where a State may have a sufficient nexus to provide a constitutional basis for the application of its law not only within that State but also in other States.

It will be sufficient to illustrate below one possible <u>legislative</u> control involving conflict of laws arising from aviation.

In the ordinary common law rules of private international law, the ascertainment of the conflictual rule governing the validity of a transfer of movables (including aircraft) is not beyond dispute. Even though lex situs be adopted as governing aircraft conveyances,

its application is difficult when the aircraft is physically in motion in the air as means of transport at extremely high speed. Apart from the selection of proper law of contract to govern such transactions, it is desirable to assimilate the status of aircraft in conflictual cases to that of ships in private international law; on this view, the law of the domicile of the airline, or the law of the State where the principal business place of the airline or aircraft-owner exists, should have preference. While using these terminologies and technicalities of the common law rules, the federal control may settle the issue by giving preference to the State law of domicile or principal place of business as governing the nature and effect of conveyances of aircraft rights This federal legislative control can go to such in rem. an extent as to prescribe what is meant by the 'principal business place of airline or aircraft-owner' or how it shall be notified and acknowledged in registration. Any rules of private international law or statutory laws of States, contrary to this federal exercise, will be

There are some reasons for the application of <u>lex situs</u> in cases where aircraft stop at a specified place for a sufficient period, thus creating a connecting factor between the chattel and the place of its location, but it is not always clear what precise period of time a chattel must be present in a particular place in order to acquire more than a 'temporary' situs.

superseded or invalidated <u>pro tanto</u>. The Courts might well uphold the validity of such legislation, unless perhaps the Commonwealth defining provisions are so completely unreasonable or unrelated to accepted concepts in the field as not to amount to a genuine exercise of the relevant power.

However, the Commonwealth has never exercised this legislative power on <u>any</u> subject of conflict of laws on the line as suggested above. There are some discussions among experts in the Australian aviation industry with respect to the recording of aircraft title of every national aircraft, and, in the present writer's opinion, the problem cannot be solved satisfactorily without references to the 'full faith and credit' powers.'

Reference of Aviation Powers by States to the Commonwealth

By sec. 51(xxxvii) of the Constitution, the Commonwealth has power to make laws with respect to 'matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards

Problems arising from 'rights in aircraft' in relation to the possibility of the Commonwealth's ratification of the Geneva Convention are summarised and discussed in Appendix I of this thesis.

adopt the law. As has been mentioned at the beginning of this Part, attempts for requiring the States to refer under this section the power to make laws with respect to aviation were made on several occasions in the Australian constitutional history, but none of them has been fully successful. There are unsettled questions in the interpretation of the constitutional clause, and the High Court had to deal with some of them in recent aviation cases.

In the Airlines of N.S.W. Case (No.1), two Judges only referred to this section, both agreeing with the general proposition decided in Graham v. Paterson that the reference by a State Parliament of a matter to the Commonwealth Parliament under sec. 51(xxvii) does not deprive the State Parliament of the power of making laws with respect to that matter. In the present case, New South Wales (and four other States had passed the Commonwealth Powers Act, 1943, to refer certain matters (including 'air transport') to the Commonwealth Parliament; the reference was to continue in force for a period ending at the expiration of five years 'after Australia ceases

^{(1950) 81} C.L.R. 1.

Victoria (which Act did not come into force), South Australia, Western Australia and Queensland. See the introductory part of this Part.

to be engaged in hostilities in the present war. 1 Graham's Case was cited to meet an argument that the continuance in force of the Commonwealth Powers Act until 1950 deprived the Parliament of the State of New South Wales of power to pass the State Transport (Co-ordination) Amendment Act, 1947, which dealt with air transport. However, it was further contended by the plaintiff that 'matters' once referred to the Parliament of the Commonwealth by the parliament of a State were irrevocably committed as subject matters with respect to which the Commonwealth Parliament could make laws. This contention had no bearing on the case, because, as Taylor J. said, either the Commonwealth Powers Act, if operative according to its tenor, expired in September 1950 or, on the other view, it was invalid and did not operate effectually to 'refer' any legislative subject matter to the Commonwealth. Taylor J. expressed a dictum that the power could be referred for a fixed period. Windeyer J. expressed also the view that a reference could be for a limited time only, but entertained a serious doubt whether a reference

Sec. 4. 2 (1963-64) 37 A.L.J.R. at p.406. 3 Ibid.

could be for an indefinite period terminable by the State legislature. He said:

If a matter be referred by a State parliament, that matter becomes, either permanently or pro tempore, one with respect to which the Commonwealth Parliament may under the Constitution make laws. If the Commonwealth Parliament then avails itself of the power, it does so by virtue of the Constitution, not by delegation from, or on behalf of the State parliament. It is not exercising a legislative power of the State conferred by a State parliament and revocable by that parliament. It is exercising the legislative power of the Commonwealth Parliament conferred by s. 51 of the Constitution.

In R. v. Public Vehicles Licensing Appeal Tribunal of

Tasmania and Others; Ex parte Australian National Airways

Pty. Ltd., which was decided shortly after the Airlines

of N.S.W. Case (No.1), the interpretation of sec. 51(xxxvii)

was directly in issue before the High Court. The factual

background of the case is not entirely relevant to the

present issue, but it is included here to give the entire

picture of the case.

The State of Tasmania passed a <u>Commonwealth Powers</u>

(Air Transport) Act in 1952. Sec. 1(2) provides that
the Act shall commence on a date to be fixed by

¹ 37 A.L.J.R. at pp.412-13. 2 (1963-64) 37 A.L.J.R. 503; A.L.R. 918. 3 No.46 of 1952.

proclamation, and 2 April 1959, was in fact so fixed.

Sec. 2 provides: 'The matter of air transport is referred to the Parliament of the Commonwealth for a period commencing on the date on which this Act commences and ending on the date fixed, pursuant to section three, as the date on which this Act shall cease to be in force, but no longer'. Sec. 3 provides: 'The Governor may at any time, by proclamation, fix a date on which this Act shall cease to be in force, and this Act shall cease to be in force, and this Act shall cease to be in force accordingly on the date so fixed'. In pursuance of this reference, sec. 19A of the Commonwealth Australian National Airlines Act 1945-61 (after sec. 19 dealing with the general functions and duties of the Commission operating Trans-Australia Airlines) provides in its sub-section (1):

Where the Parliament of any State has, prior to the commencement of section 10 of the Australian National Airlines Act 1959, by any State Act, referred to the Parliament of the Commonwealth the matter of air transport, the Commission may, subject to this section, during the period of operation of that State Act, or during any extension of that period - (a) establish airline services for the transport for reward of passengers and goods within that State; and (b) maintain and operate airline services for any such transport, and shall have, in relation to

any such service, the like powers as it has in relation to airline services specified in subsection (1) of the last preceding section. 1

The <u>Traffic Act</u> 1925-61 (Tas.), ² as amended or as affected by the <u>Transport Act</u> 1938 (Tas.), provides in sec. 30A for the constitution of the <u>Public Vehicles Licensing Appeal</u>
Tribunal. Sec. 30B provides, <u>inter alia</u>, that any person who being the holder of any licence is...aggrieved by the grant of any such licence to any other person may appeal therefrom to the abovementioned tribunal. ³ Sec. 24(1) III provides that no person shall drive or use or cause or permit to be driven or used as a public vehicle any vehicle in respect of which a licence is not in force; 'public vehicle' is defined to include 'aircraft'. ⁴ The Australian National Airways Pty. Ltd. (i.e., Ansett-A.N.A.) regarded itself as aggrieved by the decision of the

Sub-section (2) of sec. 19A provides for the Commission's operation by the consent of the Premier (to the Prime Minister) of a State; Sub-section (3) provides for the payment of licence fees (if any) by the Commission operating in pursuance of such State 'consent'.

No.38 of 1925 - No.31 of 1961.

By sub-section (12), every determination or order of the Tribunal on the hearing of any appeal under this section is made final and without appeal.

See sec.3; Act No.31 of 1961, sec.23(c); sec.14AB(4), as inserted by Act No.31, sec.11.

Transport Commission granting to T.A.A. an aircraft licence to be operated on a certain route within Tasmania, and caused an appeal to be instituted to the Public Vehicles Licensing Appeal Tribunal against that decision. The company stated several grounds of appeal, most of which concerned policy questions, but the main argument related to the constitutional problem of reference of State power to the Commonwealth. The Tribunal, upholding the validity of the Commonwealth Powers (Air Transport) Act 1952, disposed of the appeal by deciding that a licence for T.A.A. was unnecessary, having regard to sec. 19A of the Australian National Airlines Act 1945-61 which was a valid exercise by the Commonwealth Parliament of its legislative powers and over-rode the State licensing requirements by reason of Constitution sec. 109. Then, the case came up before the High Court.

Discussion before the Court centered around the problem of the validity of sec.19A of the Commonwealth Act, as depending on the meaning and operation of sec.51(xxxvii) of the Constitution. The Court in a joint judgment (Dixon C.J., Kitto, Taylor, Menzies, Windeyer and Owen JJ.) held the Commonwealth Powers (Air Transport) Act and sec.19A of the Australian National Airlines Act valid, and disclosed its opinions on the following points:

The argument that the matter referred to the Commonwealth Parliament by a State parliament must itself be a law because sec. 51(xxvii) lays down the words 'which afterwards adopt the law', is an entirely erronous inference; the 'law' referred to by the last words is that denoted by the initial words of sec.51 - !The Parliament shall...have power to make laws for the peace, order and good government of the Commonwealth, thus referring to the law made by the Commonwealth Parliament in pursuance of a reference of a matter. With respect to the chief question as to whether such a reference must be once for all, the Court, maintaining the interpretative approach of construing the Constitution with all the generality which the words used admitted, rejected the view attaching to it any implications concerning the period of reference, and said:2

There is no reason to suppose that the words 'matters referred' cannot cover matters referred for a time which is specified or which may depend on a future event even if that event involves the will of the State Governor in Council and consists in the fixing of a date by proclamation.

Although the Court reserved any final opinion upon the question whether, when the Parliament of a State has made

¹ 37 A.L.J.R. at p.507.

³⁷ A.L.J.R. at pp. 507-08.

a reference, it may repeal the reference, which (though forming a subsidiary matter in this case) if decided might throw light on the whole ambit or operation of the paragraph, it expressed the dictum that, the reference being the one by the Parliament or Parliaments of a State or States, the will of a parliament is expressed in a statute or Act of Parliament and it is the general conception of English law that what parliament may enact it may It seems that Windeyer J. withdrew his doubt as to the possibility of a reference for an indefinite period terminable by the State legislature. 2 Although the judicial authorities thus establish the rule that a reference can be for a limited time, the question of revocability at any time at the discretion of a State is undesirable because 'revocation is an unpredictable occurrence, likely to be resorted to for irrelevant political reasons. 3 In many fields of legislative subjects

³⁷ A.L.J.R. at p.508.

³⁷ A.L.J.R. at pp.412-13.

G. Sawer, Some Legal Assumptions of Constitutional Change, 4 U.W.A. Ann. L.R.1, p.12. Cf. also, Anderson, Reference of Powers by the States to the Commonwealth, 2 U.W.A. Ann. L.R.1.

and in the field of aviation in particular, revocation of a reference of legislative powers by States at any time will cause a great deal of confusion and inefficiency of federal control which has been exercised in sole reliance upon that reference. It is desirable, therefore, to return to Windeyer J.'s remark in an earlier case that such a reference adds a further subject of concurrent

Commonwealth legislative power to the existing list in sec. 51 of the Constitution, but, if the Commonwealth

Parliament then avails itself of the power, it does so by virtue of the Constitution, not by delegation from, or on behalf of the State parliament.

Incidental Matters

The rule of construction of the Constitution expressed in an early American case, McCullock v. Maryland, 1 has been

^{(1819) 4} Wheat. 316, 4 L. ed., 579. The Congressional power to incorporate a bank (i.e., the United States National Bank) under an Act of Congress in the absence of any express word 'bank' (unlike the Australian Constitution) among the enumerated powers of the 'Legislature' was held as a valid means whereby the powers to levy and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, to raise and support armies, could be more effectively exercised. As regards the significance of the existence of the 'necessary and proper' clause, Marshall C.J. said: 'The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be considered to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection (cont. next page)

accepted as a general authority in the Australian Courts, but there have been divergencies of opinions as to the nature and scope of sec. 51(xxxix) of the Constitution, which is similar to the 'necessary and proper' clause of the United States Constitution. Sec. 51(xxxix) confers upon the Parliament legislative power with respect to matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth. Various aviation powers conferred by the Constitution, discussed above, must always be read together with this placitum, for, whenever the legislative reach of a federal power is in question, the extent of its 'incidentality', whether it be regarded as included in the grant of power itself or conferred expressly under the placitum, becomes a vital issue.

of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

Art.1, sec.8(xviii): 'The Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof":

Probably, the Jumbunna Coal Mine Case marked the high-water mark of this 'incidental power', where a flexible and wide interpretation comparable to that of the United States was adopted by the Court. In order to carry into effect the Commonwealth power with respect to 'arbitration and conciliation', an Act providing for registration of associations, together with meticulously detailed conditions for it, was held valid as properly conducive or necessary for the objects of the Commonwealth power with respect to prevention and settlement of a 'two-State dispute' - or as helpful to the President of the Commonwealth Court of Conciliation and Arbitration when he proceeds to prevent a two-State dispute before it occurs, or to settle it after it has occurred - even if such an industrial dispute might or might not occur in future, and, even if such an association was in one State. A strong objection was put forward on behalf of the appellant that, if the mere possibility of an association becoming involved in a dispute extending beyond the limits of one State were to give the right to be registered,

Jumbunna Coal Mine, No Liability v. Victorian Coal Miners

Association (1908) 6 C.L.R. 309.

Sec.51(xxxv): Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

the ancillary power would exceed the principal power which was confined to 'industrial disputes extending beyond the limits of any one State; hence, to become one of the parties to a two-State dispute, every disputant must have a sphere of operations extending beyond a single As Barton J. said, however, that does not follow State. from the fact that the subject matter of the dispute permeates or may permeate the whole extent of such operations, of which the disputant occupies only a partial area!, and the power granted is wide enough to enable the legislature to make a body like the respondent association registrable as, under circumstances which may arise, though not perhaps in all events, a competent participator in a dispute extending beyond State limits where its industrial interests are wholly or in part at stake. On the contrary, the Royal Commission Case would probably be the low-water mark of the 'incidental power', where the High Court held that a power to enact a law compelling persons to give evidence on matters as to which the Executive Government of the Commonwealth thought it desirable to collect information to be made

⁶ C.L.R. at p.342.

Attorney-General for the Commonwealth v. Colonial Sugar Refining Co. Ltd. (1914) A.C. 237; 17 C.L.R. 644.

use of in exercising any existing power of the Commonwealth Parliament was 'incidental' to the execution of that power within sec.51(xxxix), but such an incidental power did not extend to enacting a law compelling persons to give evidence on matters, information as to which was relevant only to a possible amendment of the Constitution under sec. 128 thereof. Upon appeal to the Privy Council, it was held that the Royal Commissions Act 1902-12 was ultra vires the Commonwealth Parliament and void so far as it purported to enable a Royal Commission to compel answers generally to questions or to order the production of documents, or otherwise to enforce compliance by the members of the public with its requisition. The Privy Council seems to have been compelled to declare the Act itself invalid, for otherwise it was impossible to pronounce in advance that the questions sought to be might not prove relevant to matters which were held by all Judges to be proper subjects of inquiry. There exists a striking difference in the interpretative approach to the exercise of 'incidental powers' between these two cases; one purports to justify a Commonwealth law in anticipation of a possible fact in the future by reason of its conduciveness to the objects of the main power, and

¹⁷ C.L.R. at pp.655-56.

the other requires a rigid adherence to the <u>existing</u>
powers on the assumption that the 'incidentality' can
only be workable within the predetermined limits thereof.

The decision of the Royal Commission Case is open to criticism if it does indeed support the proposition that it was not sufficient for a Commonwealth Act to be intra vires the Parliament that it should be 'ancillary to a possible subject of legislative capacity, as distinguished from being an incident in actual legislation about such subjects. There is no reason why the <u>actual</u> existence of some legislation relating to a subject should be required before any matter can be called incidental to its execution, for, otherwise, the Parliament will have to pass numerous enactments in order to authorize the incidental matters through the whole range of legislative powers confided to the Parliament. The legislative powers may be addressed to more than one of the substantive powers, and the Parliament, as it does normally, can at one and the same time, in the same Act, pass a law which contains both main provisions and incidental ones, although

Cf. R. v. Kidman (1915) 20 C.L.R. 425, per Griffith C.J.; Walsh and Johnson; In re Yates (1925) 37 C.L.R. 36, per Knox C.J.

Cf. Quick, Legislative Powers of the Commonwealth and the States of Australia, 1919, pp.604-05.

no Act on the topic previously existed. The question in the determination of the constitutionality of a law is always whether it is competent under any of the <u>powers</u> from whatever source derived, not merely from any actual existence of statutes or common law on the topic. This is particularly so in the exercise of the executive power of the Commonwealth (sec. 61) to justify a Commonwealth law for its self-existence and self-preservation;

R. v. Kidman and R. v. Sharkey are examples thereof.

¹ (1915) 20 C.L.R. 425. In this case Kidman and others were charged on conspiracy to defraud the Commonwealth. A question before the Court was whether the retroactive provision of the Crimes Act (C'th) (No.6 of 1915) making such conspiracies punishable was valid. The opinion of Isaacs J. was based on the view that punishment was not included in the implied executive powers and the validity of the Act was justified solely upon the placitum for legislative purposes. He conferred upon the placitum an independent power of legislation as high as any of the preceding thirty-eight in s.51' and therefore did not agree that it added nothing to the Parliamentary powers which would not have been implied if it had been omitted (at pp.440-41). Higgins J's view was that frauds on the Commonwealth, and the punishment of such frauds, as well as protection from such frauds, were 'matters incidental to the execution, of the powers vested by the Constitution in the Government of the Commonwealth, as well as those vested in the Parliament (at pp.448-50). Semble, Higgins J's construction is more natural. Both Judges upheld the validity of the retroactive law in view of the plenary nature of the Commonwealth Parliamentary powers, aided by the express provision of the incidental power, so long as the Parliament kept within the ambit of the subjects of legislation specifically assigned to it. 2

^{(1949) 79} C.L.R. 121. See, Chapter III, ante.

However, the trend of judicial opinions as to the incidental power, as affected by the decision in the Royal Commission Case, has tended to put great emphasis on the term 'execution' of some existing power. In Le Mesurier v. Conner, the Court drawing a distinction between a matter incidental to the execution of a power, something which attends or arises in its exercise, and a matter incidental to a subject to which the power is addressed, declared the departure of the Australian placitum from the doctrine contained in the similar provision in the U.S. Constitution. However, in spite of some semantic difficulties arising from sec.51(xxxix),

^{(1929) 42} C.L.R. 481. It was decided that neither the general powers of the Commonwealth Parliament with respect to the subjects confided to it, nor the specific power conferred by sec.77(iii) to make laws investing State Courts with federal jurisdiction, enabled the Parliament to deal with the organization of such Courts and to act on its behalf and administer part of its jurisdiction, because they were not matters incidental to the execution of a power vested by the Constitution in the Federal Judicature.

⁴² C.L.R. at p.487 (a joint judgment).

^{&#}x27;Any power vested by this Constitution' has already included, on a general rule of construction of the constitutional powers, the whole of the governmental capacity over all of the subject matter to legitimately carry out the objects. But the phrases of the placitum do not stop there, and add the words 'matters incidental for the execution of' those powers. However, the view attaching some special meaning to this placitum by (cont. next page)

it appears that the Court admitted in later cases that the said distinction was immaterial at least for the Legislative purpose of the Parliament, as distinct from the Executive and the Judicature.

The real reason why the Court has been inclined to think that there must be in existence some substantive legislation to support the incidental provisions or that there must be a distinction between matters incidental to the subjects placed under the legislative power of the

^{1 (}cont.) emphasizing the term 'execution' would be insignificant, so far as concerns the legislative power. Considering that the essential function of the Parliament as an independent department of the government is to make laws, namely, to enact 'legislation', the 'execution' of the power vested in the Parliament means nothing but the enactment of legislation to realize the ends of those legislative powers most effectively. If the placitum confers upon the Parliament a legislative power over something which arises in a legislative act itself, it will mean but some 'procedural matters', e.g., rules and orders of the Parliament, which are to be regulated by each House of the Parliament as its autonomous regulations under sec.50 of the Constitution. However, in the case of the Executive and the Judicature, which is independent of the other branches of government respectively, the insertion of the term 'execution' means something, for otherwise the power to encroach upon the substance of the other powers vested in the Executive or in the Judicature might be implied as belonging to the Parliament, as against the distribution of the powers in the government of the Commonwealth, on the one hand, and the power to make laws might be implied as belonging to a respective organ (of the government) other than the Parliament, as against the preponderance of the Parliament, on the other.

See, e.g., <u>Burton v. Honan</u> (1952) 86 C.L.R. 169 at pp.177-78, per <u>Dixon</u> C.J.

Commonwealth and matters which arise in the execution of the various powers reposed in the Legislature, the Judiciary and the Executive, lies in the apprehension that the Parliamentary powers might otherwise transcend, under the name of 'incidentals', the limits of Commonwealth power under a federal Constitution. For example, as in the Royal Commission Case, the enactment of a law compelling persons to give evidence on matters, information as to which was relevant only to a possible amendment of the Constitution, or, as in the Communist Party Case, 1 the enactment of a law dissolving the Australian Communist Party, the provisions of which operated upon Parliament's or the Governor-General's opinion, including an opinion as to matters on which the validity of those provisions Thus, the problem takes on a character touching depended. the core of 'federalism', 'incidentality' being evaluated in accordance with the individuals ideals or convictions as to a desirable political, economic and social order in the 'Federation'.

The Court does not grudge due regard for the Commonwealth plenary powers in pursuing the ends of any power vested under the Constitution, and admits that once

Australian Communist Party v. Commonwealth (1951) 83 C.L.R. 1; see, espe., at p.266, per Fullagar J.

the subject matter is fairly within the province of the federal legislature the justice and wisdom of the provisions which it makes in the exercise of its powers over the matter are matters entirely for the Legislature and not for the Judiciary: Cf. Burton v. Honan and Huddart Parker Ltd. v. the Commonwealth. 2 However, this proper attitude has been taken only within the restricted area where a law said to be incidental to the main power could not, under the guise of 'incidental powers', intrude into the exercise of the constitutional powers of the States: Cf. the Second Uniform Tax Case and Wragg v. New South Wales. 4 It is no easy task to draw a clear line between 'main' subjects and 'incidentals' thereto. word 'incidental' is one of 'relativity' as well as of 'degree'; incidentals spring from the general language of the subject matter of a legislative power, and by causality are connected in all directions with other incidentals. They are necessary components of the whole content of the power itself as well as 'incidentals' for the execution

^{(1952) 86} C.L.R. 169, at p.179, per <u>Dixon</u> C.J.

(1931) 44 C.L.R. 492, at pp.514-15, per <u>Dixon</u> J.

State of <u>Victoria v. Commonwealth</u> (1957) 99 C.L.R. 575, at p.614, <u>Dixon</u> C.J.

(1953) 88 C.L.R. 353, at pp.385-86, per <u>Dixon</u> C.J.

of the power. Strictly speaking, only 'common sense' based upon the 'reality' of the subject can decide a 'reasonable connection' between the subject to which the power is addressed and its incidentals. The selfrighteous view that a law said to be incidental to the main power cannot intrude into the exercise of the constitutional power is no more than to put an a priori limitation upon the granted power itself, presuming the existence of what is prima facie the province of the States into which the Parliament cannot invade. It is to be observed that such a use of federal implications seems closer to the old doctrine of 'implied prohibitions' than to the doctrine of the State Banking Case, and it seems to involve an assumption about the minimum extent of treserved t State powers. 2 It is desirable, therefore, to discard this narrow approach to constitutional interpretation. The possible reach of a granted power should be measured by first giving to the Commonwealth Parliament 'every power and every control the denial of which would render the grant itself ineffective. 3 The

Melbourne Corporation v. Commonwealth (1947) 74 C.L.R. 31.

G. Sawer, The Second Uniform Tax Case, A.L.J. vol.31, p.350.

Cf. D'Emden v. Pedder (1904) 1 C.L.R. at p.110; Noarlunga Case 92 C.L.R. at pp.597-98, per <u>Fullagar</u> J.

measures is <u>not</u> free from any restraint, but the limits should be sought <u>only</u> when the measures thus adopted are expressly prohibited by the Constitution, or tend to a serious distortion of the Constitution - 'serious distortion' in the sense that, despite a standpoint based upon a broad perspective of accommodating the Australian constitutionalism to the nation's requirements and keeping pace with the times, one might insist that the matter in question cannot possibly be understood as within federal power.

The extent of the 'incidental powers' relates to
the scope of the subjects of a power as wellas to the
relation of the division of powers as between Commonwealth
and States. The foregoing discussion has centered much
around the latter aspects. 'Aviation' is one of the
fields in law where various aspects of legal relations
are intricately inter-related, and so the determination of
their 'incidentals' must be made in the light of such
'actuality' of the industry. The two aspects of the
operation of surface damage caused by aircraft is
illustrative. It may be argued that the States should
retain their jurisdictional exclusiveness in regulating
the legal relations of liability for surface damage as

between aircraft operators or owners and third parties resident in their respective territory. This argument is open to criticism of being one-sided; the clarification of liability principles, standardization of extent of damages, promotion and security of fair compensation therefor, etc. are not only advantageous for both operators and victims but also essential for the control of normal and regular flow of aircraft operation which would ultimately be conducive to the development of domestic aviation. For the purpose of attaining these objectives, no important discrimination can be drawn between the regulation of carriers! liability and that of operators! liability, although the former arises out of the contractual relationships of people involved in an accident in the course of transport activities and the latter arises irrespective of the will of the third party on the ground. They are all 'incidentals' of aircraft operations. question whether a compulsory insurance system should be introduced so as to require the aircraft owners to be satisfactorily insured before flying, persons capable of issuing policies or giving securities to be sufficiently responsible, and requiring aircraft operators to bring or submit a copy of the insurance certificate to the authority, &c. are of the same order. If the Courts acted fully on the rules adjudicated in the <u>Jumbunna Case</u>, then the Commonwealth powers in respect of aviation will contain a wide variety of 'incidentals' and will be more flexibly applied to the actual conditions of the industry.

Whatever may be the merits and demerits of the Australian 'federalism' in respect of the 'aviation' industry, there is now wide agreement between authorities on civil aviation that most governmental control thereof should be exercised by one authority, which in Australia must mean the Commonwealth. By virtue of the nature of activity in the air and the necessary implication of uniform control of aviation, an independent 'sovereignty' and a residuary 'autonomy' of the local interests become Probably, various factors in the Australian unsuitable. history, geography, economics, &c., have weakened awareness of the need for central control; a long-pending co-operative regime as between Commonwealth and States since late 1930's, together with comparative absence of litigation pertaining to the constitutional issues involved (whether or not due to such a regime), may also have caused considerable indifference to the necessity

See Chapter IX, post.

for central control except among a few aviation-experts. However, when the issue was again raised before the Court in 1960's, with the background of the contemporary industry, it was a disappointing surprise that the Court adhered to the conceptional rules which had been adjudicated as a matter of principle thirty years ago; commerce by air has since attained tremendous changes in quality as well as in quantity, and the predominant position of international aviation legislation has since gained in importance in the domestic legal system. the Airlines of N.S.W. Case (No.2) was disputed, the Court was expected by many to strike out a new line for the interpretation of relevant constitutional powers, while the State Governments were worried about the implications of a Commonwealth win because of its impacts upon their control over other forms of transport. Foregoing examinations of each aviation power in the Australian Constitution point to a positive suggestion that there should be much wider areas for the Commonwealth control. Our conclusion goes a step further in saying that, combining those predominant powers together, the constitutional basis for 'aviation' should be extensively entrusted in the Commonwealth Parliament. The conclusion is supported by the practical fact that the overwhelming

control has so far been exercised upon every aspect of the industry by the central Government. It may hardly be accepted by the judicial minds of the present High Court whose approach has been to reduce the 'reality' to its components under each head of the granted powers. It is quite doubtful if any dynamic application of the Constitution to the 'social demands' in this promising industry, which has and will have a great influence on the nation's economic structure and social development, can be expected therefrom. The amendment of the Constitution may be difficult, but the adaptation of the Constitution to aviation is not impossible.

PART II

Liberty to Fly

No man can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law:

As <u>Dicey</u> says, this is a characteristic in the English constitutional system guaranteeing human freedoms under the 'rule of law'. This rule would probably apply to man's liberty to fly as in the case of freedoms of speech, association, &c.; his liberty to fly is guaranteed except when his flight activity constitutes a breach of law.

It is in the legal relation between aviators and landowners that law has prohibited or restricted a person to fly. The common law, whether modified by statutory rules or not, recognizes rights or interests of landowners

A.V. <u>Dicey</u>, Introduction to the Study of the Law of the Constitution, ninth ed., p.183, et seq.

The word 'liberty' is used here in the sense of 'privilege' defined by <u>Hohfeld</u> as the opposite of 'duty' that one can do for himself, free of the possibility of <u>legal</u> interference by others, but not in the sense of 'right' in a narrow meaning presuming the existence of 'duty' on the part of other parties. Cf. Paton, Jurisprudence, second ed., p.224, et seq.

(including the Crown in respect of the Crown land) in superincumbent airspace, and authorizes them to claim for prohibition of, or for damages resulting from, the flight in airspace. In international law, it is doubtful that there has existed any such positive guarantee of liberty to fly over the State's territory in the absence of any forbidding law; liberty to fly flows only when a State restricts its sovereignty in airspace by the exercise of its sovereign authority in relation to other States and their nationals, and to that extent only. 'Liberty' is synonymous with 'right' in this field. Hence, similarly to the relation between aviators and landowners in private law, jurisdictional rights possessed by a subjacent State in the airspace territory prescribe largely other States! or nationals! liberty to fly. the case of Australia, by virtue of the federal Constitution, jurisdictional rights in airspace of several sovereign Governments function as sources of power to condition liberty to fly. Accordingly, we shall examine in Chapter VI the legal status of airspace, namely, the nature of rights or interests of subjacent States, Governments or persons in airspace, and then their effects upon liberty to fly (or vice versa).

However, a person is now largely controlled in his use of aircraft or in his qualifications to engage in aviation by detailed governmental regulations designed both for the purpose of the protection of the public and for the purpose of regular development of civil aviation, which may amount in effect to prohibition of liberty to The system, in which liberty to fly is guaranteed by balancing the conflicting interests in airspace of the public demand for aviation and the landowners! claims for their uninterrupted use of land, has been replaced by such a governmental controlling system, especially through the licensing regulations. These conditions limiting liberty to fly have also been established in international legislation, but no governmental system to enforce effectively punishment for breach of regulations exists in the present international society, the task being largely entrusted to the member-States. matters will be discussed in Chapter VII.

CHAPTER VI

Legal Status of Airspace and Liberty to Fly

1. State's Sovereignty in Airspace and Freedom of the Air

The importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority over persons and property and over which no foreign authority has any power unless recognized by international customary law or treaties. Largely because of the experience of many States in World War I of danger from the air, the principle that every State has complete and exclusive sovereignty over the airspace above its territory was laid down in the Paris Convention as early as in 1919, putting an end to the pre-war academic disputes as to the nature of State's rights in airspace

Lauterpacht, Oppenheim's International Law, seventh ed., vol.1, p.408; eighth ed., p.452.

Convention for the Regulation of Aerial Navigation, signed on October 13 1919, at Paris, Art.1.

which have now become only of historical interest. The principle is reaffirmed in Art.1 of the Chicago Convention of 1944, to which Australia is a party. The question whether the principle had already been in existence even

Major opinions were in summary as follows: (1) Free airspace (Grotius, De Jure Belli Et Pacis, 1625, II, c.2, sec. 3; Nys (a statement to the Institute de Driot International)), (2) Free airspace with State's reserved right for its own safety (Fauchille, Le domaine aerien et le regime juridique des aerostates Annuaire de l'institut de driot internationale, XIX, 1902, 32; La circulation aerienne et les droits des Etats en temps de paix, 1910; opinions of the Institute of International Air Law (1906), Institute of International Law (1911) and International Air Navigation Conference (Paris) (1910), (3) Territorial and free airspace - a lower zone of territorial airspace with a higher zoning of free airspace (Leech, Von Holzendorf, Rivier, Pietri, Hilti), (4) Cujus est solum ejus est usque ad coelum, (5) State sovereignty in the atmosphere or airspace, but restricted by a servitude of innocent passage for foreign non-military aircraft (Westlake (a statement at the meeting of the Institute of International Law at Ghent in 1906)), (6) State sovereignty in the atmosphere or airspace (Nijeholt, Sovereignty of the Air, 1910; Hazeltine, The Law of the Air, 1911).

Convention for the Regulation of International Air Navigation, signed on Dec. 7, 1944, at Chicago, Art. 1.

The approval of ratification of the Chicago Convention on behalf of Australia was effected by No.6, 1947, sec.3, of the Air Navigation Act (C'th) 1920-63.

before the <u>Paris</u> Convention is not beyond argument, ¹ but the principle of absolute sovereignty is a definite declaration of established international customary law and is widely regarded as binding all member—States in the present family of nations, even though not parties to that or similar conventions. The airspace above the high seas and unoccupied territory, however, is treated as having a position comparable to the status of the high seas, and so is open to all States and persons.

The sovereignty of airspace is dependent upon the horizontal extent of territorial land and sea (or other waters); hence, the necessity of ascertaining the geographical scope of the Australian territory, to begin with. By Art.2 of the Chicago Convention, the territory of a State is deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State. The Air Navigation

Professor <u>Cooper</u> comments on Art.1 of the Paris Convention: 'It is not an exchange of rights or privileges between the nations signing the Convention. It is drafted as the recognition of a basic principle already in existence that every Power, great or small, friend or enemy, throughout the world, controls the airspace over its territory (defined later to include territorial waters and colonies) to the exclusion of all others' (J.C. Cooper, The Right to Fly, p.32).

Act (Cith) 1920-63 defines 'Australian territory' as the territory of the Commonwealth and of every Territory of the Commonwealth including the territorial waters of the Commonwealth and of every such Territory and the airspace over any such territory or territorial waters.! The following three points appear to warrant special mention with respect to the concept of 'Australian territory. First, Australia accepted a mandate in pursuance of the League Covenant in respect of the Territory of New Guinea and later entered into a trusteeship agreement in respect of New Guinea in pursuance of Chapter XII (International Trusteeship System) of the United Nations Charter. It is argued that, in view of the differences between territories held under mandate and trust territories (i.e., the Trusteeship Council as a political body and the Mandate Commission with a mainly technical character), sovereignty over trust territories vests in principle in the United Nations, and therefore a definition of 'territory' in bilateral aviation agreements, whereby trust territories are included in the territory of the contracting States,

Sec.3(3). See also Reg.5(1) of the Air Navigation Regulations.

fails to recognize the international status of such territories. However, in view of the two other aviation conventions, wherein 'territory' is defined as comprising all the territory for the international relations of which the respective contracting States are responsible, it is submitted that the meaning of Art. 2 of the Chicago Convention would be construed in the same way. Secondly. the extent of the territorial sea has not been defined in general international law while there is international recognition of a belt not less than three miles seaward from the coasts. This ambiguity applies also to the airspace above the sea. A more complex problem arises as to States' claims of rights over the continental shelf surrounding their land territories. In 1953, Australia made declarations of sovereign rights over the continental shelf contiguous to its coasts and to the coasts of territories under its authority, but the sovereign rights asserted in the Prerogative Proclamations

H.A. Wassenbergh, Post-War International Civil Aviation Policy and the Law of the Air, second ed., p.99n.

Cf. the Geneva Convention on the International Recognition of Rights in Aircraft, 1948, Art.23; the Rome Convention on Ground Damage, 1952, Art.36.

Bin Cheng, The Law of International Air Transport, p. 109.

are limited by the concluding words 'for the purpose of exploring and exploiting the natural resources.' In the present international law, such rights will not affect the legal status of the superincumbent sea or of the airspace above it. Thirdly, Australian Antarctic Territory, to which Australia made a formal claim in 1933, when a United Kingdom Order in Council laid claim to such area and placed it under the Commonwealth of Australia, extends to a certain area, amounting to about a third of the continent. The Antarctic Treaty, which was signed on December 1, 1959, at Washington by 12 original States including Australia and came into force in 1961, aims at inter alia nonmilitarization of Antarctica (Art.1),

The Declaration was made on 11 September 1953. Cf. Australia and the Continental Shelf, 1953, A.L.J., vol.27, pp.458-60.

Cf. Lauterpacht, Oppenheim's International Law, eighth ed., p.632. See also the Draft Articles adopted by the International Law Commission in 1953, laying down a principle that such rights do not affect the legal status of the superincumbent sea or of the airspace above it.

Cf. P.C. Jessup & H.J. Taubenfeld, Controls for Outer Space and the Antarctic Analogy, 1959, p.152. The Australian Antarctic Territory extends to the areas south of the sixtieth parallel and between 160°E and 45°E (except for Adelie Land between 136°E and 142°E).

As for the text of the Antarctic Treaty, see Official Documents Conference on Antarctica, A.J.I.L., 1960, pp.476-83; see also R.D. Hayton, The Antarctic Settlement of 1959, A.J.I.L., 1960, pp.349-71.

freedom of scientific investigation and cooperation toward that end (Art.2) and 'freezing of territorial claims' (Art.4). Australia may still maintain its claim to sovereignty in Antarctica, but the legal status of the airspace above that territory will be quite different from the 'complete and exclusive' sovereignty which it enjoys in the airspace above other territories.

The upper limit of 'territorial airspace' has not been defined yet. None of the aviation conventions including the Paris and Chicago Conventions defines the altitude of 'airspace', and a number of theories and opinions have so far been advocated as to what height limit, if any, should be accepted. We can eliminate at the outset the old theory of the simplest assertion of unlimited height; this fails to take into account the physical nature of space, and of astronomical and cosmic

Art.4(2) provides: 'No acts or activities taking place while the present treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present treaty is in force.'

At the time of the Paris Convention in 1919, no State paid any attention in this respect, for no need for fixing the upper limit of airspace was then felt. The drafters of the Chicago Convention have also left the question open.

phenomena, as now disclosed by scientific knowledge and the development of flight instrumentalities. The view that sovereignty may be extended as far into space as human endeavour may reach, or, as a corollary to it, as far as the State's 'coercive power' extends, is in the same category. Many commentators now advocate the establishment of a dividing line between airspace and outer space on various grounds. The theory based on the characteristics of the 'atmosphere' has received wide support, but there are two different approaches. It was suggested that the present Art.1 of the Chicago Convention should be affirmed but limited vertically to the height to which aircraft as defined in the Annex 6 can operate, and that above that altitude there should still be a 'contiguous zone' of sovereignty, through which there

The following views have so far been advocated: that the term 'airspace' used in the air conventions is construed as 'atmospheric space', that physical boundaries are created by the natural law of gravity and centrifugal force, that an upper limit to State sovereignty is determined by the lower boundary of outer space at the lowest height at which an artificial satellite may be put in orbit, that an upper limit is determined by the law applicable to a flight according to the intentions of its directors, and not on the locus of the flight-path, and so on. As to these commentators' opinions, see J.T. Lyon, Space Vehicles, Satellites and the Law, 7 McGill Law Journal 271 (1961), reprinted as Publication No.7 of the Institute of Air and Space Law, McGill University (1961), p.65.

would be a right of transit for 'all non-military flight instrumentalities when ascending or descending, and above that there was to be freedom from sovereignty. Draft Code of Rules on the Exploration and Uses of Outer Space! prepared by the Study Group on the Law of the Outer Space adopts in principle a similar approach by defining 'airspace' as the volume of space between the surface of the earth at sea level and an altitude of 80,000 metres above it, 'as far as the performance of existing conventional aircraft is a guide to the definition of airspace. 2 Any such view inferred from the performing ability of ordinary aircraft fails to cope with the development of modern aeronautical technology (e.g. X-15 type aircraft), and any attempt to demarcate a dividing line upon that assumption cannot escape from the criticism that it is arbitrary. Another approach in the 'atmospheric' arguments which receives much wider acceptance is to look upon the term 'airspace' in Art.1 in accordance with its literal meaning. For example, Dr Goedhuis considers it

Cooper, Legal Problems of Upper Space, 23 J.A.L.C. 1956, 311, et seq.

Draft Code of Rules on the Exploration and Uses of Outer Space, by the study group on the law of the outer space, the David Davies Memorial Institute of International Studies, a comment on Art.1.

not beyond the bounds of expectation that, aided by the information gleaned by the satellites, a 'communis opinio on this point may be formed. Above all, he disagrees that the connection between Art.1 of the Chicago Convention and Annex 6 defining aircraft exists; Art.1 acknowledges a general principle of law, which exists irrespective of the Conventions, but the provisions defining aircraft are of no more than a technical nature, not binding upon States whether they are parties to the Conventions or not. 1 This view begs the question on the hypothesis that the upper limit of the location of 'air' can be definitely drawn which is quite doubtful in the present state of geophysical knowledge. Perhaps, it will be necessary to approach this complex problem by seeking for an appropriate community policy in space as a whole of 'accommodation between inclusive and exclusive interests of States! - a functional approach based upon multifactoral analysis of

Goedhuis, Rapporteur on Air Sovereignty and the Legal Status of Outer Space, International Law Association, New York University Conference, 1958, cited from Lyon, op.cit. Dr Cheng's view is on the same line; he says that the natural meaning of the term 'airspace' in the Paris and Chicago Conventions should be its geophysical meaning, denoting space where air is to be found. Bin Cheng, op.cit., pp.121-22. See also the same writer's articles, 'International Law and High Altitude Flights; Balloons, Rockets and Man-Made Satellites', 6 I.C.L.Q. (1957), p.487 at p.492 et seq.; 'From Air Law to Space Law', 13 C.L.P. (1960), p.228; 'The United Nations and Outer Space', 14 C.L.P. (1961).

various relevant factors for achieving a mode of balancing inclusive and exclusive interests in particular instances in a way which conforms to overriding community policies. Similarly, there may be some profit in considering downward extension of a freedom of outer space rather than an upward extension of State space: this approach has a great potentiality to become a decisive test in the light of the increasing cooperation among States in the use of outer space but is apt to neglect or deny the firmly established principle of the 'airspace sovereignty' as a fundamental basis of the present air law system. None of the aforesaid proposals can escape from criticism, and none has been unanimously accepted as

McDougal, Lasswell, Vlasic, Law and Public Order in Space, Yale University Press, 1963, p.320, et seq. The work contains a comprehensive analysis of numerous and varying proposals for establishing boundaries between airspace and outer space. According to the writers' opinion, none of these previously surveyed proposals can meet the need of community policy. The balancing factors to be taken into account are, e.g., the nature, duration, magnitude, and intensity of the threat from space; the location of the activity; the kinds of interests of the subjacent States which are menaced; the characteristics of interests that have been asserted in the name of inclusive and exclusive use; alternative modes for protecting both sets of interests, and so on. Although they suggest a transitional arrangement of artificial boundary, the writers prefer a customary development of accommodation between inclusive and exclusive interests.

Lyon, supra; see also F. Ikeda, The Law of the Outer Space (Uchu-Ho), 1961, pp.206-8.

a decisive test. All one can say is, therefore, that the State's sovereignty to an infinite height has been rejected, and the solution of setting up the exact upper limit of 'territorial airspace' will ultimately be left to decision among States either by some multilateral treaty or by customary development.

'sovereignty' in airspace? A claim to sovereignty based not upon some particular act or title such as a treaty of cession, but merely upon some particular display of authority, involves two elements each of which must be shown to exist; the intention and will to act as a sovereign, and some actual exercise or display of such authority. The territorial sovereignty over areas in thinly populated or unsettled countries may provide some analogies for airspace sovereignty, for the full and constant possession of airspace is difficult owing to its physical attributes. Hence, 'actual exercise or display of State's authority' over airspace is cognizable if there be any possibility on the part of the subjacent

Cf. the decision rendered by the Permanent Court of International Justice in the case concerning 'the legal status of Eastern Greenland' (1933, Series A/B No.53).

State to exclude infringement by other sovereign powers in that area. 1

'Complete and exclusive' sovereignty means that sovereignty over airspace of a State is not restricted in any way by general international law; for example, the right of innocent passage by foreign ships in territorial seas which has been recognised in general international law (provided that such foreign ships do not harm the interests of the coastal State) is not applicable to territorial airspace. However, various international conventions on air law have had the effect of limiting such a general status of State's territorial airspace. Among the contracting parties to the Chicago Convention, all civil aircraft of contracting States have the right to make non-scheduled flights into or in transit non-stop across the territory of each contracting State and to make stops for non-traffic purposes without necessity of obtaining prior permission, and, among those of various air transport agreements, multilateral or bilateral, rights of commercial operation by scheduled air services are mutually secured on certain conditions. If a foreign

Ikeda, op.cit., p.86.

Art.5.

aircraft enters the airspace above a State's territory without any such permission, then, as a corollary to the general status of airspace in international law, the subjacent State may force the aircraft to land or, as the case may be, may shoot it down. This is expressly embodied in some States' national regulations; for example, the Air Navigation Order (U.K.) 1949 provides that, when signals requiring aircraft to land have been given and the aircraft fails to comply, a commissioned officer of His Majesty's naval, military or airforce may order fire to be opened on the aircraft and use any other means to compel compliance therewith. No Australian civil aviation legislation contains such provisions. But there will be various causes or reasons for such intrusions which are not necessarily attributable to hostile and unjustifiable activities. It is submitted that, according to the practice of States, a subjacent State usually gives a warning, in the first place, to the intruding aircraft in order to ascertain the real intention or cause of the intrusion, and if the subjacent State uses force without

Schedule II, sec.II, 9(4).

But, see reg.175 of the Air Navigation Regulations, providing for visual signals between State aircraft and other aircraft in flight.

giving such warning, the State whose nationality the aircraft possesses is entitled to protest against the incident. It is doubtful, however, whether this practice constitutes an established rule of international customary law, because situations may vary from case to case, as for example, the case of a sudden attack or intrusion by supersonic planes. In view of the extraordinary speed of modern aircraft and their dangerous potentialities to the subjacent State's security, the exclusiveness of the State's sovereignty in airspace would be accentuated by the overriding necessity of 'self-defence', but the practical attitudes of States will depend largely upon the political relationship, changing from time to time, between the subjacent State and the State whose nationality the intruding aircraft possesses. Here again the international conventions interfere with and impose limitations upon the legal status of airspace; for example, the Chicago Convention expressly provides for an obligation

Ikeda, op.cit., p.65, et seq.

Ibid. Reflecting the political relationship of States in the world, there have been a number of aerial incidents between the West and the East blocks; for example, see International Court of Justice (C.I.J.) Pleadings, Oral Arguments, Documents, concerning aerial Incident of October 7 1952 (U.S.A. v. U.S.S.R.), 1956 issue, Aerial Incident of March 10 1953 (U.S.A. v. Czechoslovakia), 1956 issue.

to provide measures of assistance to aircraft in distress in its territory, 1 so that aircraft in distress will probably be exempt from the charge of illegality of intrusion of airspace as between the contracting States. Special considerations also arise in relation to intrusion by 'State' aircraft; the Chicago Convention provides that no State aircraft of a contracting State shall fly over the territory of another State or land thereon without authorisation by special agreement or otherwise, and in accordance with the terms thereof. 2 Such and other limitations imposed upon the general status of airspace which are provided for in various aviation treaties will be discussed in more detail at a later stage.

We are not concerned here with legal problems arising from outer space activities (e.g., legal status of satellites or stellar bodies, collisions between space vehicles in outer space), but, as airspace and outer space locate in the same column of vertical continuance and every aircraft and spacecraft must first penetrate

Art.25.

²

Art.3(c). See also Art.32 of the Paris Convention. 'State aircraft' is a term used in air law conventions (e.g. Art.3(b) of the Chicago Convention) to denote normally 'aircraft used in military, customs and police services.'

airspace, some aspects of current space activities affect State's sovereignty in airspace. These problems will include operations of observation satellites to gain intelligence as to surface conditions in foreign territory, ¹ consultation with other States concerned for a new use of outer space, ² assistance to astronauts and

There are different States attitudes as to the question whether a State, about to embark on a new use of outer space, must consult in advance with every other State concerned, but except in cases involving observation no State including U.S.S.R. has protested against the passage of spacecraft in space even when such spacecraft pass through the airspace at the time of launching and landing. See the Draft Code, supra, Art. 4.1, establishing a controlled right of passage for spacecraft through the airspace of States.

The problems of observation satellites involves 'primary questions of international law as well as of international politics'. The U.S.S.R., together with the Soviet group, take the view that the use of artificial satellites for the collection of intelligence information in the territory of a foreign State is incompatible with the objectives of mankind in its conquest of outer space, and constitutes espionage. The Soviet standpoint, as against the U.S.'s view, is maintained irrespective of whether such a surveillance or reconnaissance is made from the upper part of airspace or from outer space, and it is in all cases an intrusion into something guarded by a sovereign State in conformity with its sovereign prerogative (J.C. Cooper, Current Developments in Space Law, a paper prepared for presentation at the 1963 Southeastern Regional meeting of the American Society of International Law, held February 1963, at the University of North Carolina Law School). The Draft Code of Rules on the Exploration and Uses of Outer Space, supra, suggests the prohibition of placing in orbit around the earth or celestial body spacecraft designed as weapons, but states that such a prohibition does not extend to surveillance or reconnaissance satellites, which may primarily serve military purposes, yet have the advantage that they contribute to an 'open world' and so increase rather than diminish security (Arts.2, 5, comment (xviii)).

spacecraft landing in foreign territory and their return, liability arising from space-vehicles accidents to persons or property on the surface, and so on. Want of space does not allow us to dwell upon these problems; suffice it to say that the 'outer-space law' is now on the way of its formation, and it is still too early for the accumulation of States' practices, in which States' political decisions affected by the current world situations predominantly prevail. Truly, States should not rely on sovereignty in outer space because sovereignty is neither necessary nor sufficient for solving problems created by the space age, 1 but States are likely to resort to 'absolute' sovereignty in airspace whenever activities in outer space might threaten their national security, safety or prestige.

Turning to the question of freedom of the air as against State's sovereignty in airspace, it seems desirable to outline at this stage the background of international legislation not only relating to liberty to fly but designed generally for the development of civil aviation. The first attempt at international regulation of air navigation in public law on a world-wide scale was

S.M. Beresford, The Future of National Sovereignty, second colloquium on the law of outer space, London 1959, proceedings, ed. by A.G. Haley and W.H. Prince of Hanover, 1960.

the 'Convention for the Regulation of Aerial Navigation' which was signed on October 13, 1919, at Paris, the Convention being generally known as the 'Paris Convention.' The Convention provided, inter alia, for 'complete and exclusive' sovereignty in national airspace, for a right of innocent passage over the contracting State's territory with the exception of prohibited areas, for freedom of access to contracting States' aerodromes, and for uniformity in technical matters of air navigation. However, the parties thereto were constituted mainly by European countries and several important aviation countries, e.g. U.S.A., U.S.S.R. and Germany, were not included. In 1926, the 'Ibero-American Convention on

¹¹ League of Nations Treaty Series 173. The Convention entered into force on July 11, 1922. Art. 34 of the Convention provided that each State represented on the International Commission for Air Navigation (I.C.A.N.) shall have one vote. By a protocol of 1923, it was amended to read, that 'each State represented on the Commission (Great Britain, the British Dominions and India counting for this purpose as one State) shall have one An important alteration was further made by a Protocol of 1929, by which each of the Dominions and India acquired equal voting rights with the other States. This in effect was a ready recognition of the fundamental change which had taken place in the constitutional structure of the Empire at this time. Though, in point of fact, the declaration and resolutions which had been concurred in by the United Kingdom and the self-governing Dominions had not as yet been formally embodied in the Statute of Westminster 1932 (22 Geo., c.44) by the Imperial Legislature. Cf. N.H. Moller, Law of Civil Aviation, 1936, p.10.

Aerial Navigation', which reproduced the text of the Paris Convention with certain modifications, was signed at Madrid by 21 signatory nations, but the Convention did not come into force. With the growth of the Carribbean air service in the late twenties, the 'Pan-American Convention on Commercial Aviation' was signed by 21 signatory nations at Havana in 1928, in order to facilitate commercial air transport in such areas. The 'Havana Convention! was ratified by 9 countries including U.S.A., but its scope was distinctly regional. Because it was necessary to formulate a more world-wide convention on international public air law, because the operation of the Paris and Havana Conventions was interrupted by the World War 2, and because the extraordinary progress of aeronautical techniques during the War had made it difficult for these previous conventions to fit the new situations of modern aviation, the 'Convention on International Civil Aviation' was signed as a result of the International Civil Aviation Conference held at Chicago, November 1 - December 7, 1944. The Convention, generally known as the 'Chicago Convention', was signed by 38 nations out of 52 allied and neutral nations which

United Nations Treaty Series 15, 102.

attended the Conference. Pending the entry into force of the principal convention, the 'Interim Agreement on International Civil Aviation' was adopted; it ceased to exist on April 4, 1947, when the principal convention came into force. At the same Conference, the 'International Air Transport Agreement', known as 'Five Freedoms Agreement', and the 'International Air Services Transit Agreement', known as 'Two Freedoms Agreement', were also adopted to fill with regard to scheduled international air services the gap left by the Chicago Convention. They entered into force on February 8, 1945, and on January 30, 1945, respectively.

The Chicago Convention is applicable only to 'civil' aircraft and not to 'State' aircraft (Art.3(a)). Aircraft used in military, customs and police services are to be deemed to be State aircraft (Art.3(b)). It has been

Immediately upon the coming into force of the Chicago Convention on April 4, 1947, each contracting State was to give notice of denunciation of the Paris Convention and the Havana Convention, if it was a party to either, and as between contracting States, the Chicago Convention superseded these previous conventions (Art.80). As at June 30, 1964, the number of the member States of the Convention amounted to 105, comprising almost every country in the world except U.S.S.R. and a few other countries. Australia was an original signatory State and, since the inception of the International Civil Aviation Organization (I.C.A.O.) established under the Convention, has been represented on the Council, a permanent body responsible to the Assembly of the Organization.

argued whether all aircraft other than those enumerated in Art.3(b) are deemed not to be State aircraft, and whether the Convention applies to all aircraft which are not State aircraft. It is sufficient here to say that, in the light of relevant sources, 1 the Convention should be interpreted as applicable to all aircraft other than aircraft used in military, customs and police services;

The Paris Convention (Art. 30) was more clear on this point: 'The following shall be deemed to be State aircraft: (a) Military aircraft; (b) Aircraft exclusively employed in State service, such as posts, customs, police; (c) Every other aircraft shall be deemed to be a private aircraft. All State aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention. ! Cooper, as a chairman of the drafting Committee in the Chicago Conference, says: 'The Convention is...applicable to all aircraft, whether owned and operated by a State, unless such aircraft are actually used in military, customs and police services by a contracting State.... The determining factor under the Chicago Convention is whether a particular aircraft is, at a particular time, actually used in one of the three special types of services. If so, it is a State aircraft. Otherwise, it is a civil aircraft.' Cf. J.C. Cooper, A Study on the Legal Status of Aircraft, 1949, pp.47, 52. See also Art. 26 of the Rome Convention 1952; Art. 16 of the Brussels Convention 1938; the Rules of Air Warfare drafted by a Commission of Jurists at the Hague, 1923 (cf. J.M. Spaight, Air Power and War Rights, third ed., pp.42-43, and Appendix to the book which contains the text of the Rules); Art.71(1) of the Air Navigation Order of the U.K., 1949. But, see Schleicher, Reymann, Abraham, Das Recht der Luftfahrt, 1960, p.31, saying that Art.3(b) is not an exhaustive definition of 'State aircraft' and they, being only examples of important State services, should include aircraft engaged in wider State objects. As to the definition of 'State aircraft' in the Australian national law, see p.255, post.

the latter alone are denoted by the term 'State aircraft'. In case of war the provisions of the Convention do not affect the freedom of action of any of the contracting State affected, whether as belligerents or as neutrals. The same rule applies in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council of the I.C.A.O. (Art.89).

We are concerned here only with fundamental principles and rules governing liberty to fly in the international sky which result from the State's restriction of its sovereign right in airspace under the Chicago Convention or other international air traffic agreements; the detailed regulatory rules of international flight-activities will be discussed in the next Chapter.

(1) Flights by State Aircraft:

The Chicago Convention does not provide for liberty to fly by State aircraft, except that no State aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof (Art.3(c)), and that the contracting State undertakes, when issuing regulations for their State aircraft that they will have due regard for the

safety of navigation of civil aircraft (Art.3(c)). In the Australian legislation, ¹ 'State aircraft' is defined as (a) in the case of Australian aircraft, a military aircraft, ² or (b) in the case of the aircraft of a country other than Australia, an aircraft used in the military, customs or police services of that country. There are no aircraft engaged in customs or police services in Australia. The non-freedom of the flight by State aircraft in the present international air law is clearly defined in Art.3(c) above, to which the Australian legislation gives effect: ³

A State aircraft other than an Australian military aircraft shall not fly over or land on Australian territory except on the express invitation or with the express permission of the Minister, but any aircraft so flying or landing on such invitation or with such permission shall be exempt from the provisions of these Regulations except to such extent as is specified in the invitation or permission.

The Chicago Convention is silent as to privileges to be enjoyed by State aircraft in the foreign territory.

Reg. 5(1) of the Air Navigation Regulations.

^{&#}x27;Military aircraft' in relation to Australian aircraft is defined as the aircraft of any part of the Defence Force, and including any aircraft commanded by a member of that Force who is detailed for the purpose, and any aircraft being constructed for any part of the Defence Force (reg.5(1)).

Reg. 111.

but the Paris Convention provided expressly that the military aircraft should enjoy in principle in the absence of special stipulation the privileges which are customarily accorded to foreign ships of war. ¹ It is submitted that the rule stated there is sound and may be considered as still part of international air law even though not restated in the Chicago Convention. ² However the analogy between public ships ³ and State aircraft other than military aircraft is doubtful; special arrangements between the States concerned will determine in what cases police and customs aircraft may be authorized to cross the frontier, and they are in no case entitled to the privileges accorded to military aircraft. ⁴ The argument that all State aircraft ought to

Art.32. The military aircraft may enjoy such privileges only in the case where special authorization is given by the State flown over with respect to their flight over the territory of the State and their landing thereon.

Cooper, A Study on the Legal Status of Aircraft, 1949, p.53.

^{&#}x27;Public ships' other than war-ships are such as those engaged in police, posts, customs and scientific services for the purpose of State, which are directly administered by the State authority and exercise the public authority. They may not enjoy so much inviolability as war-ships do, and although they may enjoy extraterritoriality in most cases, the rule is not established yet in international law, most States admitting it merely as a practice.

Cf. Art.33 of the Paris Convention.

enjoy the same exemptions when in foreign territory is not correct, since 'no such principle has as yet been accepted into either conventional or customary international air law,' and the rule is not established yet in the maritime law.

(2) Flights by Civil Aircraft:

There would be various ways of classifying civil flights, such as, routine, charter, contract-service, business, pleasure, aerial-work, etc., but, in the international air law, civil aviation is broadly classified into two types of aircraft operations: 'scheduled' and 'non-scheduled'. The definition of 'scheduled international air services' was adopted by the Council of the I.C.A.O. in 1952; it is defined as a series of flights that possess all the following characteristics: 2

- (a) It passes through the airspace over the territory of more than one State;
- (b) It is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;

Cooper, op.cit., pp.52-3.

Cf. D. Goedhuis, Questions of Public International Air Law, Recueil des Cours, 1952, II, Academie de droit International, pp.257, 259-60.

(c) It is operated, so as to serve traffic between the same two or more points, either (i) according to a published time-table, or (ii) with flights so regular or frequent that they constitute a recognizably systematic series.

Hence, neither flights to carry pilgrims nor emigrant flights are generally 'scheduled' air services. However, the definition was advanced merely to serve as a basis for the comments of contracting States, 1 and therefore it seems quite likely that all countries would accept as 'scheduled' or 'non-scheduled' respectively clear examples such as regular 'Qantas' services to London (scheduled) or an exploratory flight over new territory (non-scheduled), while the border-line cases between them would have to be categorized by decision of national law of each contracting State. In the Australian legislation, 'non-scheduled' flight, in relation to an aircraft that possesses the nationality of a contracting State of the Chicago Convention, is defined as 'a flight by that aircraft over or into Australian territory otherwise than under the authority of an international airline licence issued by the Director-General (of Civil Aviation) in pursuance of the regulations'. 2 It is also provided that

Shawcross and Beaumont, Air Law, second ed., pp.267-8.2 Sec.3, sub-sec.3(1) of the <u>Air Navigation Act</u> 1920-63.

an aircraft shall not be used in regular public transport operations except under the authority of and in accordance with a licence (in the Regulations referred to as an 'airline licence') issued by the Director-General. It would follow that, in Australia, the presence of 'international airline licence' is a practical standard, and the concept of 'regular public transport', as defined, is a substantial standard, for determining whether a certain flight should be categorized as 'scheduled' or 'non-scheduled'.

(i) Scheduled Flights

By Art. 6 of the Chicago Convention,

No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

Although the mutual right of flight by civil aviation under the Chicago Convention is thus applicable only to 'aircraft not engaged in scheduled international air services', it is submitted that, besides observing the terms and conditions

Reg. 198.

^{&#}x27;Regular public transport operations' are all air service operations in which aircraft are available for the transport of members of the public, or for use by members of the public for the transport of cargo, for hire or reward and which are conducted in accordance with fixed schedules to and from fixed terminals over specific routes with or without intermediate stopping places between terminals (reg.191(d)).

contained in the 'permission or authorization', a 'scheduled' air carrier would also have to observe the general conditions and limitations imposed by the Convention on 'non-scheduled' flight, unless exempted from them by the terms of the 'authorization.' 1

The Chicago Conference was unsuccessful in finding an acceptable formula to secure by means of the Convention a certain freedom of traffic for 'scheduled air service' mainly because of an acute confrontation of interests among the contracting States, particularly between the two major aviation countries - U.S.A. and U.K.; the former espoused the case of complete freedom and the latter insisted on protectionism in exchange of traffic rights, which was supported by the Commonwealth countries including Australia. The Australia-New Zealand proposal which was not adopted at the Chicago Conference was based on the joint affirmation by Australia and New Zealand in January 1944 that full control of international air trunk routes and ownership of all aircraft and auxiliary equipment should be vested in an international air

Shawcross and Beaumont, op.cit., p.268.

D.G. Anderson, Australia's Contribution to International Civil Aviation, the second Sir Ross and Sir Keith Smith Memorial Lecture, April 1960.

authority. As a result of the Conference, only the following methods have been available for securing rights of commercial operations among States: (a) the 'Two Freedoms Agreement', (b) the 'Five Freedoms Agreement', (c) bilateral treaties between the States concerned, and (d) other agreements on air services of less complete and usually a more temporary nature contained in an Exchange of Notes at the diplomatic level, and temporary permits which may or may not involve the exchange of reciprocal rights which are usually issued, and renewed from time to time at the diplomatic level.

By the International Air Services Transit Agreement ('Two Freedoms Agreement'), each contracting State, a member of the I.C.A.O., grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:

It was stated by the Minister, Mr <u>Drakeford</u>, in his statement on 22 January 1944, that international ownership of airlines would prevent a rumous scramble for business by competitive nations in the post-war future. It is worthy of note that such a proposal of 'ownership, operation and control of international airways by an international air authority' was launched by the Labor Governments of Australia and New Zealand, when various projects of 'nationalization' schemes were attempted in their respective national economics. As to the drawbacks of this plan, and various standpoints of major aviation countries including Australia at the Conference with respect to the matter of a scheme for postwar international civil aviation control, see J.C. Cooper, The Right to Fly, pp.161-2.

- (a) privilege to fly across its territory without landing, and
- (b) privilege to land for non-traffic purposes.

 Those privileges are subject to the various conditions: they are not applicable with respect to airports utilized for military purposes to the exclusion of any scheduled international air services; aircraft making stops for non-traffic purposes may be required to offer reasonable commercial service at the stopping places; each contracting State may designate the route and airports and other facilities; each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State if it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State, 1 or in case of failure of such air transport enterprise to comply with the laws of the State flown over to perform its

It is pointed out that with the development of aviation necessitating important capital investments this condition of substantial ownership, as it appears in many bilateral agreements (e.g. Australia - U.S.A.), may involve the air companies in great difficulties. There are two possible ways for the interpretation of the words 'nationals of a contracting State'; one is to regard them as 'nationals of the other State party to the Agreement' and the other as 'nationals of other than non-contracting States to the Agreement.' (Goedhuis, ibid.). In most States, the national law prohibits the registration of an aircraft owned by a foreigner. See, reg.322 of the Australian Air Navigation Regulations.

obligations under the Agreement; and those privileges must be in accordance with the provisions of the Chicago Convention concerning air navigation (e.g. documents to be carried in aircraft). The Agreement provides further for proceedings of the Agreement, and the methods to settle disputes and disagreement among contracting States. As at June 1964, there were 67 contracting States including all the principal aviation countries parties to the Chicago Convention. Australia, together with U.S.A., U.K. and Canada, is a party to the Agreement.

By the International Air Transport Agreement ('Five Freedoms Agreement') to which Australia, like many other countries, is not a party, each contracting State grants to the other contracting States the following <u>further</u> freedoms of the air in respect of scheduled international air services in addition to the 'Two Freedoms':

- (c) privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses,
- (d) privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses, and
- (e) privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.

The Agreement contains similar provisions as to various conditions to the granted privileges as those in the Two Freedoms Agreement. The fifth freedom may be reserved, and each contracting State retains the right of cabotage, viz. carriage of traffic between two points in the territory of the same foreign State. Twenty States signed the Agreement at Chicago, including the U.S.A., but not all subsequently accepted it. None of the British Commonwealth countries signed or have since adhered to it. By 1960, a total of 18 countries had at one time or another adhered to the Agreement but of these 7 had since withdrawn or denounced it, including the U.S.A. The Agreement is now, therefore, of little significance.

Possible additional freedoms will include (a) carriage of traffic between two foreign States, via the home State of the airline (a combination of Third and Fourth Freedom activity, sometimes referred to as the Sixth Freedom), (b) carriage of international traffic by an airline operating entirely outside its home State, or (c) cabotage; the latter two freedoms are often called the Seventh and Eighth Freedoms. 1

Bin Cheng, The Law of International Air Transport, 1962, pp.13-17.

The first two Freedoms were reciprocally accepted at a multilateral level at the Chicago Conference, but beyond that main reliance has been on bilateral agreements. A model type of such bilateral agreements was formulated in 1964 between U.S.A. and U.K. at Bermuda, 1 the pattern of which has been followed thereafter by many States! bilateral agreements (e.g. U.S.A. - Australia). The general effect of this Bermuda Agreement is that, for the purpose of operating air services over a number of routes specified in the Annex, each party grants to the 'designated air carriers! of the other the use of airports and facilities on these routes, and rights of transit, of stops for nontraffic purposes, and of 'commercial entry and departure for international traffic in passengers, cargo and mail; the exercise of these rights is to be subject to a number of general principles laid down in the Final Act, of which the object is to exclude unfair competition, and the effect is to limit considerably the full 'Five Freedoms' rights. A detailed survey of legal and policy

¹¹ February 1946, at Bermuda. Treaty Series No.3(1946), Cmd. 6747.

United Nations Treaty Series vol.7 (1947), No.100.

Cf. Shawcross and Beaumont, op.cit., pp.276-81.

problems involved in such commercial arrangements would be beyond the scope of this thesis, but, from the Australian point of view, the following points should be noted. First, the general Australian standpoint in respect of international liberty to fly on which the Director-General of Civil Aviation made a comment in his lecture is as follows: 1

It is interesting to speculate what the effects of a free exchange of freedoms might have had upon the development of Qantas, remembering in particular that its major growth occurred after Chicago. Qantas owes its commercial existence to the large volume of long haul third and fourth freedom traffic which flows between the United Kingdom and Australia. Unrestricted competition on this route in the post war years by large foreign carriers, few of which would have originated much long haul traffic of their own, could clearly have prevented the subsequent growth of Qantas into a world air carrier. The judgement of history must then be that a multilateral exchange of traffic freedoms, no matter how fine an ideal it may have been, was clearly inconsistent with our best aviation interests in 1944 and our representatives at Chicago acted prudently in rejecting it.... The post war policy of Australia in dealing with other countries on this traffic rights question remained for more than a decade predominantly protectionist - and thus in line with the 'Commonwealth' principles espoused at Chicago in However, political developments of the 1950's which threatened the security of our Middle East route to the United Kingdom, together with the growth of Qantas into a world carrier

D.G. Anderson, Australia's Contribution to International Civil Aviation.

able to withstand fair and reasonable competition from any foreign carrier, caused a shift of policy to the Bermuda type agreement. We now stand prepared to negotiate an agreement of this type with other aviation countries.

Secondly, the co-operation system among the British Commonwealth countries is a characteristic feature of the international air transport network. As an alternative to their internationalization plan, Australia and New Zealand supported a system of air trunk routes controlled and operated by the British Commonwealth under Government ownership. This has been realized in a more moderate form of partnership, pooling or other co-operative arrangements among the British Commonwealth countries. Australia has now pooling or partnership arrangements with the United Kingdom, India, South Africa and New Zealand, while other countries have also entered such arrangements in their respective regional areas (e.g. 'Air Union' between the airlines of France, Italy, West Germany and Belgium). Thirdly, bilateral air transport agreements involve such main problems as following: because of the possibility of unequal economic strength in two competitors there is some

Art.77 of the Chicago Convention provides that nothing in the Convention shall prevent two or more contracting States from constituting joint air transport operating organizations or international operating agencies and from pooling their air services on any routes or in any regions.

need for the regulation of competition even in the exchange of common Third and Fourth Freedoms rights (e.g. the predetermination of the total capacity, or some statement of principle urging a fair and equal opportunity to the carriers of the two nations.) With respect to the Fifth Freedom, it is generally recognized that international operators on long routes cannot operate economically without rights to Fifth Freedom traffic; hence, the necessity to find a compromise between this need and the principle that every State has a primary right to its own Third and Fourth Freedom traffic. For example, the Final Act of the Bermuda Conference, which is reproduced in the Australia-U.S.A. agreement, reads as follows:

The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in the Annex to the Agreement shall be applied in accordance with the general principles of orderly development to which both Governments subscribe and shall be subject to the general principle that capacity should be related (a) to traffic requirements between the country of origin and the country of destination; (b) to the requirements of through airline operation; and (c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.

Cf. Poulton, Notes on Lectures in Air Law 1955, pp.19-21.

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U.N. Treaty Series, 1947, vol.7, No.100, Annex Sec.III(E).

Other problems arising from bilateral agreements relate to routes and customs duties, etc., on which we will not make any further comment.

Australia now has in force bilateral air services arrangements with 26 other countries exchanging traffic rights for scheduled international air services. of these are Air Services Agreements and the remaining 7 are provisional arrangements. It has been already mentioned that an international airline of a country other than Australia shall not operate a scheduled international air service over or into Australian territory except in accordance with an international airline licence issued by the Director-General in accordance with the regulations. It is further provided that an international airline licence shall not be granted to an international airline of a country other than Australia unless that country and Australia are parties to the Air Transit Agreement, or to some other agreement or arrangement, whether bilateral or multilateral, under which scheduled international air services of that other country may, subject to the

Civil Aviation Annual Report (1963-64) at pp.19-21. As to such air service agreements, see Australian Treaty Series published by the Department of External Affairs. The countries and dates of these agreements (until 1961) are listed in Civil Aviation Annual Report (1960-61) at Appendix 1.

agreement or arrangement, be operated over or into Australian territory. 1

(ii) Non-Scheduled Flights:

By Art.5 of the Chicago Convention,

Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights. aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Art. 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.

Art.7 provides for <u>cabotage</u> - the contracting State's right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. The

Sec. 12(1) of the Air Navigation Act.

term 'cabotage' is an analogy from maritime law which, as an exception to the principle of the freedom of the seas, reserves national control over sea traffic along the coast-line; but cabotage in air law (generally called 'air-cabotage'), being read together with the definition of 'territory' in Art.2, is an affirmation of the principle of national sovereignty over airspace, and is of much wider application, covering distant points in metropolitan territory and also places between the latter and the colonies of the State concerned, even though the passage may cross other countries or the high seas.

Although the contracting States seem to have granted each other the right to perform non-scheduled air transport for commercial purpose as well as for non-commercial purpose regardless of prior permission, the States' practice has shown that many of the contracting States (including Australia) require 'prior permission' for non-scheduled flights performed for commercial purposes with traffic stops. 1 In the case of Australia, an aircraft of a contracting State may fly in transit non-stop across Australian territory, or land in Australian territory for

Goedhuis, op.cit., pp.269-70, referring to a Report of the Council of I.C.A.O. of July 21, 1949 (Doc.6850 C/797).

non-traffic purposes, in the course of non-scheduled flight, without the necessity of obtaining prior permission, but it shall not take on or discharge passengers, cargo or mail (being passengers, cargo or mail that has been, or is to be, carried for reward) except with the permission of the Director-General and in accordance with that permission. Those States following such a practice are of opinion that in the absence of a definition of 'scheduled services' which is universally acceptable, insistence upon prior permission forms the only guarantee against the risk that nonscheduled air transport of other States from and to their territory will be developing into a disguised scheduled service. ² The most practical excuse for requiring such prior permission is that 'prior permission' is one of the 'regulations, conditions or limitations' envisaged in the second paragraph of Art.5 of the Convention. conditions, &c. of granting the permission will vary from State to State in accordance with its political and/or economic policies; for example, in Australia the Director-General of Civil Aviation, in considering an

Sec.14(1) & (2) of the Air Navigation Act.

Goedhuis, ibid.

application for permission, is required to have regard to (a) the public interest, (b) the need to provide reasonable protection for the operators of scheduled international air services, and (c) any relevant decision of I.C.A.O. or I.A.T.A. (International Air Transport Association). However, the lack of a communis opinio with respect to the concept of 'non-scheduled flight' may not be a legal excuse for requiring a prior permission; such requirement may be a breach of international law. Pacta sunt servanda. Hence, as Dr Goedhuis suggests, the solution of this matter might be an appeal to the Council of I.C.A.O., or to an ad hoc Court of Arbitration or to the International Court of Justice.

A foreign aircraft not possessing the nationality of a contracting State of the Chicago Convention (e.g. aircraft of U.S.S.R.) shall not make a non-scheduled flight over or into Australian territory unless the Minister of Civil Aviation has approved the flight. The Minister may, in giving such an approval, impose such conditions and requirements as to the flight as he thinks fit, including such conditions and requirements as he

Sec. 14(4).

Ibid.

considers necessary to ensure compliance with the general principles contained in the Chicago Convention, and the aircraft shall comply with them. 1 If the foreign aircraft makes a flight over or into Australian territory without such permission, this will be an illegal invasion of the sovereignty of the Australian airspace under the present international law. No liberty to fly is established for such aircraft, and the aircraft must be subject to the 'absolute' sovereignty of airspace enjoyed by the subjacent State.

The subject of law is a sovereign 'State' incurring rights and obligations under international law, but once the right to fly is given by a State to other States, the nationals of the latter acquire liberty to fly over that State's territory under national law incorporating international law rules by some means varying from State to State. On the other hand, the State which restricts its airspace sovereignty under Chicago Convention or other international air traffic agreements must secure

For example, two Russian civil aircraft traversed Australia southbound from Djakarta via Darwin and Sydney to New Zealand and to Antarctica in December, 1961, and returned along the same route northbound in January, 1962. As the U.S.S.R. was not a party to the Chicago Convention, the Minister for Civil Aviation gave approval for the flight, subject to appropriate conditions, in accordance with sec.15 of the Air Navigation Act. Cf. Second Civil Aviation Annual Report (1961-62), p.10.

liberty to fly accorded to other contracting States or their nationals in its national law so as to implement faithfully the international obligation. Hence, by the mutual exchange of the right of innocent passage in the international agreements, the legal status of airspace in national law as well as in international law is affected pro tanto; the mode of such influences by international law depends on the national legal system, as we will see next.

2. Federal and State Jurisdictions in Airspace and Public Right of Transit across States' Boundaries:

Art.1 of the Chicago Convention is an international recognition of 'complete and exclusive' sovereignty of Australia in the airspace above the Commonwealth territory. However, this principle does not of itself authorize the Commonwealth Government to override the States' sovereign or jurisdictional rights in the airspace above their respective territories, since the question how Australia exercises its <u>internal</u> sovereign power within its territorial domain depends upon what the federal Constitution prescribes. 'Supreme power' is embodied in the principle of 'parliamentary sovereignty' in the Australian context, and is divided between seven Parliaments (Commonwealth and six States), each being

sovereign within its constitutional powers. The extent to which the Commonwealth Parliament has constitutional powers in respect of aviation control has already been discussed, and we need only add the following points relating to the special status of airspace in constitutional law.

It was once argued in the United States that, until the advent of air navigation, the original colonies did not acquire sovereignty in the <u>upper</u> airspace, as distinct from the strata close to the surface which had been used since earliest times by mankind, and, after the adoption of the Constitution, no State could acquire territory in the airspace as this would amount to the acquirement of new or additional domain, a function vested solely in the Federal Government. Professor <u>Cooper</u> is inclined to dismiss this historical argument denying State sovereignty: ²

F.P. Lee, The Air Domain of the United States, Civil Aeronautics Legislative History of the Air Commerce Act of 1962, corrected to Aug. 1, 1928, U.S. Government's Printing Office (1943). As to this theory, mention has already been made in Chapter IV, ante.

J.C. Cooper, State Sovereignty vs. Federal Sovereignty of Navigable Airspace, 15 J.A.L.C. 1948, p.37.

I have always felt that the airspace over a nation was an integral part of the nation's I have never been impressed with territory. the argument that such airspace did not become part of national territory until nations had the physical ability to fly in that territory and thus to control and occupy it. It has always seemed to me that the airspace in the early days was in exactly the same status as those mountain peaks which mankind could not scale or the dense jungles which he could not penetrate. The lack of physical ability to reach and control such parts of a nation's territory can hardly be urged as a reason for denying that such mountains and jungles are under the sovereign domain of a nation if found within its recognized boundaries. The obvious need of a nation to control its own airspace existed from the earliest days when mankind first envisaged the possibility of flight.

The same holds good in the Australian position, or perhaps with more cogency by reason of the difference of the time of federation in the United States (1787) and in Australia (1901). The Government of each original colony as an organ of His Majesty's Government had full imperium and dominium over land ultimately held by the Crown within its boundaries. The customary international law of a State's territorial rights in the three-mile marginal ocean belt had been generally recognised at the beginning of the twentieth century, and the original colonies had their sovereign powers in their respective territorial waters. At the time of federation, or since then, they have never surrendered their territorial rights to the Commonwealth, except as expressly provided by the Constitution.

Professor <u>Cooper</u> cites two comparatively recent U.S. decisions bringing out a new question on this subject so as to require a reconsideration of the respective sovereign rights of States Government and the Federal Government in the airspace: <u>U.S. v. State of California</u> and <u>U.S. v. Causby.</u> To state his conclusions first, he sees in the <u>California Oil Case</u> a possible, but not certain, basis for denying State power; but he regards the commerce clause in its wide, modern interpretation as aided by the 'commingling doctrine' and as applied in the <u>Causby Case</u> as giving Federal authorities substantially overriding authority.

In the <u>California Oil Case</u>, a suit was brought before the Supreme Court of the United States to determine the ownership of and paramount rights over the submerged land and the oil and gas thereunder off the coast of California between the low-water mark and the three-mile limit. The court held that the State of California was not the owner of the marginal belt along its coast, and that the Federal Government rather than the State had paramount rights in and power over that belt, on the

^{(1947) 332} U.S. 19, 91 L.Ed. 1889.

^{(1946) 328} U.S. 256, 90 L.Ed. 1206.

grounds that the thirteen original colonies did not acquire from the Crown of England title to the three-mile marginal ocean belt nor the land underlying it, and, after the United States became a nation, statesmen became interested in establishing national dominion over a definite marginal zone to protect the neutrality of the United States, a protection and control of which is a function of national external sovereignty. The historical argument will be readily dismissed in the Australian setting, where, as we have seen before, the original (and present) six States formed the federation in 1901, and no such problems as experienced in the United States cases would arise as to whether a New State had surrendered its dominion and sovereignty over the soil under the three-mile belt, upon entering the federation on terms of equality with the existing States. persuasive argument lies in the Supreme Court's rulings based upon the idea that the responsibility for the

See, e.g. <u>United States v. Louisiana</u>, (1950) 339 U.S. 699; <u>United States v. Texas</u>, (1950) 339 U.S. 707. It was held in the latter case that since the original States had been found not to own the soil under the three-mile belt, Texas, which concededly did own this soil before its annexation to the United States, was held to have surrendered its dominion and sovereignty over it, upon entering the Union on terms of equality with the existing States.

conduct of foreign relations rests exclusively with the Federal Government:

What this Government does, or even what the States do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations. The very oil about which the State and nation here contend might well become the subject of international dispute and settlement. The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation rather than an individual State, so, if wars come, they must be fought by the nation. The State is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks. Conceding that the State has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries, these do not detract from the Federal Government's paramount rights in and power over this area.

This view is analogous to the argument that complete and exclusive national control of navigable airspace is necessary to the nation as a single member of the family of nations, which may be criticized on the ground that the mere fact that the doctrine of exclusive national sovereignty has been adopted and declared does not necessarily mean that the several States are without sovereign rights in the airspace above their territories

³³² U.S. 35-6, 91 L.Ed., 1897-8.

so far as the exercise of internal regulatory and police powers are concerned; it in nowise affects the apportionment of sovereignty as between the several States and the United States, but only as between the United States and the rest of the world. However, apart from such an argument for an a priori authority of the Federal Government in airspace or waters, the balance of sovereign rights as between the Commonwealth and the States will certainly be affected by international legislation imposing obligations upon Australia, for which the Commonwealth is a responsible Government. We have already discussed the nature and scope of 'external affairs' power in the Australian Constitution.

In the <u>Causby Case</u>, the U.S. Supreme Court held that at common law the landowner also owned airspace above his land to the extent he made use of it, and, where the noise and glaring lights of planes landing at or leaving an airport leased to the United States, flying below the navigable airspace as defined by Congress, interfered with the normal use of neighbouring farm as a chicken farm, there was such a taking as to give the owner a constitutional right to compensation under the Fifth

Cooper, op.cit., pp.33, 38.

Amendment to the Constitution. Various problems relating to private property rights in airspace and the 'taking' theory will be discussed later in detail. For the present purpose, we are concerned only with the constitutional status of the 'navigable airspace' placed by the Congress in the 'public domain', not in respect of the relation between aviators and landowners but in respect of the relation between the Federal Government and State Governments in their jurisdictional rights in airspace. Under the Air Commerce Act of 1926, 1 as amended by the Civil Aeronautics Act of 1938, which are now consolidated in the Federal Aviation Act of 1958, 3 the United States has 'complete and exclusive national sovereignty in the airspace over the United States. 4 The Acts grant any citizen of the United States 'a public right of freedom of transit in air commerce through the navigable airspace of the United States. 15 'Air commerce' is defined as including 'any operation or navigation of aircraft which

<sup>1
44</sup> Stat. 568, 49 U.S.C. 171 et seq., 49 U.S.C.A. 171 et seq.

52 Stat. 973, 49 U.S.C. 401 et seq., 49 U.S.C.A. 401 et seq.

72 Stat. 739, 49 U.S.C. 1301 et seq., 49 U.S.C.A. 1301 et seq.

49 U.S.C. 176(a), 49 U.S.C.A. 176(a).

5
49 U.S.C. 403, 49 U.S.C.A. 403.

directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce, 1 and 'navigable airspace' as 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority . The authority had prescribed minimum safe altitudes of flight varying from 300 to 1,000 feet and also angles of glide. According to the Court's opinion, the path of glide was not the minimum safe altitude of flight within the meaning of the statute, and the flights in question were not within the navigable airspace. However, the Court said that the airspace, apart from the immediate reaches above the land, was part of the public domain, and the Congress had properly placed certain parts of the airspace within the public domain to be used freely by United States citizens. Thus, Congress had established highways through the air just as it has established water highways in navigable streams. It should not be thought, however, that, by establishing the national highway in the air, the Federal Government

⁴⁹ U.S.C. 401(3), 49 U.S.C.A. 401(3).

⁴⁹ U.S.C. 180, 49 U.S.C.A. 180.

Note on Griggs v. County of Allegheny, (1962) 28 J. Air L. 311, 314.

appropriated the navigable airspace as new Federal territories. Sovereignty in the airspace rests also in the State 'except where granted to and assumed by the United States.' But, once the 'navigable airspace' is declared to be the 'public domain', the State powers become restricted in that area to a large extent, and practically overriden by the Federal authority. The State cannot interfere with the free passage of flights by the public in the use of the highway.

Probably, any Commonwealth's exclusive territorial claim to the airspace above the State's territory will fail except where the Commonwealth acquires part of the State's lands for the public purposes or on some other grounds under the Constitution (e.g., sec.51(xxxi), sec.52(i) or sec.85). Accordingly, the relation between federal and State sovereign rights in the Australian airspace puts, as in the United States, the airspace over a State in the similar legal and constitutional status as the lands and waters of that State, thus bringing us back to the proposition that the question how far the federal Government can exercise its jurisdictional rights within all strata of airspace depends entirely upon the scope of the enumerated legislative powers in the Constitution.

The Commonwealth Air Navigation Regulations now applicable to every civil flight set up minimum low flying altitudes, but no concept of 'navigable airspace' and 'public right of freedom of transit' has been embodied in any federal legislation. The 'controlled airspace' set up by the Commonwealth Government is no more than the place where the federal safety regulations operate. However, liberty to fly across the States! boundaries is perhaps guaranteed to every Australian citizen under sec. 92 of the Constitution, and, more generally, by the common law in the absence of any prohibition by statutory rules of the Commonwealth or of the States. The States refrain in practice from attempting to prohibit or interfere with flights of aircraft through their territorial airspace; they tacitly recognize Commonwealth authority over such flight activities, which may be inferrable from relevant statutes or implied constitutional powers. This is also the case with foreign aviators flying over a State's territory in accordance with the terms of an international agreement concluded with Australia; any State's interference based upon its territorial sovereignty will be prevented, expressly or impliedly, by virtue of

Reg.133.

Commonwealth law giving effect to their liberty to fly in Australia.

Probably, the Australian judicial trend has discouraged introduction of the concepts of the 'nature of air! or the 'interests of the public! into constitutional interpretation. However, these American concepts are equally applicable to the Australian 'commerce' clause in respect of aviation. At least, there is no reason why the Commonwealth cannot define the airspace above reasonable height from the ground as a national highway so as to confer every citizen of Australia a public right of innocent passage in commerce by air, insofar as it is necessary for securing proper conduct of inter-State and foreign trade and commerce by air or of international intercourse by air. It may not be necessary for the Commonwealth to introduce the American concept of 'public domain', but it is sufficient here to say that the establishment of the right to fly throughout Australia to the exclusion of any possible hindrance on the part of the State Governments is a legitimate exercise of the federal 'commerce' power, and is consistent with sec.92 of the Constitution. However, a discussion concerning liberty to fly through the 'navigable airspace' is not complete without referring to its relation to private property rights in airspace.

3. Private Property Rights in Airspace and Right of Innocent Passage:

In Australia as in England, there is no judicial authority at common law directly bearing on the question of property rights in airspace in relation to aircraft flights above landowners! property. There are several reported cases in the Australian courts about a stretched electric cable for lighting purposes across another's land, erection of ventilating pipes overhung the neighbour's land, or firing of bullet from a rifle at a neighbour's cat on a shed on the adjoining property occupied by the neighbour. In every case, it was held that those acts constituted trespass per se. them, Davies v. Bennison 4 is worthy of special mention here, for the decision, relating to trespass by shooting into the plaintiff's land, has a dictum concerning aircraft activity. The court said that the ownership of land, part of the earth's surface, was necessarily

Barker v. The Corporation of the City of Adelaide (1900) S.A.L.R. 29.

Lawlor v. Johnston (1905) V.L.R. 714.

Davies v. Bennison (1927) 22 Tas. L.R. 52. See also Williamson v. Friend (1901) 1 S.R. (N.S.W.) (Eq.) 23, 27; Evans v. Finn (1904) 4 S.R. (N.S.W.) 297.

(1927) 22 Tas. L.R. 52.

described by the application of the maxim 'Cujus est solum est usque ad coelum'. The words of Lord Ellenborough in Pickering v. Rudd were cited as the only direct dicta upon the point; there it was suggested that there is a distinction between a shot which struck the soil and one fired in vacuo without touching anything, the former being trespass, the latter not actionable unless it constituted a nuisance. However, referring to Blackburn's and Pollock's views against Lord Ellenborough's dictum, the Tasmanian Supreme Court said:

It seems an absurdity to say that if I fire at another's animal on his land, hit it, kill it, and so leave the bullet in it, I have committed no trespass, and yet, if I miss the animal and so let the bullet fall into the ground, have committed a trespass. Such distinctions have no place in the science of the Common Law. If the hovering aeroplane is perfected the logical outcome of Lord ELLENBOROUGH'S dictum would be that a man might hover as long as he pleased to a yard, or a foot, or an inch, above his neighbour's soil, and not be a trespasser, yet if he should touch it for one second he would be.

A man has the undoubted right to build a high tower on his land, and the space above the

^{(1815) 4} Campbell 219.

Kenyon v. Hart, 6 E. & B. 252, per Lord <u>Blackburn</u>: 'I understand the good sense of that doubt, though not the legal reason of it'. F. Pollock, Law of Torts, eighth ed., p.347.

land is exclusively his for that purpose. Then why not for any other legal purpose? It seems to me that the only real difficulty is in saying (what I need not say here), viz., how far the rights of a landowner 'ad coelum' will have to be reduced to permit the free use of beneficial inventions, such as flying machines, etc.

So far as the ability to use land, and the air above it, exists, mechanically speaking, to my mind any intrusion above land is a direct physical breach of the negative duty not to interfere with the owner's use of his land, and is in principle a trespass. At any rate, I can see no doubt whatever that an owner's rights extend to a height sufficient to cover the facts of this case (Italics ours.)

But, as in numerous English cases, 1 the Australian cases are confined to examples of intrusion into or interference with airspace by things other than aircraft. Many English writers on air law or law of tort rely on these analogies so as to make a prediction of the lines upon which the Courts will treat the activities of aircraft. Even in the United States whose common law is now an abundant source of decisions relating to the subject, various analogies from similar circumstances were formerly attempted by writers to explain this new experience of law; for example, analogies of wires stretched across land,

As to these English cases, see McNair, The Law of the Air, third ed., by M.R.E. Kerr and A.H.M. Evans, p.32, et seq. 2

Cf. Winfield, Textbook of the Law of Tort, fourth ed., p.321.

cattle roaming, easement of air and light, bullets or projectiles fired across land, baseballs thrown across land, radio wabes passing over land, carrier pigeons and other birds, etc. None of these analogies was found conclusive and appropriate for the new conflict of rights between landowner and airman. Although a study of the historical development is important for the proper understanding of common law rules, it is sufficient for our present purposes to start from the conclusions of writers as to the present state of English law.

Professor Richardson's surveys are in summary as follows: It has not been necessary for an English Court to give literal effect to the maxim cujus est solum, ejus est usque ad coelum ('whose is the his it is up to the sky'), and no court has done so. English courts have always accepted the general right of the landowner to the uninterrupted use and enjoyment of his property, and, as a corollary of the owner's right of full enjoyment, no one has the right in normal circumstances to prevent him building upwards from his land. There is an underlying assumption in the cases that use and enjoyment of land are meaningless without the ability to use the space above,

See, e.g. C. Zollmann, Law of the Air, 1927, p.16, et seq.

but the courts have not pronounced upon ownership of space. The decisions do not inhibit persons from making transient use of airspace above private property in circumstances having no bearing on an occupier's use and enjoyment of the subjacent soil. Hence, it is generally recognized that the mere flight of an aircraft over privately held land does not of itself give a right of action to the owner below.

In earlier days, writers on air law had difficulty in establishing a reasonable construction of the <u>cujus</u> maxim to meet the aviation age, but it is now widely understood that the maxim establishes no wider proposition than that the air above the surface is subject to dominion insofar as the use of space is necessary for the proper enjoyment of the surface. Apart from juristic writers opinions, judicial cases concerned with the maxim <u>directly</u> involving aircraft flights are provided not in the English and Australian cases but in the North American cases. The U.S. Supreme Court said: 3

J.E. Richardson, Private Property Rights in the Air Space at Common Law, 31 Canadian Bar Review (No.2), 1953.

Cf. J.G. Fleming, The Law of Torts, second ed., p.46.

³²⁸ U.S. 256, at 261; 90 L.Ed. 1210 (Causby Case). See also Swetland v. Curtis Airports Corp. (1932) 55 F. 2nd 201.

It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe...But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

Similarly, the Exchequer Court of Canada said:

This principle was admitted at a time when nobody could foresee our modern inventions and developments. It would be difficult to apply rules of law of a past period which had no idea of the sets of facts and circumstances that exist at the present time. So in France, the United Kingdom and the United States the tendency has been to restrict the interpretation of the above maxim and rule of law, always keeping in mind that the owner is entitled to full enjoyment of his property.

Probably, the most debatable point in English law is the nature of the landowner's interest in airspace, or, to put it in a more simple question, 'can airspace be owned?'

McNair suggested two theories - (i) that prima facie a surface-owner has ownership of the fixed contents of the airspace and the exclusive right of filling the airspace with contents, and alternatively, (ii) the same as (i)

Jean Lacroix v. the Queen (1953) 1954 U.S. and Canadian Aviation Reports (September No.3), p.259.

with the addition of ownership of the airspace within the limits of an 'area of ordinary user' surrounding and attendant upon the surface and any erections on it. McNair prefers the first theory, and considers it doubtful that the common law is committed to the view that mere abstract space can be the subject of ownership apart from its contents. 1 Winfield ventures to take the second theory, considering that it is not clear why space, if its common meaning of 'extent of length, breadth and thickness, irrespective of its contents! be taken, should be incapable of ownership; a vacuum in an exhausted receiver is just as capable of ownership as air in a bottle. 2 Professor Richardson avoids any conclusive opinion about space ownership, in the present state of the English authorities, either separately or as a consequence of the enjoyment of land, but is inclined to

McNair, op.cit., pp.48-9.

Winfield, op.cit., fifth ed., at p.323, seventh ed., at p.374.

put more stress on possession than on ownership. In
the present writer's opinion, the air may be distinguished
from the airspace, because the air is a floating, drifting
and shifting substance while the airspace is a geographical
area, capable of being reduced to occupation or possession
if enveloped by fixed contents or even by fictitious
lines; what matters is not whether airspace is physically
occupiable or possessable but how it has been regarded in
law.

The United States courts have taken the view that a landowner <u>owns</u> space up to a height which is necessary for his full and complete enjoyment of the land itself, or (particularly at the place near to an airport) to the minimum altitude of flight prescribed by the Civil Aviation Authority, and flight below those heights therefore constitutes a trespass. Through early aircraft cases in

Richardson, op.cit., pp.135-6. He says: 'It seems that there can be actual occupation of space, at any rate in connection with the use of land. The law is silent on the circumstances in which possession can ripen, if at all, into ownership. But the cases dealing with rateable occupation are authorities supporting possession. So far as the ownership of land is concerned, it does not much matter whether the occupation of space is considered to be possession or ownership, although possession is a more realistic and much tidier concept. Buildings upon land form part of the land itself and pass with it; as such they have no bearing on space rights.'

1920's upholding right of flight and later cases since
1930's relating to the conflict between the owner and
operator of an airport, and the owner and dweller on land
nearby, this zone theory has been a main trend in the
American judicial cases. The <u>Causby Case</u> firmly established
ownership of space of landowners:

The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land.... The fact that he does not occupy it in any physical sense - by the erection of buildings and the like - is not material....While the owner does not in physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.

Although the course of decision favours partial ownership, there are some differences among U.S. cases in the court's

As to those cases, see Hotchkiss, The Law of Aviation, second ed., pp.20-3 (esp. Johnson v. Curtis Northwest Airplane Co. et al. (not officially reported - 1924)).

See, Hotchkiss, op.cit., p.23, et seq. (esp. Smith v. New England Aircraft Co., Inc. (1930) 270 Mass. 511; 170 N.E. 385; 1930 U.S.Av.R.1: Swetland v. Curtiss Airports Corporation, U.S.D.C.N.D. Ohio, 1930, 41 Fed.(2d) 929; 1930 U.S.Av.R. 21.)

⁽¹⁹⁴⁶⁾ U.S.Av.R. at pp.241-2; 382 U.S. at pp.264-5.

approach to the problem. Hinman v. Pacific Air Transport would be an interesting exception, where it was held that there was no trespass unless the flight occurred within the zone of the landowner's actual use; on this view, in ordinary cases remedy will lie not in trespass but in nuisance only. It would follow from the requirement of actual, rather than potential, user that by raising the height to which he actually uses the airspace above his land (e.g. by erecting buildings) the landowner can increase the minimum height below which flights will be a trespass. It is submitted that the United States courts now face a logical dilemma; they say that there is ownership of airspace up to a certain height, yet they refuse to enjoin flights unless the landowner's interest is adversely affected or threatened, although theoretically the Court should grant a remedy in trespass for any flight which involves an intrusion through airspace which is the subject of ownership. 3

U.S.Av.R. 1; 1 Av.640; 84 F.2d. 755; 300 U.S.654.

McNair, op.cit., p.55. But, in view of the <u>Causby Case</u> and <u>Griggs Case</u>, <u>infra</u>, it is doubtful that, as <u>McNair</u>, says, the 'actual' theory has prevailed in the American judicial cases.

³ Cf. Poulton, Notes on Lectures in Air Law, 1955, pp.28-9.

In the United States, there is the special constitutional problem of the guarantee of compensation for 'taking' private property in the Fifth Amendment (or Fourteenth Amendment) to the Constitution. It has already been mentioned that the U.S. Supreme Court in the Causby Case held that, where the noise and glaring lights of military planes landing at or leaving an airport leased to the United States, flying below the navigable airspace as defined by Congress, interfered with the normal use of a neighbouring farm as a chicken farm, there was such a taking of an easement of flight as to give the owner a constitutional right to compensation under the Fifth Amendment. The provisions of the Fifth Amendment, so far as relevant, read: 'No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Under sec.51(xxxi) of the Constitution, the Commonwealth Parliament may make laws with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws!. It should be noted, first, that at the time of the Causby Case the Federal Claims Act of 1946 had not been enacted; in order to

⁶⁰ Stat. 428 (1946).

give the landowner a remedy in that case it was necessary to work out the 'taking' theory. It was otherwise an action in tort, and the similar solution is unlikely to be adopted in Australia where there is no such governmental immunity from suit for torts.

However, once successful in the <u>Causby Case</u>, this method of bringing damage actions against the Federal Government (under the Fifth Amendment) or the local Government (under the Fourteenth Amendment) could be used in similar circumstances, as this decision has recently been applied by the U.S. Supreme Court in <u>Griggs v. County of Allegheny.</u>

The second point of importance is that at the time of the

³⁶⁹ U.S. 84 (1962), 7 L.Ed., 2d, 585-92. The defendant county designed the plan for its airport, including the arrangement of its take-off and approach areas, in compliance with federal requirements and under the supervision of and subject to the approval of the Civil Aeronautics Administrator of the United States. Allowable costs payable by the federal government included costs of acquiring land or easements through airspace. The noise, vibrations, and fear caused to the occupants of plaintiff's residential property located near a runway of the airport by constant and extremely low overflights interfered with the use of the owner's property. In Common Pleas of Allegheny County, the Court held that there had been a 'taking' by defendant of an air easement over plaintiff's property and fixed compensation. The Supreme Court of Pennsylvania - two of the justices dissenting - held that if there was a 'taking' in the constitutional sense, the county was not liable. certiorari, the Supreme Court of the United States reversed. It was held that (1) the interference with the plaintiff's property amounted to a 'taking', in the constitutional sense, of an air easement for which compensation must be made; and (2) the defendant county, and not the United States, was the 'taker' liable to pay the compensation. Two justices dissented from the ruling under (2).

Causby Case Congress did not place the path of glide or flight in question within the 'navigable airspace', which was later redefined as including 'airspace needed to insure safety in take-off and landing of aircraft. 1 is to be observed, therefore, that, in order to invoke the 'taking' theory, it was irrelevant whether the flight causing damage was performed within the 'navigable airspace or not. In the Griggs Case, no flights were in violation of the regulations of the Federal authority; nor were any flights lower than necessary for a safe landing or taking-off. Yet, there was held to be a 'taking', where the noise, vibrations, and fear caused to the occupants of plaintiff's residential property located near a runway of the airport by constant and extremely low overflights interfered with the use of the owner's property. The third point is that the similar situations are confined to cases of damage caused by the Government-owned or: Government-operated aircraft (as in the Causby Case) or by the owner or operator of Government-owned aerodromes (as in the Griggs Case), for private owners of aircraft and private airports have no power of 'eminent domain'.

⁷² Stat. 739, 49 U.S.C. 1301(24), 49 U.S.C.A. 1301(24).

A philosophy underlying the 'taking' theory is based on the 'ownership' theory of the landowner's interest in airspace that he owns at least as much of the space above the ground as he can occupy or use in connection with An invasion of this 'superadjacent airspace' land. affects directly the use of the surface of the land itself. If by reason of the frequency and altitude of the flights, the landowner could not use the land for any purpose, his loss is as complete as if the invader had entered upon the surface of the land and taken exclusive possession of Although it will be only an easement of flight which is taken, this easement, if permanent and not merely temporary, normally would be equivalent of a fee interest. Hence, if the flight was not a direct invasion of 'superadjacent airspace' to which the landowner's ownership extended, then the remedy would have been in tort (trespass, nuisance or negligence.) Where as in English law the nature of the landowner's interest in airspace is not entirely clear, it may be that the landowner does not own any more of the space above the ground than he can occupy or use in connection with the contents on the land (which is a possible prediction of the line upon which the Australian court will proceed), then the mere establishment of flightway and flying of

aircraft in ordinary cases cannot be regarded as 'taking' or 'expropriating' any 'property' belonging to the landowner or interfering with his rights of In such a case, a direct invasion of ownership. 'superadjacent airspace' owned by the landowner is unlikely to happen (except, perhaps, when aircraft fly in the airspace between the contents on the surface), and there is less opportunity to establish a flight easement. However, apart from such an invasion of the 'landowner's airspace, the complete destruction of the enjoyment and uninterrupted use of land may be caused by frequent and extremely low flights (not necessarily trespassing), particularly at the places near airports where it is inevitable for aircraft taking off from or landing at runways to cause a certain amount of noise, vibration, etc., within approach areas. If, on the contrary, the Australian law adopts the 'ownership' theory, circumstances more similar to the United States position will arise in Australia. In either of the situations, the 'taking' concept; may be invoked, if the damage caused is so serious and frequent (not merely temporary or casual) as to amount to the deprivation of the subjacent landowner's

property right. 1 Under the Australian Constitution, prima facie there is no reason why the right in airspace of the landowner in using his land should be excluded from the concept of 'property', for 'property' as a subject of compulsory taking would cover 'not only specific estates and interests in land recognized in law and equity and specific forms of property in chattels and choses in action similarly recognized, but also innominate and anomalous interests. 2 The Commonwealth Parliament has exclusive legislative power with respect to 'all places acquired by the Commonwealth for public purposes' (sec.52(i)), under which the Commonwealth controls the Commonwealth-owned aerodromes. Hence, the

Spater says that there can be no 'taking' of tangible property under the U.S. federal Constitution unless two conditions exist: First, there must be a physical or direct 'invasion' of the property and, second, the invasion must be of a type which results in 'exclusive' appropriation. Applying this test to aviation cases, he asserts that only the landowner over whose property the flight path has been laid has lost the use of that airspace, and a neighbouring landowner may not recover for damage arising from the same objectionable activity (G.A. Spater, Noise and the Law, 63 Michigan Law Review (No.8), 1965, p.1373, esp. p.1385, et seq.) However, in view of the high-speed mobility of aircraft and extensive scope of the resulting damage area, there is no reason why the 'taking' theory, if invoked, should be limited to the landowner's property directly beneath the flight path. American cases seem to support Spater's, view, but the application of the taking theory to aviation damage cases will need more clarification by judicial thinking.

Wynes, Legislative, Executive and Judicial Powers in Australia, third ed., pp.455-6, and see cases there cited.

reason for invoking the protection of sec.51(xxxi) will be that, since an adequate approach way is a necessary part of an airport, the Commonwealth could and should have acquired private property near the Commonwealth-owned aerodromes for the purpose of operating them. But, it seems to be a matter of degree whether an Australian court will deal with this problem on the constitutional level of acquisition or on a tort basis. In Australia, there is authority for the view that sec.51(xxxi) is a protection to property and is not intended as a guarantee against damage and interference for which the normal remedy is an action in negligence or nuisance. Causby Case, Black J. whose dissenting opinion was joined by Burton J. raised a serious doubt as to whether the concept of taking property as used in the Constitution had been given so sweeping a meaning and, having put an emphasis upon the paramount authority of Congress in the navigable airspace, he rejected the 'taking' theory:2

No greater confusion could be brought about in the coming age of air transportation than that which would result were courts by Constitutional

R.W. Baker, The Compulsory Acquisition Powers of the Commonwealth, Essays on the Australian Constitution, second ed., p.193, et seq. at p.204.

³²⁸ U.S. 273-5, 90 L.Ed. 1217-8.

interpretation to hamper Congress in its efforts to keep the air free. Old concepts of private ownership of land should not be introduced into the field of air regulation. I have no doubt that Congress will, if not handicapped by judicial interpretation of the Constitution, preserve the freedom of the air, and at the same time, satisfy the just claims of aggrieved persons. The noise of newer, larger, and more powerful planes may grow louder and louder and disturb people more and more. But the solution of the problems precipitated by these technological advances and new ways of living cannot come about through the application of rigid Constitutional restraints formulated and enforced by the courts. What adjustments may have to be made, only the future can reveal. It seems certain, however, that courts do not possess the techniques or the personnel to consider and act upon the complex combinations of factors entering into the problems. The contribution of courts must be made through the awarding of damages for injuries suffered from the flying of planes, or by the granting of injunctions to prohibit their flying. two simple remedial devices are elevated to a Constitutional level under the Fifth Amendment, as the Court today seems to have done, they can stand as obstacles to better adapted techniques that might be offered by experienced experts and accepted by Congress. Today's opinion is, I fear, an opening wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital and national problems. In my opinion this case should be reversed on the ground that there has been no 'taking' in the Constitutional sense.

However, in the <u>Griggs Case</u>, the majority opinion in the <u>Causby Case</u> was followed, and <u>Black</u> J. agreed with the 'taking' theory: 1

³⁶⁹ U.S. 91, 7 L.Ed. 2d, 590.

Although I dissented in Causby because I did not believe that the individual aircraft flights 'took' property in the constitutional sense merely by going over it and because I believed that the complexities of adjusting atmospheric property rights to the air age could best be handled by Congress, I agree with the Court that the noise, vibrations and fear caused by constant and extremely low overflights in this case have so interfered with the use and an enjoyment of petitioner's property as to amount to a 'taking' of it under the Causby holding.

Probably, the establishment of 'navigable airspace (or public domain) would imply that no trespass suit lies against flight which takes place above the safe altitude fixed by the Federal authority, but the flight is not entirely exempt from nuisance, which may occur above (as well as below) the safe altitude. If the Commonwealth ventures to adopt the 'navigable airspace' system, and if the Court admits the ownership of superadjacent airspace above the land, then the Causby Case and Griggs Case may be inferred by the Court. The Commonwealth will suffer from numerous suits for 'taking' which may be brought by landowners below flightways near the Commonwealth-owned aerodromes, because theoretically the Court should otherwise grant a remedy at least in trespass for any flight invading airspace owned by them. If the Court interprets the nature of the landowner's property right in airspace in a limited way, there still exists a

possibility of nuisance, a remedy for which is a suit for injunctive relief or damages or both against the flight taking place within the 'navigable airspace'.

Whether the suit lies in tort or on an acquisition basis will be a matter of degree, depending largely upon the factual circumstances.

The Canadian Case, Jean Lacroix v. the Queen, 1 in a sharp contrast with the American 'ownership' arguments. The Crown expropriated an easement for on the suppliant's land and on adjoining properties for a lighting system to guide aircraft into and from an airport. The Crown accepted without question its liability to pay compensation for the actual use of the surface for lighting equipment, but suppliant also claimed compensation for the 'flightway' established by the regular passage of the planes over his land; the establishment of this flightway and the flying of planes over his land was, according to the suppliant's claim, an interference with his rights of ownership and a disturbance of his full enjoyment of his property, and the Crown, having established this flightway and interfered with his rights

⁽¹⁹⁵³⁾ Exchequer Court of Canada (December 29, 1953); 1954 U.S. and Canadian Aviation Reports (September No.3), p.259, et seq.

of ownership, was liable for the damages claimed.

Fournier J., after having rejected the application of the cujus maxim, disclosed his opinion as to the nature of the landowner's rights in airspace:

To agree with the position taken by the suppliant that the Crown, by expropriating an easement for a lighting system, had created a flightway and appropriated airspace over his land would be admitting that air and space may be appropriated or possessed. In my view, air and space are not susceptible of ownership and fall in the category of res omnium communis, which does not mean that the owner of the soil is deprived of the right of using his land for plantations and constructions or in any way which is not prohibited by law or against the public interest. It seems to me that the owner of land has a limited right in the airspace over his property; it is limited by what he can possess or occupy for the use and enjoyment of his land. By putting up buildings or other constructions the owner does not take possession of the air but unites or incorporates something to the surface of his land. This which is annexed or incorporated to his land becomes part and parcel of the property. The Crown could not expropriate that which is not susceptible of possession. is contrary to fact to say that by the so-called establishment of a flightway and flying of planes it had taken any property belonging to the suppliant or interfered with his rights of ownership.

For these reasons the suppliant's claim for damages by reason of the establishment of a flightway over his land failed, but the suppliant was held to be entitled to compensation for the value of the easement taken on the actual land surface and the injurious affection of his remaining land. Although, in view of the physical natures

of air and space, our common sense should perhaps be impressed by the idea of <u>res omnium communis</u> rather than by other fictitious arguments setting up arbitrary boundaries in the air, nevertheless it is difficult to square the literal application of the idea with long established landowner's rights in airspace. If, however, the concept does not derogate from the owner's or occupier's full enjoyment of his property, then it is similar to <u>McNair's</u> first theory and in accord with some English cases. 1

Whatever the nature of the landowner's interest in airspace, the courts in England and in the United States fully recognize the right of the owner to the uninterrupted use and enjoyment of his land, and such a right carries with it a right to use the airspace above the land as an incident to the enjoyment of the land itself. Hence, if the aircraft or anything from it falls or descends upon the land, it will certainly be a trespass. If the aircraft passage interferes with the reasonable use and enjoyment of land, that will be a nuisance. If the aircraft fly so low as to come within the 'area of

The view then becomes akin to Lord Ellenborough's dicta, supra.

Richardson, op.cit., p.148.

ordinary user' which varies in almost every case, then either a trespass or nuisance suit will probably lie at the present common law. The Australian courts are likely to treat the activities of aircraft on these general But, in view of the indispensable importance and lines. increasing popularization of aviation, it seems desirable if the Court would reject the fictitious zone theory or similar views allowing the landowner to own or possess airspace up to a certain height, and give him a remedy only in nuisance upon proof of damage. Liability problems arising from ground damage caused by aircraft will be examined in detail in Chapter IX and it is sufficient here to mention that ordinary principles of 'nuisance' apply to such cases - that is, in order to merit legal intervention as nuisance the annoyance or discomfort must be substantial and unreasonable; in determining 'substantiality' and 'unreasonableness' we must have regard to 'an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant and dainty modes and habits of living, but according to plain and sober notions among our people', 'reactions of normal persons in the particular locality, not to the idiosyncrasies of the particular plaintiff' or 'the social value which the law attaches to the object the defendant is pursuing by his activity'.

Undoubtedly, in many cases, continuance or recurrence is necessary to cause substantial harm, and the courts are particularly reluctant to grant an injunction where the nuisance is only temporary or occasional. But if the claim is for damages, the duration of the interference must be weighed together with all other relevant factors. In cases of actual injury to persons or property, as distinct from mere comfort, the fact that the occurrence was momentary and unlikely to recur is ordinarily irrelevant.

Shawcross and Beaumont say that to constitute a nuisance by flight, there must be considerable repetition of the act complained of. But McNair seems to support the view that circumstances might arise in which the court would hold that a single flight interfered with the reasonable use and enjoyment of the land so as to constitute a nuisance, although he admits that the disturbance caused by a single flight is so trivial as to attract to itself the protection

Fleming, op.cit., pp.361-70.

Shawcross and Beaumont, op.cit., p.418.

of the maxim <u>de minimis non curat lex.</u> Probably, when those writers expressed such opinions in the early 1950's, they may not have considered the enormous noise caused by jet-aircraft.

The common law rules of the legal status of airspace in relation to the landowner's interest and aircraft flight are now modified by statutes in four States of Australia. In New South Wales, Victoria, Tasmania and Western Australia, statutory enactments in almost identical terms with sec. 40 of the Civil Aviation Act (U.K.), 1949, govern the basic principles of aircraft flights above subjacent lands and of liability for ground damage caused by aircraft. The provisions of those enactments, establish, firstly, no liability for technical legal injury, viz. mere invasion of legal title (trespass or nuisance), and, secondly, absolute liability for material loss or damage caused by aircraft on the surface.

McNair, op.cit., (2nd ed.) p.45.

New South Wales: Damage by Aircraft Act, 1952.
Victoria: Wrongs (Damage by Aircraft) Act, 1953, as repealed by Wrongs Act, 1958 (Part VI - Damage by Aircraft).
Tasmania: Damage by Aircraft Act, 1963.
Western Australia: Damage by Aircraft Act, 1964.

The provisions of the statute do not cover other relevant liability problems, e.g. limitation of liability, insurance system, actions for damages, etc.

The provisions common to four States statutes read as follows:

No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case is reasonable, or the ordinary incidents of such flight so long as the provisions of the Air Navigation Regulations are duly complied with.

This gives a right of innocent passage to aviators insofar as they comply with the stated conditions. To this extent, private property rights in airspace at common law are modified, and possible trespass or nuisance suits at common law are denied. However, since even a flight in conformity with this sub-section may be liable under sub-section (2) establishing absolute liability in the case of material loss or damage on the surface, the landowner's interest is not obliterated by the legislation. It is submitted that 'all the circumstances of the case' includes the fact that the aircraft has recently taken off or is preparing to land, and 'ordinary incidents of such flights' is construed as ordinary consequences of the normal behaviour of an aircraft; for example, a certain amount of noise and a certain invasion of privacy

are inevitable. 1 It should be observed, however, that in certain circumstances 2 the statutory rule does not apply and the common law rules do. In the two other States (i.e., Queensland and South Australia) and in Commonwealth Territories, the matter is still governed by common law.

No such federal legislation has so far been enacted in Australia; note however reg.90 of the Air Navigation Regulations providing that:

Nothing in these Regulations shall be construed as conferring on any aircraft, as against the owner of any land or any person interested therein, the right to alight on that land, or as prejudicing the rights or remedies of any person in respect of any injury to persons or property caused by the aircraft.

Accordingly, even if an aircraft complies with rules of the Regulations (e.g. low flying), rights of the landowner of the person interested in that land are protected in any

McNair, op.cit., p.109. See also Halsbury's Laws of England, third ed., vol.5, p.246. It is submitted that the word 'of' seems to have been omitted before the words 'the ordinary incidents of such flight'.

According to McNair, the cases in which the statutory provisions do not apply are, for example, when the air traffic regulations have not been complied with (then the immunity ceases to apply) or when the flight does not take place 'at a height above the ground, which having regard to wind, weather and all the circumstances of the case is reasonable', &c. Cf. McNair, op.cit., pp.99-100.

case. It is not clear, however, whether any 'injury' means only 'material (or physical) injury' or includes 'technical legal injury', but at any rate it would include 'injury' by nuisance. While any flight complying with rules of the present Commonwealth Regulations is generally lawful in other respects, the effect of reg.90 is to declare that liberty to fly in relation to the legal status of airspace in private law is left to the State statutory rules or common law.

As the foregoing discussions disclose, there are two types of solutions to be adopted by the Commonwealth: one is to set up 'navigable airspace' by declaring airspace above a certain safety altitude uniformly as the 'public domain' wherein every citizen enjoys the right of freedom of transit, as has been firmly established in the U.S., and the other is to establish the right of innocent passage to the exclusion of the landowner's action for trespass or nuisance 'by reason only of the mere flight', as has been adopted by the four States' statutes modelled after the U.K. legislation. The practical effects of the two solutions are similar; any flight taking place within the 'navigable airspace' will be exempt from trespass suit (but not necessarily from nuisance suit), while the establishment of 'innocent passage' only is a manifestation

of the implied Commonwealth authority in upper airspace. It should be observed, however, that the concept of 'public domain' is less favoured in Australia, partly because the nature of the landowner's property right in airspace is not entirely clear, partly because a formal interpretation of legislative power rather than the idea of 'public use' is emphasized in Australia, and perhaps because a public domain theory may lead to numerous suits for compensation by reason of 'taking' in the constitutional sense, which will be brought by private landowners and the State Governments in respect of Crown land, particularly at places near the Commonwealth-owned aerodromes. The Commonwealth cannot under any of its powers arbitrarily declare all of the airspace over a State's territory or a person's land to be in the 'public domain' and then give absolute immunity against claims for damages, excepting in federal territories; only the States can adopt such a drastic policy in their territorial limits under the full power of 'eminent domain', but they are not likely to do so. On the other hand, the establishment of innocent passage is merely to authorize the flight free from trespass or nuisance, depending on whether the conditions of weather, height or flight rules are duly complied with; it does not establish a national

highway in a true sense. Moreover, it is doubtful that the Commonwealth 'commerce' power can regulate the damage relations between aviators and landowners in general, to any greater extent than prescribing the innocent passage of aircraft flights. Probably, the best Commonwealth solution in the Australian setting will be to combine the effects of the above two solutions that is to say, to provide that no action shall lie in respect of trespass or nuisance by reason only of the flight of aircraft over any property at a height fixed by the Commonwealth. Such a provision could certainly be enacted as incidental to federal authority to regulate flight under the various heads previously discussed. The Commonwealth may apply the present regulation of low flying to the safe altitude in this highway, including the path of glide needed for taking off from or landing at aerodromes. The Commonwealth may also provide that no action shall lie in respect of nuisance by reason only of the noise and vibration caused by aircraft on or near a Commonwealth aerodrome, so long as the Air Navigation Regulations are duly complied with. The task of interpreting what constitutes 'nuisance' by reason only of the noise and vibration in the normal operation around aerodromes will be entrusted to the Courts. But, in any

case, it must be distinguished from mere discomfort or annoyance. Perhaps such a system will primarily confined to aircraft engaged in international, inter-State, Territory, etc. 'commerce' by air, but it is not inconceivable that intra-state flights could eventually be authorised as well by judicial extension of the doctrine of Airlines of N.S.W. Case (No.2). By such a system, any doubt of foreign aviators flying in accordance with an international agreement to which Australia is a party that they might be sued in trespass or nuisance while in Australian territory will also be removed.

To summarize then, the position in Australia with respect to the legal status of airspace and liberty to fly is as follows:

International flight activities are largely conditioned by the State's 'complete and exclusive' sovereignty in airspace above the State's territory; 'freedom of the air' in the international sky, in contrast with the doctrine of 'freedom of the seas', is secured only when some States agree to restrict airspace sovereignty by international conventions or treaties concluded with

¹ 38 A.L.J.R. 388.

other States. However, the Chicago Convention, now accepted by more than 100 countries, including Australia, imposes upon a contracting State an obligation to give freedom of the air in respect of non-scheduled air services of the other contracting States (or vice versa), and the Two Freedoms Agreement and bilateral air transport agreements exchange among the contracting States freedom of the air in respect of scheduled international air services. By these international agreements, which are given the force of law in national law in the respective contracting States, foreign aviators or specified airlines acquire the right to fly within Australia and reciprocally Australian aviators or a designated airline (Qantas) acquire the right to fly in other contracting States.

In the case of Australia, such an international exchange of liberty to fly will have effect both upon the constituent State's jurisdictional rights in airspace within its territorial boundaries and upon the landowner's private property rights in airspace above his land. Suppose a constituent State takes a measure to prevent or obstruct the passage of foreign aviators flying through that particular State's airspace in accordance with the terms of international agreements. The air safety regulations including flight and maneouvre of aircraft are

now wholly entrusted to the Commonwealth, but, in the absence of any Commonwealth law to the contrary, the State might take such a step within its some constitutional power for some reasons other than air safety matters. Similarly, if the Australian national law does not guarantee or fails to authorize the innocent passage of foreign aviators as against the landowner's interests in airspace, their right to fly over Australian territory would be subject to potential claims for trespass or nuisance at common law or under several States! statutory rules. Since an individual observes only applicable Commonwealth or State laws, and the immediate effect of the breach of international obligations produces only a liability of the responsible Government to the other sovereign States concerned, it would be desirable for the Commonwealth to regulate expressly the relation between landowners and foreign aviators in private law within Australia, insofar as necessary for securing the terms of international obligations. Perhaps, such protection would be inferred by the Courts from the present statutory law, but it is unsatisfactory that the position

is left to implication. 1 From the Australian point of view, it would have been most convenient if some international legislation were introduced on this subject so as to enable the Commonwealth Parliament to enact a substantially uniform law concerning trespass or nuisance by all kinds of aircraft.

One other consideration will be necessary for <u>foreign</u> aviators of countries other than contracting parties to any of such international agreements involving Australia. They are subject to the Australian 'exclusive and complete' sovereignty, and can fly within Australian territory only in accordance with the authority or permission issued by the Commonwealth Government. The Commonwealth has assumed no international obligation to ensure the innocent passage of such foreign aviators, but, once it authorizes or permits them to fly, any interference with such flights upon the

It is to be remembered that the principal reason why sec.40 of the Civil Aviation Act 1949 (formerly sec.9 of the 1920 Act) were considered necessary in the United Kingdom was the adoption of the principle of a mutual right of innocent passage for civil aircraft by the Chicago Convention (previously the Paris Convention). In the case of England, possessing a unitary form of government, such an implementation of international law could be achieved by a single statute, which dealt not only with international flights but with all flight. Different considerations will be necessary in the case of Australia by virtue of its Constitution, but the international exchange of the right of flight with other countries (even though they are of the nature of public law) must affect the relation between Australian landowners and foreign aircraft.

grounds other than the conditions prescribed in the temporary permission or authorization will cause an international illegal act for which the Commonwealth Government is liable, so that here again more explicit provision as to the private law position is desirable.

The sovereign rights of the Commonwealth and the States in the 'Australian' airspace are in principle co-existent; their respective scope is defined by the Constitution. However, owing to the increasing importance of the federal authority in aviation matters, the balance of jurisdictional rights in airspace is now changing in favour of the Commonwealth. Although the Commonwealth has not introduced in its legislation the idea of 'every citizen's right of freedom of transit' through the 'navigable airspace', liberty to fly across the State airspace barriers is implied either by the practically overwhelming Commonwealth authority over every aircraft flight or by the Constitution. It may not be necessary to introduce the American concept of 'public domain', but it is desirable for the Commonwealth to establish a national highway linking the domestic free air-corridor with the international sky, and remove remaining doubts as to aviators' right of flight over the State territories. Eventually, this will also exclude the State's interference based upon its property claims for the Government-owned land and airspace above it in right of the Crown.

The Australian legislation need not necessarily follow American judicial theories in respect of the nature of the private landowners' interest in superincumbent airspace at common law. The Australian courts may well take their own views, differing from the American examples by balancing the landowner's interests, the aviation interests and the public needs in a different way. At present, the law is divided into several jurisdictions in Australia; statutory rules govern in four States and common law rules in the remaining two States and the Commonwealth: Territories. However, international legislation reciprocally exchanges the right to fly among the contracting States, and implicitly requires the changing of national private law in respect of the legal status of airspace, and the Commonwealth commerce power may well establish by implication the right of innocent passage of Australian aviators. Hence, it may be given as a conclusion that the Commonwealth could and should incorporate 'liberty to fly' in an Australia-wide code on the lines suggested already.

CHAPTER VII

Regulations of Air Navigation and Liberty to Fly

With the appearance of aviation age, Governments have been deeply concerned about the safety of the public and the development of the industry. Liberty to fly both in international and in domestic aviation is largely conditioned by various regulatory rules designed for the purpose that aviation be conducted in a safe, regular and efficient manner. Even if flight over others! lands does not constitute any legal interference with those owners! property rights in airspace, the aviator may be in fact prohibited to fly unless he complies with these administrative rules concerning aircraft, flight, licences, In outlining these rules and administrative machineries etc. to enforce them, special notice should be taken of the strong influence of international legislation upon national law, and of the fact that, under various legislative heads and particularly under international influences, the Commonwealth Government is (as it should be) entrusted with legislation and administration of almost every aspect of aviation regulations in Australia. However, it is not intended here to go into details of

these innumerable and mostly technical rules; our present survey is confined to outline the international and Australian regulatory systems of air navigation.

I <u>International Law</u>

As declared in the Preamble, the professed object of the Chicago Convention is to lay down principles and make arrangements in order that international civil aviation may be developed in a safe and orderly manner and international air transport services may be established on the basis of equality of opportunity and operated soundly and economically. The Chicago Convention follows as a whole the general lines of the Paris Convention. It recognizes again that every State has complete and exclusive sovereignty over the airspace above its territory; it provides for freedom of the air (though only in respect of non-scheduled civil air services), for nationality and registration of aircraft, for conditions to be fulfilled with respect to aircraft, and for adoption of measures to facilitate aviation. The Convention established the I.C.A.O. to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport.

1. Limitations to Freedom of the Air

The general principles of freedom of the air in the international sky have been discussed in the previous Chapter in relation to the legal status of airspace. The mutual flight guaranteed by the Chicago Convention to aircraft not engaged in scheduled international air services is subject to various limitations expressly laid down in the Convention: designation of routes and airports (Arts. 5 and 68), cabotage (Art. 7), prohibition of flight by pilotless aircraft (Art. 8), restriction or prohibition of flight over prohibited areas (Art. 9), landing at or departure from an airport for the purpose of customs and other examination (Art. 10), restrictions on articles carried in aircraft (i.e. aircraft radio equipment (Art.30), cargo restrictions (e.g. munitions of war (Art.35), and photographic apparatus (Art.36)). Air Navigation Act and Regulations of the Commonwealth give effect to those provisions; for example, with respect to designation of airports, the Minister may designate as an international airport an aerodrome at which facilities are available for the formalities incident to customs, immigration, quarantine and other requirements in connection with arrival in or departure from Australian territory of aircraft, and international aircraft must

land at and take off from the international airports so designated. Mention has already been made as to these limitations attached to freedoms of the air in respect of scheduled international air services. ²

2. Conditions to be fulfilled with respect to Aircraft

Aircraft have the nationality of the State in which they are registered. An aircraft cannot be validly registered in more than one State, but its registration or transfer of registration of aircraft is left to the laws and regulations of the State. Every aircraft engaged in international air navigation must bear its appropriate nationality and registration marks; the method of doing this is specified in Annex 7 of the Chicago Convention. The contracting States have an obligation (a) to supply to any other contracting State or to the I.C.A.O., on demand, information concerning the registration and ownership of any particular aircraft on its register, and (b) to furnish the I.C.A.O. with such pertinent data as can be made available as to the ownership and control of aircraft on its register which are habitually engaged in

Secs. 9 and 10 of the Act.

See Chapter VI, ante.

international air navigation. These matters relating to nationality of aircraft are prescribed in Chapter III (Arts. 17-21) of the Chicago Convention.

The Convention lays down conditions which must be complied with by aircraft in respect of their documents. By Art.29, every aircraft of a contracting State, engaged in international air navigation, must carry the following documents:

- (a) its certificate of registration,
- (b) its certificate of airworthiness,
- (c) the appropriate licences for each member of the crew,
- (d) its journey log book,
- (e) if it is equipped with radio apparatus, the aircraft radio station licence,
- (f) if it carries passengers, a list of their names and places of embarkation,
- (g) if it carries cargo, a manifest and detailed declaration of the cargo.

Conditions as to certificate of airworthiness, licences of personnel, recognition of certificates and licences, and journey log books are respectively prescribed in the Convention (Arts. 31-34). Mention has already been made as to the restrictions on aircraft radio equipment, cargo restrictions, and photographic apparatus.

3. Unification of Rules, Regulations and Practices of Air Navigation

The provisions of the Chicago Convention requiring unification of rules, etc. of air navigation are particularly important, for they set out the obligations to be implemented by Australia not only as to international aircraft and aviation, whether 'schedules' or 'non-scheduled', but also as to air navigation in general.

(1) Rules of Flight and Manoeuvre:

Each contracting State undertakes to adopt measures to insure that every aircraft flying over or manoeuvring within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force (Art.12, first paragraph). This obligation is thus applicable to 'every' aircraft, irrespective of whether it is engaged in 'domestic' (in the case of Australia, 'inter-State' or 'intra-State) or 'international' aviation. However, the expression 'rules and regulations...there in force' may give rise to a difficult problem in a federal country like Australia, because it might be argued that the Commonwealth assumed an international obligation only to make every aircraft comply with the rules it can make

under its domestic distribution of powers - not an obligation to regulate the whole field of the flight and manoeuvre of aircraft. However, each contracting State must undertake to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under the Convention (Art. 12, second paragraph). Accordingly, under the external affairs! power as properly construed, the Commonwealth could have acquired the power from this paragraph to regulate the flight and manoeuvre of all aircraft flying within the Australian territory. could also have allowed the Commonwealth to implement effectively another international obligation that each contracting State undertakes to insure the prosecution of all persons violating the regulation applicable (Art. 12, fourth paragraph). However, now that the Commonwealth constitutional competence to regulate air safety matters (including flight and manoeuvre of aircraft) in respect of every aircraft flying within the Australian territory has been established in the Airlines of N.S.W. Case (No.2),

Cf. Annex 2 of the Convention (Rules of the Air). 2 38 A.L.J.R. 388.

it is not necessary for us to develop this suggestion further. Over the high seas, the rules in force shall be those established under the Chicago Convention, namely, the standards and practices recommended or established from time to time by the Council of I.C.A.O. (Art.12, third paragraph).

(2) International Standards and Recommended Practices:

A more comprehensive obligation for the unification of rules, &c. of air navigation is provided in Art.37, which reads as follows:

Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, proceedings, 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 [11 items or topics] and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

They are: (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) airworthiness 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.

Fifteen Annexes have so far been adopted by the I.C.A.O.: Annex 1 (Personal Licensing), Annex 2 (Rules of the Air), Annex 3 (Meteorology), Annex 4 (Aeronautical Charts), Annex 5 (Units of Measurement to be used in Air-Ground Communications), Annex 6 (Operation of Aircraft -International Commercial Air Transport), Annex 7 (Aircraft Nationality and Registration Marks), Annex 8 (Airworthiness of Aircraft), Annex 9 (Facilitation), Annex 10 (Aeronautical Telecommunications), Annex 11 (Air Traffic Services - Air Traffic Control Service, Flight Information Service and Alerting Service), Annex 12 (Search and Rescue), Annex 13 (Aircraft Accident Inquiry), Annex 14 (Aerodromes), and Annex 15 (Aeronautical Information Services). In each Annex, the attention of contracting States is drawn to the desirability of using in their own national regulations, as far as practicable, the precise language of those I.C.A.O. standards that are of a regulatory character and also of indicating departures from the standards, including any additional national regulations that are important for the safety or regularity of air navigation. For this purpose, wherever possible, the provisions of the Annexes have been deliberately written in such a way as would facilitate incorporation, without major textual changes, into

national legislation. Mention has already been made of the constitutional obstacle to Australian implementation of those requirements which, in contrast with the similar provisions of Annexes of the Paris Convention, may be regarded as non-obligatory. It is therefore sufficient to add a few more comments on the nature of the international legislation. First, as the Convention was primarily drawn up for the development of international air navigation, most provisions of the Annexes are necessarily concerned with international aviation and aircraft; for example, Annex 6 is applicable to the operation of aircraft in scheduled international air transport

^{&#}x27;Standards' is defined as 'any specification for physical characteristics, configuration, materiel, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Art. 38. Recommended practice' is defined as 'any specification for physical characteristics, configuration, materiel, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation, and to which Contracting States will endeavour to conform in accordance with the Convention. Cf. the 'Forward' of each Annex.

See Chapter III, ante.

operations for renumeration or hire. Theoretically, such international requirements may be directed to that portion of national legislation relating only to international operations or aircraft. But some other Annexes are not so limited, and indeed the true intent of Art. 37, requiring the States' collaboration in securing the uniformity in 'all matters in which such uniformity will facilitate and improve air navigation! and 'such other matters concerned with the safety, regularity, and efficiency of air navigation!, is to obligate each contracting State to adopt the standards and practices in its national regulations which should be observed as nearly as possible by aircraft engaged either in international or in domestic aviation. Secondly, such international standards and recommended practices might relate only to regulatory aspects of air navigation of the technical nature without affecting a State's economic or political interest. The 15 Annexes deal with technical and operational aspects of civil aviation and it is unlikely that the I.C.A.O. would adopt henceforth Annexes affecting directly any national policy of co-ordination or rationalization. However, this has nothing to do with the question how the Government of a contracting State should implement them (even if they are of a regulatory

nature) to the fullest extent within its constitutional framework. The whole objective of Art. 37 is directed to the achievement of the 'safety, regularity, and efficiency of air navigation! which may not be attained unless the responsible Government of a contracting State exercises economic control over the national industry as a whole; the situation would vary from State to State in accordance with the State's development of civil aviation at a particular stage. Thirdly, any State which finds it impracticable to comply with any such international standards or procedures, or which deems it necessary to adopt regulations differing from them, must immediately notify the I.C.A.O., and, in such cases, the Council of I.C.A.O. shall make immediate notification to all other States of such differences (Art. 38). In the case of Australia, this gives also rise to a constitutional question as to how far the Commonwealth can deviate from those standards, etc. It might be argued that the Commonwealth cannot deviate whether by way of a supplementary requirement (unless incidental) or a different regulation covering the same subject, unless supported by other heads of legislative power. However, now that the Commonwealth has comprehensive constitutional power to control air safety matters, no such problem would arise, and in any case the

'external affairs' power is likely to be construed by the Court today in a flexible way. Moreover, the power to deviate in a prescribed manner recognized under Art.38 of the Convention limits the relevance of the rigid test adopted by the High Court in considering the Paris Convention, viz. 'the regulation must be stamped with the purpose of carrying out the Convention. There are two more subordinate pieces of international legislation. The 'Procedures for Air Navigation Services (PANS)', approved by the Council for world-wide application, comprises for the most part, operating procedures regarded as not yet having attained as a sufficient degree of maturity for adoption as International Standards and Recommended Practices, as well as material of a more permanent character which is considered too detailed for incorporation in an Annex, or is susceptible to frequent amendment, for which the processes of the Convention would be too cumbersome. As in the case of Recommended Practices, the Council has invited contracting States to notify any differences between their national practices and the PANS when the knowledge of such differences is

R. v. Burgess; Ex parte Henry (first Henry Case) 55 C.L.R. 608; cf. Poulton, op.cit., p.7.

important for the safety of air navigation. 'Regional Supplementary Procedures (Supps)' have a status similar to that of PANS in that they are approved by the Council, but only for application in their respective regions. They are prepared in consolidated form, since certain of the procedures apply to overlapping regions or are common to two or more regions.

4. Measures to facilitate Air Navigation:

The contracting States undertake the following obligations intended to facilitate air navigation in general: adoption of all practicable measures to facilitate and expedite international air navigation and to prevent unnecessary delays to aircraft, crews, passengers, and cargo (especially in the administration of the laws relating to immigration, quarantine, customs and clearances) (Art.22); establishment of customs and immigration procedures (Art.23); freedoms from customs duty of aircraft engaged in international air navigation, of fuel, lubricating oils, spare parts, regular equipment and aircraft stores, and of spare parts and equipment imported into a contracting State for use in such aircraft (Art.24); assistance to aircraft in distress and collaboration with other States in such measures and in the search for missing aircraft

(Art.25); investigation of accidents (Art.26); exemption from seizure or detention of aircraft, equipment and spares on claims for infringement of patents (Art.27); provision of airports and air navigation facilities (Art.28); adoption of effective measures to prevent the spread by means of air navigation of various diseases (Art.14); 1 prohibition of imposing fees, dues or other charges in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon (Art. 15). These obligations are primarily intended for the facilitation of 'international' air navigation in which considerable administrative discretion of the contracting State concerned will be allowed, but some of them (e.g. Art.23) explicitly impose upon the contracting States an obligation to accord their regulations to the standards and recommended practices adopted by the I.C.A.O.

Cf. The Sanitary Convention for Aerial Navigation, signed on 12 April 1933, at The Hague, entered into force on 1 August 1935. Until this Convention was formulated, measures of protection against the spread of disease by aircraft had been included in the municipal law of several countries, and in certain bilateral agreements. The Convention was modified by the International Sanitary Convention for Aerial Navigation, 1944, signed at Washington. Australia is a party, and gives effect to the Convention in the Quarantine (Air Navigation) Regulations (S.R. 1948, No.91, as amended by S.R. 1950, No.42).

5. International Civil Aviation Organization (I.C.A.O.)

Part II (Chapters 7-13 (Arts.43-66)) of the Chicago Convention deals with the International Civil Aviation Organization (I.C.A.O.), which resulted from the Chicago Conference. The aims and objectives of I.C.A.O. are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport. Art.44 states these objectives in more detail:

- (a) Insure the safe and orderly growth of international civil aviation throughout the world;
- (b) Encourage the arts of aircraft design and operation for peaceful purposes;
- (c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;
- (d) Meet the needs of the peoples of the world for safe, regular, efficient and economic air transport;
- (e) Prevent economic waste caused by unreasonable competition;
- (f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
- (g) Avoid discrimination between contracting States;
- (h) Promote safety of flight in international air navigation;
- (i) Promote generally the development of all aspects of international civil aeronautics.

The Organization enjoys in the territory of each contracting State such legal capacity as may be necessary for the performance of its functions. 1 It is a specialized agency in relationship with the United Nations, and maintains close liaison with certain of the specialized agencies such as International Telecommunications Union, the World Meteorological Organization, etc. Its finance is borne by the member States, in accordance with a scale of contributions laid down by the Assembly, which is based upon the interest and importance in international civil aviation of the various States, their national incomes and various other relevant factors. 2 Officials of the ICAO

Art.47. By sec.6 of the Commonwealth Air Navigation Act, Australia gives effect to it:

⁽¹⁾ The International Civil Aviation Organization possesses such legal capacity and is entitled to such privileges and immunities as are necessary for the independent exercise of its powers and performance of its function in Australian territory.

⁽²⁾ Without limiting the generality of the last preceding sub-section the ICAO has in Australian territory judicial personality and the capacity - (a) to contract; (b) to acquire and dispose of real and personal property; and (c) to institute legal proceedings.

⁽³⁾ The archives and other documents of the International Civil Aviation Organization kept in Australian territory are inviolable.

Australia contributes to ICAO approximately £48,000 per year (June 1964 at present) (cf. 'The International Civil Aviation Organization' prepared by the International Relations Branch, Department of Civil Aviation, 1964).

are entitled, in the territories of States who are parties to the Convention on the Privileges and Immunities of the Specialized Agencies, to privileges and immunities.

Art.59 of the Chicago Convention emphasises their international: character.

I.C.A.O. is made up of an Assembly, a Council, other subsidiary bodies (i.e. Air Navigation Commission, Air Transport Committee, Committee on Joint Support of Air Navigation Services, Legal Committee, Finance Committee, Regional Air Transport Committee) and a Secretariat.

The Assembly, a governing body, meets not less than once in three years² and is convened by the Council. Each contracting State is entitled to one vote and decisions of the Assembly are taken by a majority of the votes cast except when otherwise provided in the Convention. The Council, an executive body, is a permanent body responsible for the Assembly and is composed of

Art.59. The Council determines the method of appointment and of termination of appointment, the training, and the salaries, allowances, and conditions of service of the Secretary-General and other personnel of the Organization, and may employ or make use of the services of nationals of any contracting State, subject to any rules laid down by the Assembly and to the provisions of the Convention.

Cf. The Protocol, signed at Rome, on 15 September 1962, amending Art. 48(a) of the Chicago Convention in respect of an extraordinary meeting of the Assembly.

representatives of twenty-seven contracting States elected by each major session of the Assembly. 2 administrative matters of international civil aviation are dealt with by this body; one of the major duties of the Council is to adopt international standards and recommended practices and to incorporate them as Annexes to the Convention. It may investigate, and give financial assistance for, any situation which presents avoidable obstacles to the development of international air navigation. In general, it may take whatever steps necessary to maintain the safety and regularity of operation of international air transport. The Air Navigation Commission is composed of twelve members appointed by the Council from among persons nominated by contracting States. These persons shall have suitable

In an Extraordinary Session (13th) held in Montreal, the Assembly resolved unanimously that the increasing of the size of the Council was necessary and approved a Protocol amending the Chicago Convention so as to authorize an increase in the size of the Council from twenty-one to twenty-seven members.

At the 12th Session of the Assembly held in San Diego, U.S.A. in 1959, Australia was elected to the Council of I.C.A.O. in the category which includes States of chief importance in air transport. Australia has been a member of the Council of I.C.A.O. since the Organization came into existence in 1947.

Arts. 67, 69-76.

qualifications and experience in the science and practice of aeronautics, and the President of the Commission is appointed by the Council. Among other bodies, special mention must be made about the Legal Committee, which is a permanent committee constituted by the Assembly. Since its institution by the First session of the I.C.A.O. in 1947, the Legal Committee has prepared a number of draft conventions relating to recognition of rights in aircraft, damage caused by aircraft to third parties on the surface, aerial collisions, carriers! liability, crimes in aircraft, &c. The Committee advises the Council on matters relating to interpretation and amendment of the Chicago Convention. It makes recommendation on matters relating to public international law referred to it by the Council or Assembly, and studies problems relating to private air law affecting international civil aviation and prepares draft conventions and reports Any draft convention which the Legal Committee considers as ready for presentation to the State as a final draft is transmitted to the Council, together with a report thereon, and the Council may take such action as it deems fit, including the circulation of the draft. In doing so, the Council may add comments and afford States and organizations an opportunity to submit comments

to the Organization within a period of not less than four months. Such draft convention shall be considered, with a view to its approval, by a conference which may be convened in conjunction with a session of the Assembly. 1

6. Disputes and Default

If any disagreement between two or more contracting States relating to the interpretation or application of the Chicago Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council.

No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. This is a matter within the compulsory jurisdiction of the Council. Any contracting State may appeal from a decision of the Council to (i) an ad hoc arbitral tribunal agreed upon with the other parties to the dispute; or (ii) the International Court of Justice. The decisions

There is another large-scale international organization of non-governmental character. The International Air Transport Association (IATA), a world-wide association of eighty-nine airlines from fifty-six countries, has developed special administrative machinery under which all international tariffs and associated matters are fixed by a 'unanimity' rule, but its recommendations or resultions are subject to Government approval.

Art.84.

Arts. 84-5.

of the International Court of Justice and of an arbitral tribunal are final and binding. The Chicago Convention provides for sanctions: 1 each contracting State undertakes not to allow the operation of an airline of a contracting State through the airspace above its territory if the Council has decided that the airline concerned is not conforming to the above final decision. The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under such decisions.

In the case of disputes and disagreements arising from the Two Freedoms Agreement (and the Five Freedoms Agreement), the Council of the I.C.A.O. inquires into the matter upon request of a contracting State concerned, and calls the States concerned into consultation. If it fails to resolve the difficulty, the Council may make appropriate findings and recommendations to those States. If thereafter a contracting State concerned unreasonably fails to take suitable corrective action, the Council may recommend to the Assembly of the I.C.A.O. that the State be suspended from its rights and privileges under the Agreement until such action has been taken. The Assembly

Arts. 87-8.

by a two-thirds vote may so suspend the State for such period of time as it may deem proper or until the Council finds that corrective action has been taken by such State. If any disagreement between two or more contracting States relating to the interpretation or application of the Agreement cannot be settled by negotiation, the provisions of Chapter XVIII (Disputes and Default) of the Chicago Convention, discussed above, are applicable <u>mutatis</u> <u>mutandis</u>. 1

Bilateral agreements set out also provisions concerning settlement of disputes among the States concerned; for example, the Bermuda Agreement provides for reference to the Council of the I.C.A.O. for an advisory report.²

II Australian Law

1. Commonwealth Legislation

(1) Air Navigation Act 1920-63

The history of Commonwealth legislation concerning the administrative control of aircraft and their flight

Art.II of the Two Freedoms Agreement; Art.IV (secs. 2 and 3) of the Five Freedoms Agreement.

Agreement, Art.9.

activities is a reflection of a series of constitutional struggles between the Commonwealth and the States, which we have already discussed in Part I. We shall therefore summarize briefly the major statutory developments of the Commonwealth Act, without touching the constitutional problems involved. The first Commonwealth statute applying to civil aviation was the Air Navigation Act 1920 which authorized regulations to give effect to the Paris Convention and for the control of air navigation in the Commonwealth and the Territories. Shortly after the validity of the Act and the Regulations made thereunder in respect of the scope of their application was successfully challenged in the High Court in 1936, 2 the Act was amended by the Air Navigation Act 1936^3 in which the Commonwealth regulation-making power was considerably limited. latter Act was amended by the Air Navigation Act 19474 which the ratification of the Chicago Convention was approved. The Act of 1947 provided also for such changes in the previous Act as would become necessary by reason

No. 50 of 1920.

The first Henry Case, 55 C.L.R. 608.

No.93 of 1936.

No.6 of 1947.

of the coming into force of the Convention, and the continuous development of civil aviation. It placed the regulation-making power upon a broader basis than that specified in the earlier legislation. The 1920-47 Act was amended by the Air Navigation Act 1947 (No.2), and later by the Statute Law Revision Act 1950² which merely omitted the definition of 'Territory' in sec. 3 of the former Act. The Air Navigation Act 19603 was enacted primarily for the purpose of carrying out the recommendation by the Joint Committee of Public Accounts that the existing regulation-making power over civil aviation should be amended so as to incorporate the basic principles in legislation enacted by the Parliament: 4 as a result of this amendment, certain important provisions were transferred from the Regulations to the Act, and consequently the number of provisions in the Act increased from five to thirty-one, with additional Schedules.

No. 89 of 1947.

No. 80 of 1950.

No. 39 of 1960.

Cf. Parliamentary Debates, H. of R. 27, p. 1763 (17 May 1960).

Act 1920-60 was further amended in 1961 and in 1963 respectively to incorporate the Protocols relating to amendments to the Chicago Convention.

The Chicago Convention, the Air Transit Agreement (Two Freedoms Agreement) and the Protocols amending certain Articles of the Convention are set out respectively in the First, Second, Third, Fourth, Fifth and Sixth Schedules to the present Air Navigation Act 1920-63. The Act places upon the Minister for Civil Aviation a statutory obligation to report annually to Parliament (after 30 June 1961) on the administration and working of the Act and the regulations and on other matters concerning civil aviation which should be brought to the attention of the Commonwealth Parliament. This section was inserted to ensure that each year Parliament has the opportunity of reviewing the relatively wide Executive powers.

No. 72 of 1961. The amendment related to Art.50(a) of the Chicago Convention by increasing the number of members of the Council from twenty-one to twenty-seven.

No. 8 of 1963. The amendment related to the Protocol (signed at Rome, on 15 September 1962) amending Art. 48(a) of the Chicago Convention in respect of an extraordinary meeting of the Assembly.

Sec.29.

Sec.26(1) defining the scope of the regulation-making power reads as follows:

The Governor-General may make regulations, not inconsistent with this Act -

- (a) prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act;
- (b) for the purpose of carrying out and giving effect to the Chicago Convention, as amended by the Protocols referred to in sub-section (2) of section three A of this Act, any Annex to the Convention relating to international standards and recommended practices (being Annex adopted in accordance with the Convention) and the Air Transit Agreement;
- (c) in relation to air navigation within a Territory of the Commonwealth or to or from a Territory of the Commonwealth;
- (d) in relation to air navigation, being regulations with respect to trade and commerce with other countries and among the States; and
- (e) in relation to air navigation, being regulations with respect to any other matters with respect to which the Parliament has power to make laws.

Sec.26(2) enumerates the detailed subject matters to be included in the regulations:

Without limiting the generality of the preceding provisions of this section, the regulations that may be made under the powers conferred by those provisions include regulations for or in relation to -

(a) the registration, marking and airworthiness of aircraft;

- (b) requiring persons performing special functions in relation to the operation or maintenance of aircraft to be the holders of licences or certificates of specified kinds, and providing for the grant, cancellation, suspension or variation of such licences and certificates;
- (c) the licensing of air transport operations;
- (d) controlling the provision for reward of air transport within a Territory of the Commonwealth or to or from a Territory of the Commonwealth;
- (e) the establishment, maintenance, operation and use of aerodromes and air route and airway facilities and the licensing of aerodromes other than aerodromes maintained by the Commonwealth;
- (f) hygiene, sanitation and public health at aerodromes;
- (g) the prohibition of the construction of buildings or structures, the restriction of the dimensions of buildings or other structures, and the removal in whole or in part or the marking of buildings, other structures, trees or other natural obstacles, that constitute or may constitute obstructions, hazards or potential hazards to aircraft flying in the vicinity of an aerodrome, and such other measures as are necessary to ensure the safety of aircraft using an aerodrome or flying in the vicinity of an aerodrome;
- (h) empowering the Director-General, or an officer thereunto authorized by the Director-General, to give or issue directions or instructions to all or any of the persons holding licences or certificates under this Act or the regulations, being directions or instructions with respect to matters affecting the safe navigation and operation, or the maintenance, of aircraft, and providing for the manner in which such directions and instructions are to be notified;

- (i) the formal proof and authentication of instruments made or issued under this Act or the regulations;
- (j) the powers (including powers of arrest) that may be exercised by members of the crew of an aircraft, in relation to persons on board the aircraft, for the purpose of ensuring the safety of the aircraft or of its passengers, crew or cargo or otherwise for the purposes of this Act or the Regulations; and
- (k) the imposition of penalties not exceeding a fine of Five hundred pounds or imprisonment for a term of two years, or both, for a contravention of, or failure to comply with, a provision of the regulations or a direction, instruction or condition issued, given, made or imposed under, or in force by virtue of, the regulations.

(2) Air Navigation Regulations 1947-65

The <u>Air Navigation Act</u> 1947 (No.2) placed the regulation-making power upon a broader basis, and, as a result of the repeal of the provision concerning the regulation-making power, the <u>Air Navigation Regulations</u> under the Act 1920-36 ceased to be in force. The present Regulations has resulted from the Regulations newly made in 1947. Although the amended Regulation-making power was again repealed in the same year and a new section was inserted by the <u>Air Navigation Act</u> (No.2) 1947, the regulations made under the 1947 (No.1) Act were made

continued. The Regulations have been amended from time to time on various dates.

In pursuance of the power contained in sec.26 of the Air Navigation Act 1920-63, more than 300 regulations have been promulgated covering a wide and complex range of safety and technical matters affecting almost every phase of civil aviation. By the amendment of the Act in 1960, some provisions of important principles have been transferred from the Regulations to the Act, but, in view of the highly technical nature of aviation control, the exercise of wide Executive powers seems to be unavoidable as it was stated in the Parliament:²

Australia by becoming a party to the Convention on International Civil Aviation, has undertaken the obligation of bringing its law into line with the international standards and practices as altered and added to from time to time in the technical annexes to the Convention. These annexes have been amended on more than sixty occasions and this explains why the Air Navigation Regulations have been amended so frequently and extensively. If the safety and technical provisions of the regulations were to be transferred

S.R. 1947, No.112, as amended by S.R. 1947, No.162; 1948, No.69; 1949, Nos.6 and 70; 1950, No.69; 1952; Nos.30, 46 and 87; 1953, No.44; 1954, Nos.26, 32 and 119; 1955, No.29; 1956, No.16; 1957, No.12; 1958, No.77; 1960, Nos.21, 96 and 99; 1961, No.102; and 1964, Nos.61 and 128.

Parliamentary Debates, op.cit., p.1765.

to the Act, it might prove difficult in practice to amend the Act as frequently and as quickly as our international obligations require, and certainly of no less importance, the safety of air navigation demands. It is interesting to note, in passing, that all countries adopt the procedure of giving effect to the annexes to the Chicago Convention by means of subordinate legislation.

Reg. 6(1) defining the scope of application of the Regulations, which has been drastically expended by the recent amendment in 1964, reads as follows:

Subject to these Regulations, these Regulations apply to and in relation to -

- (a) international air navigation within Australian territory;
- (b) air navigation in relation to trade and commerce with other countries and among the states;
- (c) air navigation within the Territories;
- (d) air navigation to or from the Territories;
- (da) air navigation in which a Commonwealth aircraft is engaged;
 - (e) air navigation in controlled air space that
 is of a kind not specified in a preceding
 paragraph of this sub-section but directly
 affects, or may endanger, the safety of
 persons or aircraft engaged in -
 - (i) air navigation of a kind specified in paragraph (a), (b), (d) or (da) of this sub-regulation; or
 - (ii) air navigation which a military aircraft is engaged; and

(f) on and after such date as is fixed by the Minister for the purposes of this paragraph by notice in the <u>Gazette</u>, all air navigation within Australian territory of a kind not specified in paragraph (a), (b), (c), (d) or (da) of this sub-regulation.

Main provisions and problems of these governmental regulations relating to aircraft (nationality, registration, import, &c.), licences (licensing of operating crew and other personnels; licensing of flying schools, training organizations and of their activities; licensing of air service operations; refusal to grant, and suspension and cancellation of, licences and certificates), flights (logs and log books, rules of flight and manoeuvre), accidents, aerodromes, facilities and services, and enforcement of governmental regulations of air navigation, are summarized and discussed in Appendix II of this thesis.

(3) Other Subordinate Legislation

In pursuance of reg.8(1) of the <u>Air Navigation</u>

Regulations, the Director-General may issue the direction or notification or give the permission, approval or authority provided for in <u>Air Navigation Orders</u> (A.N.O.) which are not Statutory Rules within the meaning of the

The date fixed was 10 October 1964. See Commonwealth Gazette, 1964, p.4003A.

Rules Publication Act 1903, as amended. The Director-General is empowered to issue directions, notify requirements, or attach conditions to an authorization or approval given or required under the Regulations. Where the direction, requirement, or condition is of general application, it is usual for the Director-General to issue it in the form of an A.N.O., and in many cases it is mandatory for him to do so. 3

The Minister for Civil Aviation may establish

Aeronautical Information Services, the functions of which
are prescribed in sec.7 of the <u>Air Navigation Act</u>. The

Aeronautical Information shall establish Aeronautical
Information Publications (AIPs) and Notices to Airmen

No.18 of 1903, as amended by No.16 of 1916 and No.55 of 1939.

As to examples of those regulations, see Halsbury's Laws of England, third, ed., Australian Pilot, 5, p.436.

Ibid.

The functions are to collect and disseminate aeronautical information and instructions relating to the safety, regularity and efficiency of air navigation, being information and instructions with respect to aerodromes, air traffic control services and facilities, communication and air navigation services and facilities, meteorological services and facilities, search and rescue services and facilities, procedures and regulatory requirements connected with air navigation, and hazards to air navigation.

(NOTAMs), the former being the aeronautical information and instructions essential to the safety and efficiency of air navigation, and the latter being those of a temporary nature or which cannot be made available with sufficient expedition by publication in Aeronautical Information Publications. 1

(4) Special Legislation

Besides those Commonwealth enactments of the administrative control over aircraft and flight activities, there are a number of federal Acts concerning special subject matters, such as, quarantine, customs, air navigation charges, airports, &c. In particular, Commonwealth legislation concerning air corporations and economic control and policy of such air transport undertakings will be summarized in Appendix III of this thesis.

2. State Legislation

(1) Air Navigation Acts

Subsequent to the aviation conference of Commonwealth and State Ministers in April, 1937, all States enacted uniform legislation adopting the Commonwealth <u>Air Navigation</u>

Sec.8.

See Appendix II, post.

Regulations as State law in 1937-38, whereby the Commonwealth Regulations have applied practically to all air navigation within Australia. All State Air Navigation Acts have a Preamble in the identical terms, stressing the necessity of uniform rules throughout the Commonwealth applying to air navigation and aircraft, the licensing and competence of pilots, air traffic rules, and the regulation of aerodromes. Those States uniform Acts set up the following common provisions:

The regulations from time to time in force applicable to and in relation to air navigation within the Territories shall (except so far as those regulations are by virtue of the Commonwealth

N.S.W.: Air Navigation Act 1938 (No.9).

Vic.: Air Navigation Act 1937 (No.4502), as repealed and substituted by the Air Navigation Act 1958 (No.6197)

Q'ld.: Air Navigation Act 1937 (No.8).

S.A.: Air Navigation Act 1937 (No.2352).

W.A.: Air Navigation Act 1937 (No.6).

Tas.: Air Navigation Act 1937 (No.14).

The Preamble reads: 'Whereas at the conference of representatives of the Governments of the Commonwealth and of the States held in April 1937, it was resolved that there should be uniform rules throughout the Commonwealth applying to air navigation and aircraft, the licensing and competence of pilots, air traffic rules, and the regulation of aerodromes, and it was agreed that legislation should be introduced in the Parliament of each State to make provision for the application of the Commonwealth Air Navigation Regulations, as in force from time to time, to air navigation and aircraft within the jurisdiction of the State:...'.

Act and the regulations applicable to and in relation to air navigation within (New South Wales)) apply, <u>mutatis mutandis</u>, to and in relation to air navigation within (New South Wales) as if those regulations as so applied were incorporated in this Act and for the purposes of this Act those regulations shall be read and construed and take effect accordingly.

However, the areas where the federal regulations were regarded as not applying in the matters of States! jurisdictions have been to a great extent narrowed by the recent High Court decision which recognized that the Federal Government need no longer depend on constitutional authority, ceded by the States to enforce air safety regulations on intra-State aviation. Hence most, if not all, of the Commonwealth Regulations apply to all types of air navigation within Australia. Provisions are also set up in those States! uniform Acts in identical terms for certain powers or functions vested in Commonwealth authorities, for the effect of Commonwealth regulations of certificates, licences, &c. within a State, and for

Airlines of N.S.W. Case (No.2), 1964-65, 38 A.L.J.R. 388.

See sec. 30 of the Commonwealth Air Navigation Act, declaring it to be the intention of the Parliament that an officer, authority or person having powers or functions under the Act or the regulations may also have, exercise and perform similar powers or functions conferred by the law of a State relating to air navigation.

the payment of fees payable under the Commonwealth regulations to the Commonwealth.

(2) State Transport Legislation

However, the Commonwealth Regulations do not apply to every aircraft with respect to matters other than those relating to aircraft safety regulations (unless supported by some heads of legislative powers), and, because of the economic effect of air services on road and rail transport, most States have amended the uniform Acts or related transport legislation so as to retain a measure of control over intra-State operations by means of licensing requirements, which differ from State to State. In New South Wales, Queensland and Western Australia, new provisions were inserted in their respective Air Navigation Acts (in different terms) to the effect that the provisions of the Act shall not affect the operation of State transport legislation governing intra-State air transport.

As to these State legislation, see Appendix II, post.

In Western Australia, sec.8 was added by 1945 (No.21) which reads that 'the provisions of this Act shall not affect in any way, and shall be deemed not to have affected in any way the operation of secs. 45, 46 and 47 of the State Transport Co-ordination Act, 1933-40.' Similarly, in New South Wales, a proviso was added to sec.4 by the Act of 1947 (No.32), and in Queensland, sec.10 was added by the Act of 1947 (No.5).

In Victoria, South Australia and Tasmania, no additional provisions have been inserted in their <u>Air Navigation</u>

<u>Acts</u>, but Tasmania retains economic control of air transport operations within the State under its general transport legislation. Mention has already been made elsewhere of the <u>Commonwealth Powers (Air Transport) Acts</u> of Queensland and Tasmania, which refer the matter of air transport to the Commonwealth Parliament under sec.51 (xxxvii) of the Constitution.

3. Administration of Civil Aviation

The <u>Air Navigation Act</u> 1920 became law in December 1920, and the Civil Aviation Branch of the Department of Defence was formed under a Controller of Civil Aviation to administer the Act and the Regulations made thereunder on 16 December 1920. In 1936, the organisation was changed and the responsibility of regulating and controlling civil aviation in the Commonwealth was entrusted to a Board,

Q'ld.: Commonwealth Powers (Air Transport) Act 1950 (No.2).
Tas.: Commonwealth Powers (Air Transport) Act 1952 (No.46).

The functions of defence and civil aviation were not clearly divided at this stage; the Minister for Defence was assisted by representatives of the Navy and Army, by the Air Board, and an independent Controller of Civil Aviation. The Controller took also a seat on the Air Council in which officers of the Navy, Army and Air Force were included.

consisting of four members and a secretary. The Chairman was the Controller-General of Civil Aviation, while the other three members were the Controller of Operations, the Controller of Ground Organization and the Finance Member. The Board was responsible to the Minister for Defence and continued to function as a unit of the Defence Department organization until November 1938. In January, 1939 the Civil Aviation Board was abolished and the Civil Aviation Administration was made a separate Department under the Minister for Civil Aviation. The Department has twelve Divisions - Air Transport, International Relations, Aviation Medicine, Flying Operations, Airworthiness, Airways Operations, Communications and Air Traffic Control, Aircraft Engineering, Finance Management, Air Safety Investigation, Navigational Aids, Electrical and Mechanical Engineering, and Administrative Management.

Neither in the Act nor in the Regulations is there any provision equivalent to sec.1(1) of the U.K. <u>Civil Aviation</u>

<u>Act</u> 1949, which defines the general administrative duty of the Minister of Civil Aviation for the development of civil aviation, the promotion of safety and efficiency in the use thereof, &c. But his specific duties and functions are prescribed in a number of provisions both in the Act and the Regulations. The Director-General who is permanent

head of the Department of Civil Aviation (D.C.A.), subject to the directions of the Minister, is charged with administration of the Regulations and must maintain close liaison with the Department of Air. Numerous regulations empower the Director-General to issue directions, notify requirements, or attach conditions to an authorisation or approval given or required under the Regulations. It is specifically provided that the Minister and the Director-General may delegate powers and functions. The general principles as to discretion given by statute were stated by the Court in the IPEC-Air Case: 1

A discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man competent to discharge the duties of his office, ought to confine himself: The courts, while claiming no authority in themselves to dictate the decision that ought to be made in the exercise of such a discretion in a given case, are

^{(1965) 39} A.L.J.R. at p.69, per Kitto J., citing the following cases: Sharp v. Wakefield (1891) A.C. 173, at p.179; Cuming Campbell Investments Pty. Ltd. v. Collector of Imposts (Vic.) (1938) 60 C.L.R. 741, at pp.750, 751, 755, 758; R. v. Cotham (1898) 1 Q.B. 802, at p.806; Randall v. Northcote Corporation (1910) 11 C.L.R. 100, at pp.109, 110; Water Conservation and Irrigation Commission v. Browning (1947) 74 C.L.R. 492, at pp.496, 498, 499-500, 504; R. v. Stephney Corporation (1902) 1 K.B. 317; Simms Motor Units Ltd. v. Minister for Labour and National Service (1946) 2 All E.R. 201; Evans v. Donaldson (1909) 9 C.L.R. 140.

vet in duty bound to declare invalid a purported exercise of the discretion where the proper limits have not been observed; even then a court does not direct that the discretion be exercised in a particular manner not expressly required by law, but confines itself to commanding the officer by writ of mandamus to perform his duty by exercising the discretion according to law: A case for the granting of mandamus on this principle exists where the officer has taken into account matters 'absolutely apart from the matters which by law ought to be taken into consideration, or has acted for a purpose other than that for which the discretion exists, or has accepted another's discretion as to the way in which the discretion should be exercised.

In the above case, the company contended inter alia that the Director-General's refusal (under the Customs (Prohibited Imports) Regulations) of the importation of five aircraft applied by the company was not in fact the decision of the Director-General but that of the government, and that if it was his determination the extent to which he was influenced in making it by the views expressed to him as to government policy made it invalid. Two Judges accepted the company's contention: Kitto J. took the view that to hold valid a decision given at a political level instead of at the permanent administrative level would be to contradict the Customs (Prohibited Imports) Regulations which committed the power of decision to the

Director-General only. 1 But the majority of the Court took a wider view as to the scope of the Director-General's exercise of discretion. In the joint opinion of two other Judges, the discretion of the Director-General under reg. 4(2) and the Third Schedule of the Regulations was to be exercised in accordance with his views as to what would best serve the interests of civil aviation within the Commonwealth; they said that no implication could be made that there was reposed in the Director-General any public duty, or any legal right created - other than a right to have an application for permission honestly considered - which was capable of enforcement by mandamus. 2 Windeyer J.'s view was more to the point; upon the examinations of the terms of the Regulations. 3

³⁹ A.L.J.R. at p.70. As to Menzies J.'s view that there is a significant difference between a discretion given to a Minister and one given to a departmental head (the latter must arrive at his own decision upon the merits of the application and must not merely express a decision made by the government), see 39 A.L.J.R. at p.74.

³⁹ A.L.J.R. at pp.73-4, per <u>Taylor</u> and <u>Owen</u> JJ., citing <u>Metropolitan Meat Industry Board v. Finlayson</u> (1916) 22 C.L.R. 340.

Cf. Shrimpton v. Commonwealth (1944) 69 C.L.R. 613 at p.620, per Latham C.J.; Swan Hill Corporation v. Bradbury (1937) 56 C.L.R. at p.758, per Dixon J.; Water Conservation and Irrigation Commission v. Browning (1947) 74 C.L.R. 492, at p.505, per Dixon J.

he considered that the Director-General <u>must</u> have regard to the policy of the Government and <u>must</u> exercise his functions accordingly. He said:

In considering whether to allow aircraft to be imported it is not only the quality and characteristics of particular aircraft that The Department of Civil are in question. Aviation is concerned with more things than ensuring the airworthiness of aircraft. the Parliament can if it wishes use its constitutional power of customs control of exports and imports to enable the Executive to pursue economic policies that it considers conduce to the welfare of the Commonwealth... The constitutional responsibility for the decision to permit or refuse entry of a conditionally prohibited import, aircraft or whatever it be, rests ultimately in every case with some responsible Minister....Indeed, as I read the decisions of this Court, it is on this proposition that the constitutional validity of the Regulations dealing with prohibited imports and exports mainly depends. Director-General is the officer whose written permission must be produced to the customs. in my opinion that does not mean that he is to grant or refuse permission according to some view of his own, giving weight or no weight as he chooses to the policy of the Crown. On the contrary, I think his duty is to obey all lawful directions of the Minister under whom he serves The Minister is answerable before the Crown. Parliament.

Under the Acts Interpretation Act 1901-63² it is required that such regulations be notified in the Gazette,

³⁹ A.L.J.R. at p.76.

No.2 of 1901 - No.19 of 1963. Similar provisions of the Rules Publication Act 1903-39 were repealed in 1916.

setting out their date of operation, which must not retrospectively prejudice a person's right or expose him to new liabilities, and that regulation issued by the Governor-General-in-Council have to be tabled, within fifteen sitting days, in both Houses, and are subject to disallowance upon notice given within fifteen days in either House. This is not applicable to air navigation orders issued by the Director-General. In the case of Australia, in addition to the danger that the delegated legislation does not come properly within the field and extent of delegation provided under the Act, there is the additional contingency that the Act itself may be ultravires the written Constitution. Any Act, regulation or order must therefore be subject to judicial review of its constitutionality.

To sum up: Liberty to fly in international aviation must be enjoyed by a contracting State (or its nationals) in accordance with the terms of the Chicago Convention or air transport agreements, or in accordance with applicable rules of national law of the subjacent State. Some provisions of the Commonwealth regulations (e.g. carriage of

Cf. L.F. Crisp, The Parliamentary Government of the Commonwealth of Australia, third ed., p.251.

dangerous goods, or documents to be carried by aircraft) may have extraterritorial operation in respect of Australian aircraft outside Australian territory; on the other hand, Australian aircraft must comply with the local law (applying to foreign aircraft) of the country in which they are flying, and will be liable while in the foreign country to any penalties or other sanctions provided by the local law. In practice, a breach of foreign law will often also constitute a breach of Australian law, since the law of all countries which are parties to the Chicago Convention is largely based on the Convention and on the decisions of the I.C.A.O. of which they are all members. 1

It should be noted that, in establishing the administrative system of international civil aviation, the Chicago Convention aims both at 'equal opportunity' and at 'uniform national laws' of air navigation; the former objective is realized, for example, in provisions prohibiting discriminatory treatment as to <u>cabotage</u>, prohibited areas, laws and regulations relating to the admission to or departure from the territory, airport and

Cf. Shawcross and Beaumont, Air Law, second ed., pp.218, 225.

similar charges, or cargo restrictions. The latter objective is to be found in provisions or administrative machineries relating to the unification of rules, regulations and practices, or facilitation of measures, of air navigation; they extend every detail to the wide field of aviation matters, which, by virtue of the very nature of aviation, relate not only to international aviation but also to air navigation in general. How far and in what manner the Commonwealth as a responsible Government should have regulatory power on the domestic aviation matters in implementing such and other international requirements is a constitutional problem relating to the scope of the 'external affairs' power. To add one point; Art.3(d) of the Convention is an important international obligation imposed upon Australia which would directly affect the national regulations of State aircraft (i.e. military aircraft only in the case of Australia). In most countries including Australia, regulation of air navigation is divided into civil aviation and aviation conducted by State aircraft, and close liaison is maintained between the two authorities.

See Arts. 7, 9, 11, 15 and 35. Cf. Ikeda, The Outline of International Air Law (Kokusai-Koku-Ho Gairon), pp.48-9.

While the Commonwealth <u>Air Navigation Regulations</u> do not apply generally to or in relation to State aircraft or military aerodromes, there are by necessity some cases where State aircraft are not outside the scope of the regulations for civil aircraft, such as those concerning visual signals between State aircraft and other aircraft in flight, or search and rescue services for or by State aircraft as well as civil aircraft. In regulating such and other matters, so far as they are concerned with the relationship between military aviation and civil aviation, the Commonwealth has assumed a comprehensive obligation not to hamper the safety of civil aviation in Australia.

In the case of Australia, the sources of power for the governmental control of air navigation are prescribed in the Constitution. However, the earlier view that the Commonwealth authority can only be maintained by uniform legislation of the States has been substantially modified by the High Court's ruling placing safety regulations altogether within the Commonwealth legislative competence. In order to justify the Commonwealth regulations, it will no longer be necessary in these matters to apply a narrow test as to whether activities in the course of intra-State

Cf. regs. 175, 101-103A.

aviation interfere with the operation of inter-State (or international) aircraft. For example, a question may have arisen as to whether the federal regulation prohibiting intoxicated persons from piloting or being carried on any aircraft was sufficiently related to the protection of inter-State operations, so far as its application to intra-State flights was concerned. Although such a fine application of the Constitution is now untenable in relation to the Australian safety regulations, it is still applicable in areas outside safety matters of aviation, viz., licensing based on politico-economic controls of intra-State air transport services.

Almost complete responsibility for the control (and financing) of aviation rests with the Commonwealth, and, in view of the high technicality of subject matters and the need for flexibility in the aviation control, wide delegated legislative or administrative power is inevitably conferred upon the Commonwealth Executive. In licensing controls over man's liberty to fly, for example, the Director-General's functions extend to aircraft maintenance engineer, flight crew (pilot, navigator, radio operator and flight engineer), air service operations,

Reg. 247.

flying school, ground instructor, air traffic controller, and aerodrome licences. In addition, he is empowered to issue numerous certificates and authorizations. Some criticisms have been raised against such a wide delegation of legislative power and administrative discretion in aviation matters, particularly in matters touching personal liberties of using aircraft, or obtaining access to the Commonwealth facilities or engaging in commerce by air. While it is true that the Parliamentary supremacy must always be maintained, it must at all times be remembered that an excessive requirement of formality and dispersion of administrative functions might impair unnecessarily the safety, regularity and efficiency of aviation in Australia.

PART III

Contractual, delictual and Criminal Responsibilities

In the following Chapters, the civil liabilities of the owner or operator of aircraft to persons who are, or whose goods are, carried in aircraft (Chapter VIII), or to persons and/or property on the ground (Chapter IX), and criminal responsibilities for aircraft crimes (Chapter X) will be examined respectively. The regulations of carriage by air or operation of aircraft in public law aspects both in international law and in national law, such as rights of air traffic, or conditions and restrictions of flight activities, breaches of which amount to offences and penalties, have been discussed in the previous Part of this thesis.

Has the Legislature in creating statutory duties by the provisions of the <u>Air Navigation Regulations</u> given to any person who suffers damage in consequence of a breach of the Regulations, a right of action against a person guilty of the breach of duty to recover compensation for the damage resulting from the breach, or is the recovery of the statutory penalty provided for a breach of the

Regulations the only remedy available? This was the question in Martin v. Queensland Airlines Pty. Ltd., 1 where the plaintiff's husband was killed while a passenger for reward in an aircraft operated and controlled by the defendant; the plaintiff alleged that the defendant had been guilty of breaches of statutory duty in operating aircraft contrary to the provisions of the Air Navigation Regulations, and that the defendant could not contract out of his liability for breach of statutory duty. It was argued for the defendant that breach of statutory duty under the Regulations gave rise to no absolute liability in a civil action, that it was only evidence of negligence, and that the company could contract itself out of civil liability in respect thereof. Having referred to the authoritative cases 2 establishing or supporting the general

⁽¹⁹⁵⁶⁾ Q.S.R. 362. An appeal to the High Court was dismissed for want of prosecution.

2

Doe d. Murray, Lord Bishop of Rochester v. Bridges, (1831)

1 B. & Ad. 847, at p.859; 109 E.R. 1001, at p.1006;

Pasmore v. Oswaldtwistle Urban District Council (1898) A.C.

387, at pp. 394-5, 397-8; Phillips v. Britannia Hygienic
Laundry Co. Ltd. (1923) 2 K.B. 832, at pp.840, 841-2;

Badham v. Lambs, Ltd. (1946) 1 K.B. 45, at p.47; Biddle v.

Truvox Engineering Co., Ltd.; Greenwood and Batley, Ltd. (Third Party) (1952) 1 K.B. 101; Clarke and Wife v. Brims (1947), at pp.505-6; Square v. Model Farm Dairies

⁽Bournemouth), Ltd. (1939) 2 K.B. 365; Cutler v. Wandsworth Stadium, Ltd. (1949) A.C. 398, at pp. 407-8.

rule that, when an Act imposed a duty of commission or omission, the question whether a person aggrieved by a breach of the duty had a right of action depended on the intention and circumstances of the Act, the Court (Macrossan C.J.) held that the duties imposed by the Commonwealth Air Navigation Regulations were not duties enforceable by individuals injured through a breach of them, but public duties only, the sole remedy for which was the remedy provided by the Regulations themselves by way of fine or imprisonment. Hence, it became unnecessary to determine whether it would have been competent for the passenger to exempt the defendant from liability to him for damage caused to the passenger through a breach of the Regulations. 1 Two aviation cases which were relied on by the plaintiff are worthy of note here. In Dominion Air Lines, Ltd. (In Liquidation) v. Strand, a decision of the Court of Appeal of the Supreme Court of New Zealand in which a majority of the Court of Appeal of three judges to two, held that the breach of a regulation requiring the pilot of an aircraft carrying passengers for reward to

The Court held that the contract relieved the carrier from all liability for the death of the passenger. 2 (1933) N.Z.L.R. 1.

hold a 'B' licence would confer a right of action on a passenger injured thereby. According to Myers C.J., who was one of the majority, a great majority of the Regulations (made under the Aviation Act, 1918) were to be regarded as merely police regulations, the breach of which would confer no right of action upon a person injured, but the New Zealand legislation was dealing with a new class of transport which at the time the Act was passed was regarded generally as involving special danger to passengers and risk of loss to owners of goods carried. He also relied upon an express power conferred by the Act on the Governor-General to make regulations 'as to the carriage of passengers and goods!, and held that the regulation in question must be regarded as made for the special protection of a class, that is, the passengers and owners of goods carried in an aircraft. However, Macrossan C.J. in Martin's Case distinguished the case on the ground that there was nothing in the provisions of the Commonwealth Air Navigation Act 1920-1947 conferring power on the Governor-General to make regulations which made any specific reference to the carriage of passengers or goods, and there was also nothing in the subject Regulations which should lead to the conclusion that they were made for the special protection of any class of the

public. Another case was Hesketh v. Liverpool Corporation where the plaintiff was injured through striking some trees when landing an aeroplane at night on an aerodrome in respect of which a licence had been granted to the defendant under the Air Navigation (Consolidation) Order, 1923. The trees in question were sited in breach of the condition of the licence and they were not indicated by fixed red lights as required by the Order. Stable J. held that the presence of the trees constituted a breach of the statutory conditions and that on this ground the plaintiff was entitled to succeed. He also held that he was entitled to succeed at common law on the ground that the trees constituted a trap. Again, Macrossan C.J. in Martin's Case distinguished this case on the ground that there was no specific consideration in the reasons for judgment of the point whether a breach of statutory condition gave a civil right of action, and the judgment could clearly be supported on the second ground. 3

Another aspect of aviation accident liabilities, namely, damage liabilities of bailees of aircraft to the

⁽¹⁹⁵⁶⁾ Q.S.R. at p.377.

^{(1940) 4} All E.R. 429.

⁽¹⁹⁵⁶⁾ Q.S.R. at p.377.

owner or operator of the aircraft, is outside the scope of the present study; suffice it to mention here a single Australian case relating to the subject. In Hughes and Bremerman v. Rooke, the defendant hired a small aircraft from the plaintiffs for a non-stop flight with one passenger from an aerodrome at Brisbane (Queensland) to a coastal town and back. The defendant was given a compass course to reach the coast at a point north of the town, from which he would follow the coast to the town of destination. On his return journey, instead of leaving the coast at the prescribed point, he left it at a nearer point, and flew on the reverse of the compass course set for the outward flight. Smoke from bush fires prevented him from seeing landmarks, and he decided that he was off his course and landed in a paddock. Having ascertained his position, he took off again. However, after a successful take-off, the engine failed because of some unexpected and unforeseeable cause and the plane crashed and became a total loss. The plaintiffs then sued the defendant for damage occasioned by the loss of the aircraft. It was held by the Supreme Court of Queensland that there was to be implied in the contract the terms

⁽¹⁹⁵⁴⁾ Q.S.R. 45; 48 Q.J.P.R. 138.

that the hirer might land en route if it became reasonably necessary to do so, and that the hirer would not deviate from the course normally taken on the flight agreed upon unless such a deviation was reasonably necessary to avoid some danger such as stress of weather or was brought about by some circumstances over which he The defendant was also under an had no control. obligation to exercise reasonable care in the operation of flying the aircraft and in navigating it; where the hirer of an aircraft returns it in a damaged condition or fails to return it at all, it is incumbent upon him to show that the damage or loss has not arisen from any want of reasonable care on his part. It was found that there was no negligence by the defendant in the operation of the aircraft and that the crash was not due to such negligence. It was held, however, that his deviation from the journey agreed upon in his contract resulted from his negligent navigation. Then, the following questions of law were considered by the Court. First, with respect to the question whether a distinction could be drawn between intentional and negligent deviation, the Court found no judicial authority to decide that, where a person chartered a vessel and also acted as master, he could successfully say that a departure from the contract route, which would

amount to a deviation if it were intentional, was not a deviation because it had arisen from his own negligence. 1 Secondly, according to the Court's opinion, the real question was whether there was any legal nexus between the defendant's negligent deviation in breach of the contract and the plaintiff's loss. The plaintiffs' reliance was placed upon the proposition that, where there is a bailment of a chattel for valuable consideration, the bailee is responsible for any damage to the chattel which happens, however occasioned, during an unauthorized use of the chattel unless he can show that such damage was inevitable. Was the event causing loss to the plaintiffs one which might not have occurred had the contract not been broken? The Court answered that it could not be said that the engine failure or the crash and consequent loss of the aircraft would inevitably have occurred even if the contract had not been broken; had the defendant not negligently navigated the aircraft he would have had to fly only to the aerodrome of departure, a substantially lesser distance than that which he did

The Court referred to shipping cases suggesting a distinction between voluntary and involuntary departure from an agreed route: Rio Tinto Co. Ltd. v. Seed Shipping Co. (1926) 134 L.T. 764; Tait v. Levi (1811) 14 East 481; 104 E.R. 686.

fly before landing in the paddock; he would have had to make a landing on that aerodrome but would not have had to take-off again. Hence, the defendant was held liable for loss with which his negligence and breach of contract had no direct causal connection. There are in the United States and in England a few reported cases concerning liabilities of bailees of aircraft (e.g., repairers, airport-owners. &c.). but the Australian case seems to deal with a unique aspect of the subject, viz., legal nexus between bailee's negligent deviation and plaintiff's loss, establishing a rule as to remoteness of damage in the case of contract of aircraft bailment. The liabilities arising from aerial collisions between two or more aircraft are also outside the scope of the present study. matters become only relevant when they relate to carriers' liabilities to persons or goods carried in aircraft or operators! liabilities for ground damage caused by aircraft.

Accident Law, 1947, p.106, et seq.; as to English cases, see, e.g., Shawcross and Beaumont, Air Law, second ed., pp.476-8.

Davies v. Garrett (1830) 6 Bing. 716; 130 E.R. 1456;
Lilley v. Doubleday (1881) 7 Q.B.D. 510; James Morrison &
Co., Ltd. v. Shaw Savill and Albion Co., Ltd. (1916) 2 K.B.
783; A/S Rendal v. Arcos, Ltd. (1937) 53 T.L.R. 953;
Vesojuznoje Objedheni Sovfracht of Moscow v. Temple
Steamship Co. Ltd. (1945) 62 T.L.R. 43, followed and applied.

Cf. 28 A.L.J. 159 (notes and comments on this case).

3
As to American cases, see, e.g., C.S. Rhyne, Aviation
Accident Law. 1947, p. 106, et seg.: as to English case.

CHAPTER VIII

Carriage by Air

I General Background of the Law

1. International Legislation: Warsaw Convention

Earlier conventions including Paris, Madrid and Havana did not deal primarily with questions of private air law. As early as 1928 Comité International Technique d'Experts Juridiques Aériens (C.I.T.E.J.A.) prepared a draft convention concerning air carrier's liability in relation to passengers and shippers at its meeting in Madrid. The draft was adopted by the Second International Diplomatic Conference on Air Law, held at Warsaw on 4-12 October 1929. The Convention, generally known as the Warsaw Convention, was entitled 'Convention for the Unification of Certain Rules Relating to International Carriage by Air'.

Since it entered into force on 3 February 1933, the Convention has made a great contribution for the development of international air transport, but aviation was in an early stage of development when the Convention was formulated. After the study of the Legal Committee

of I.C.A.O. which inherited from C.I.T.E.J.A. the task of revising it, the Warsaw Convention was amended by the Protocol signed at The Hague on 28 September 1955, 1 so as to meet the rapid growth of international carriage by air, particularly after World War 2. The original Convention of 1929 and the Protocol of 1955 are deemed to be a single document called 'the Warsaw Convention as amended at The Hague, 1955'.

Supplementing the Warsaw Convention, the 'Convention for the Unification of Certain Rules Relating to International Carriage by Air performed by a Person other than the Contracting Carrier', commonly known as the Guadalajara Convention, was adopted at the International Diplomatic Conference under the auspices of I.C.A.O. on 18 September 1961, at Guadalajara, Mexico.

In the original Convention of 1929, Australia, like other Commonwealth dominions, was not treated as an independent 'High Contracting Party' but merely as a territory of 'His Majesty, the King of Great Britain, Ireland and the British Dominions beyond the Seas,

The revision was undertaken by C.I.T.E.J.A. in 1935, but the study was interrupted by World War 2. A final draft of the amendment had been prepared at Rio de Janeiro in 1953. The Paris draft of 1952 which aimed at a drastic revision of the 1929 original Convention became therefore a skeleton draft.

Emperor of India: However, when the domestic legislation to give effect to it was introduced in Australia in 1935, 1 Australia became an independent acceding State to the Convention. Until then, a flight direct from Australia to New Zealand (or other Dominions) was not covered by the Convention. As of 1 April 1961, the Convention was in force in 57 contracting States including most of the Commonwealth countries.

The Hague Protocol was adopted unanimously by the representatives of 44 States including Australia who signed it in 1956 and introduced domestic legislation to give effect thereto in 1959. With the deposit of the necessary 30 ratifications, the Protocol came into force between the ratifying States on 1 August 1963. To date the Convention as affected by the Hague Protocol has been ratified by 37 States.

The Guadalajara Convention has been ratified to date by 7 States including Australia² and came into force as between the ratifying States on 1 May 1964, ninety days after the deposit of the fifth instrument of ratification.

Carriage by Air Act, 1935 (No.18).

The Parties are Australia, Federal Republic of Germany, France, Mexico, the Netherlands, Switzerland and the United Kingdom.

In proportion to the increase in volume of passengers and goods carried by air, the regulation of carriage by air in its private law aspects has likewise grown in importance. The national law governing or affecting this legal relation may differ from State to State, and, owing to its trans-national character, carriage by air would suffer many difficult problems of conflict of laws unless there be a uniformity of rules regulating it. While some aspects of carrier's liabilities had been regulated by a set of uniform 'Conditions of Carriage' which were adopted by the air transport companies members of the I.A.T.A. even before the Warsaw Convention of 1929 was formulated, 3

The public law aspects of international carriage by air have been regulated by the Chicago Convention (formerly, the Paris convention), other Conventions and bilateral treaties. The <u>Air Navigation Act</u> 1920-63 and the <u>Air Navigation Regulations</u> govern international and domestic carriage by air in public law aspects in Australia.

As to the difficulties arising from, and the desirability of uniformity of rules in, this field of international flight, see P. Reiber, Ratification of the Hague Protocol; Its Relation to the Uniform International Air Carrier Liability Law achieved by the Warsaw Convention, 23 J.A.L.C. (1956), p.272, et seq.

The uniform 'Conditions of Contract' issued in 1927 by the Vienna Conference of the I.A.T.A. contained sweeping exonerations from liability. The Warsaw Convention forced the Association to modify its uniform contract form in 1930 (Antwerp Conference). Cf. P.H. Sand, Limitation of Liability and Passengers' Accident Compensation under the Warsaw Convention, 11 A.J.C.L. 1, p.24; see also Shawcross and Beaumont, op.cit., p.62, et seq.

the main purpose of the Convention was to establish, on the scale of a multilateral treaty, uniform rules of civil liability of air carriers engaged in an international carriage in respect of injury or death of passengers, loss or damage to goods, and other matters incidental thereto. Among other things, it has established uniform documentation rules, a system of liability based on negligence coupled with a transfer of the burden of proof to the carrier, and, most important, a limitation of liability in the case of passenger injury or death, occurring during the period of international carriage. Those liability principles have not drastically been changed by the Hague Protocol, because, in order to minimize the danger of losing adherents to the Convention, only those amendments which were generally considered to be essential have been included in the form of a Protocol; nevertheless, the Protocol is in effect a new treaty incorporating important amendments to the original Convention. With or without modifications, the rules of the international legislation have been applied to non-international carriage in national laws in many countries including Australia.

The main purpose of the Guadalajara Convention is to fill the gap in the Warsaw Convention and the Hague Protocol created by the absence of any rules relating to

international carriage by air performed by a person who is not a party to the agreement for carriage, to the effect that both the actual carrier and the contracting carrier are to be subject to the rules of the Warsaw Convention relating to liability, limitation of the damages recoverable and the venue of actions against the carrier. Accordingly, the term 'Convention' is used here to denote the international legislation comprised in the Warsaw System as a whole; where distinction is necessary, the terms 'the original Convention', 'the Hague Protocol' and the 'Guadalajara Convention' will be used respectively. Following is the scope of application of the Convention.

(i) <u>Concept of 'International' Carriage</u>: The Convention applies only to 'international' carriage of persons, baggage or cargo. For the purposes of the Convention, 'international carriage' is defined as,

any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties 1 or within the

As to the questin whether the expression 'High Contracting Party' means the 'signatory State' or 'ratified (or adhered) State', the Hague Protocol defines it clearly as 'a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective' (Art.XVII). Semble, this definition is in accord with the established judicial (continued on p.387)

territory 1 of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party (Art.1(2)).

As will be seen in the above definition, the scope of application of the Convention is limited to certain, geographically restricted, categories of carriage - that is, the so-called 'Warsaw carriage'; some carriages which are international in the ordinary sense of being from one country to another may not be governed by the Convention, thus giving rise to complex problems of choice of law.

Various proposals to expand the application of the original Convention had been put forward, but no substantial amendment was made in the Hague Protocol.

^{1 (}continued from 386)
precedents and theories. But as a contrary view, see the opinion of the House of Lords in Phillippson et al. v.
Imperial Airways (1939) A.C. 332. The expression was also defined, in relation to Arts. 37(2) (ratification) and 40(1) (declaration of non-application of the Convention to the State's territories, &c.), as merely meaning 'State'. This was inserted to solve the special situation of the Commonwealth countries, for in the original Convention the Dominions in the British Commonwealth had been represented by a single High Contracting Party, viz., U.K.

For the purposes of the Convention the word 'territory' means not only the metropolitan territory of a State but also all other territories for the foreign relation of which that State is responsible (Art. XVII of the Protocol, inserted as Art. 40A of the original Convention).

- (ii) 'Agreement' for Carriage: The Convention applies only when there is an agreement 1 for carriage between the parties; hence, the intention of the parties is decisive for the application of the Convention; it does not apply primarily to a stowaway or members of the crew, regulation of whom is left to the national law of each State concerned. A State or 'legally constituted public bodies' can be a party or parties to the agreement (Art.2(1)).
- (iii) <u>Nature of 'Carriage':</u> The Convention applies to international carriage by air 'for reward', ² and also to 'gratuitous carriage' if performed by an air transport undertaking (Art.1(1)).

Carriage to be performed by several successive air carriers is deemed to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose

This is an interpretation of the French text 'stipulation' which is a less formal notion than 'contract'.

As to the meaning of this expression, see Shawcross and Beaumont, op.cit., p.339(f).

Ibid., at p.339(g). 'Gratuitous carriage' is the carriage not performed 'for reward' (Halsbury's Laws of England, third ed., vol.5, p.227-9).

its 'international' character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State (Art.1(3)). By Art.2 of the Guadalajara Convention, if an actual carrier, as distinct from a contracting carrier, performs the whole or part of carriage governed by the Convention, both the contracting carrier and the actual carrier are subject to the rules of the Warsaw Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which he performs. In the case of 'combined carriage' performed partly by air and partly by any other mode of carriage, the Convention applies only to the carriage by air, provided that the carriage by air falls within the terms of Art.1 of the

^{&#}x27;Actual carrier' means a person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated by the contract made by the contracting carrier but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention (Art.1(c) of the Guadalajara Convention). For example, cases of charter and hire of aircraft (e.g. the operation by the Italian airline, Alitalia, of services between Italy and Australia with aircraft owned by the French airline, T.A.I., and flown by T.A.I. crews).

There is no definition of 'carrier' in the original Convention nor in the Hague Protocol. However, the Guadalajara Convention (Art.1) defines 'contracting carrier' as 'a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor'.

Convention. A 'double-trip carriage' between a contracting State and non-contracting State seems to be within the scope of application of the Convention. 1

The Convention does not apply to carriage of mail and postal packages (Art.2(2)). A State may at any time declare by a notification addressed to the Polish Government that the Convention as amended does not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities (Art.XXVI of the Convention as amended). Therefore, unless there is any such declaration, the Convention applies to military transport. There is no provision excluding carriage by aircraft for customs or police services from its application when the carriage falls within the conditions of application as laid down in Art.1.

F. Ikeda, Outline of International Aviation Law (Kokusai-Kokuho-Gairon) pp.98-9. Cf. Garcia v. Pan-American Airways (1945) U.S.Av.R.39; (1946) U.S.Av.R.496, and Grein v. Imperial Airways Ltd. (1937) 1 K.B. 50; (1936) 2 All E.R. 1258; U.S.Av.R.211.

Carriage on aircraft registered in one State and chartered by the military authorities of another would come under the provisions of the Convention notwithstanding the reservation - Cf. Calkins, Grand Canyon, Warsaw and The Hague Protocol, 23 J.A.L.C. (1956) p.269.

2. Australian Legislation

The Warsaw Convention of 1929 has been accepted by Australia by virtue of the <u>Carriage by Air Act</u> 1935.
When the Bill was introduced in the Commonwealth Parliament, its object was stated:

With the growth of civil aviation in Australia, and as between England and Australia, it becomes increasingly important that proper provision should be made for regulating the matters which necessarily arise in relation to the carriage of persons and goods by air. Carriage by air has for several years been a feature of interstate transport, between Sydney and Brisbane and between Adelaide and Perth. More recently, the establishment of the England to Australia air services has brought Australia into the sphere of international air transport, and it is essential for the proper conduct of that service that people utilizing it should know the conditions under which they do so.... I need not emphasize the desirableness of early steps being taken to ratify this convention. The ramification of modern international air travel make it essential that the rights and obligations of carriers by air should be clearly delimited. The bill provides the solution, and marks an important stage in the development of the law with regard to aviation.

The Act was primarily applicable only with respect to 'international carriage' as defined. The First Schedule to the Act contained the text of the 1929 Convention, and

No.18 of 1935.

Commonwealth of Australia, Parliamentary Debates, 25 Geo. V. vol. 146. First Session of the Fourteenth Parliament (Second Period), p.717.

the Second Schedule the provisions having effect with respect to the persons by and for whose benefit the liability imposed by the Convention on a carrier was enforceable and with respect to the manner in which it might be enforced. It is worthy of note that the Act empowered the Governor-General to make regulations applying, with such exceptions, adaptations and modifications (if any) as he thought fit, the provisions of the Convention to non-international carriage (sec.5(1)). This section was of doubtful constitutionality, in view of the decision of the High Court in the first Henry Case in 1936 but no such regulations were made pursuant to it. Accordingly, non-international carriage of goods and passengers by air within Australia had been governed by the rules of common law, by the terms of special contracts, and by statutes enacted independently of the Warsaw Convention.

The <u>Carriage by Air Act</u> 1935 was repealed by the <u>Civil Aviation (Carriers' Liability) Act</u> 1959² in which approval was given to ratification by Australia of the Hague Protocol of 1955. However, Australia has continued to be a party to the unamended Convention in relation to

R. v. Burgess; Ex parte Henry, 1936, 55 C.L.R. 608.

No.2 of 1959.

the States which delay or fail to adopt the Protocol, until a date to be fixed by Proclamation (which has not yet been made). The Act of 1959 consists of Part I (Preliminary), Part II (Carriage to which the Warsaw Convention and the Hague Protocol apply), Part III (Carriage to which the Warsaw Convention without the Hague Protocol applies), Part IV (Other Carriage to which this Act applies) and Part V (Miscellaneous), with the First Schedule (Warsaw Convention) and Second Schedule (Hague Protocol). Part IV deals mainly with domestic carriage but also with some categories of international carriage to which the Convention is not applicable. This Part is an extension of rules of the Convention, with certain modifications which are considered more appropriate for domestic purposes, into the area of domestic carriage within Federal legislative competence.

The Act of 1959 was amended by the <u>Civil Aviation</u>

(Carriers' Liability) Act 1962¹ in order to introduce the provisions of the Guadalajara Convention. This was done by inserting Part IIIA (Carriage to which the Guadalajara Convention applies) in the principal Act to which Third Schedule (Guadalajara Convention) was further added.

No.38 of 1962.

In 1963, the Air Accidents (Commonwealth Liability)

Act 1 was enacted. This Act provides for the payment of damages by the Commonwealth and authorities of the Commonwealth in respect of the death of, or personal injury to, persons carried in aircraft operated by the Commonwealth or a Commonwealth authority and to certain persons carried in other aircraft.

The view has so far prevailed that the constitutional powers of the Commonwealth Parliament to regulate carriage by air are limited to international and inter-State operation, and to carriage in, to or from Commonwealth Territories; hence purely intra-State carriage by air has been regarded as exclusively within the legislative domain of the States. In order to achieve uniformity of legislation in this field, the Commonwealth Government took an initiative by preparing a draft Model Bill as a guide to assist in achieving uniform State legislation. The Parliaments of all States except New South Wales have passed Acts in almost identical terms with the draft Model Bill, which extends the principles of the Commonwealth legislation on carriers' liability to air transport

No.74 of 1963.

within their respective States' territory. A similar statute is expected to be enacted by New South Wales in the near future. 2

(i) Commonwealth Legislation: There is no doubt that the Commonwealth had constitutional power to enact Parts II, III and IIIA of the Civil Aviation (Carriers' Liability) Act 1959-62, under the external affairs power (sec.51(xxix) of the Constitution) and/or foreign and interstate commerce power (sec.51(i)). The rules of the Warsaw Convention, Hague Protocol and Guadalajara Convention are given respectively the force of law in Australia by the Act (secs. 21, 11 and 25A, respectively) and only the question of implementation is, as a constitutional problem, left to be considered. Although very few provisions of the Convention require in express terms the adjustment or change of domestic legislation in accordance with rules of the Convention, as the scope of its application is limited to the 'Warsaw carriage', there is no reason why the federal Act cannot supplement them by inserting any

Vic.: Civil Aviation (Carriers' Liability) Act 1961.
W.A.: Civil Aviation (Carriers' Liability) Act 1961.
S.A.: Civil Aviation (Carriers' Liability) Act 1962.
Tas.: Civil Aviation (Carriers' Liability) Act 1963.
Q'ld.: Civil Aviation (Carriers' Liability) Act 1964.

Annual Civil Aviation Report 1963-64, at p.23.

matter necessary for giving the fullest effect to the Convention. Moreover, insofar as the international carriage is concerned, the Commonwealth Parliament is competent to enact matters which are independent of the Convention but fall within the scope of 'trade and commerce with other countries'.

The Commonwealth Parliament has extended the rules of the Convention to domestic carriage, with certain modifications, upon the basis of its other constitutional powers. Part IV, headed as 'Other carriage to which this Act applies', applies to the carriage of a passenger where the passenger is or is to be carried in an aircraft being operated by the holder of an airline licence in the course of commercial transport operations, or in an aircraft being operated in the course of trade and commerce between Australia and another country, under a contract for the carriage of the passenger -

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

^{&#}x27;Airline licence' means an airline licence in force under the Air Navigation Regulations (sec.26(1)). See Appendix II, post.

^{&#}x27;Commercial transport operations' means 'operations in which an aircraft is used, for hire or reward, for the carriage of passengers or cargo (sec.26(1)).

- (b) between a place in a Territory of the Commonwealth and a place in Australia outside that Territory;
- (c) between a place in a Territory of the Commonwealth and another place in that Territory; or
- (d) between a place in Australia and a place outside Australia, not being carriage to which the Warsaw Convention, or the Hague Protocol or the Guadalajara Convention applies (sec.27(1) as amended by sec.8 of the 1962 Act).

The constitutional basis for this provision is the 'foreign and inter-State trade and commerce' power or 'Commonwealth Territory' power (sec. 122), with (if necessary) the 'incidental' power of the Constitution (sec.51(xxxix)). Accordingly, Part IV does not in terms apply to purely intra-State carriage, but there are several exceptions to this limited application of the federal legislation. Firstly, where the carrier is the Australian National Airlines Commission who operates T.A.A. (Trans-Australia Airlines), the Part applies in relation to carriage between a place in a State and a place in the same State in like manner as it applies in relation to carriage between a place in a State and a place in another State $(\sec 27(2))$. The powers, functions and duties of the Commission for the operation of airline services are summarized in Appendix III of this thesis; it is sufficient

to say that the Commission cannot operate intra-State services unless enabled to do so by an Act of the Parliament of the particular State or as incidental to authorized services (i.e. airline services for the transport, for reward, of passengers and goods by air between States and between a place in a Territory and another place inside or outside that Territory). 1 Mention has already been made as to the legislation of this kind which has so far been passed by the Queensland and Tasmanian Parliaments. 2 Hence, the Commonwealth Parliament is competent to apply the federal Act concerning carriage by air to the Commission's operation in those particular States under sec.51(xxxvii) and sec.51(xxxix) of the Constitution. Unless these background facts are noted, the wording of sec.27(2) of the Act 1959-1962 concerning the Commission's activity could mislead; Part IV of the Act might be read without any such conditions. Secondly, where, under a contract of carriage, the carriage is to begin and end in the one State or Territory of the Commonwealth (whether at the one place or not) but is to include a landing or landings at a place or places outside that

Arts.19-29 of the Australian National Airlines Act 1945 (No.31)-1961 (No.71).

See Part I, ante.

State or Territory, the carriage is deemed to be carriage between the place where the carriage begins and that landing place, or such one of those landing places as is most distant from the place where the carriage begins, as the case may be $(\sec.27(3))$. This implies in turn that Part IV of the Act does not apply to the carriage which has the place of departure and the place of destination in the same State but merely passes over the other State's or Territory's land. The question how far the Commonwealth's power can be extended to such cases has already been discussed in relation to the constitutional problem of 'border-hopping' cases. Thirdly, where (a) the carriage of a passenger between two places is to be performed by two or more carriers in successive stages, (b) the carriage has been regarded by the parties as a single operation, whether it has been agreed upon by a single contract or by two or more contracts, and (c) Part IV would apply to that carriage if it were to be performed by a single carrier under a single contract, then Part IV applies in relation to a part of that carriage notwithstanding that that part consists of carriage between a place in a State and a place in the same State ($\sec.27(4)$). By analogy,

See Chapter II, ante.

the Part could also have been applied to carriage by air where part of the carriage is connected with other forms of transportation, if the whole journey has an 'inter-State' or foreign nature and was regarded by the parties as a single operation.

(ii) State Legislation: The Parliaments of all States except New South Wales have passed Acts which extend the principles of the Commonwealth legislation on carriers' liability to air transport operators within their territories. The carriage to which those States! Acts apply is the carriage of a passenger where he is or is to be carried in an aircraft being operated by the holder of an airline licence in the course of commercial transport operations under a contract for the carriage of the passenger between a place in the State and another place in the State, not being carriage to which Part IV of the Commonwealth Act applies or 'to which the Warsaw Convention, or the Warsaw Convention as affected by the Hague Protocol, and by the Guadalajara Convention, applies:. 1 The last condition was inserted because there are some instances where the carriage between aerodrome A and

See, e.g., Civil Aviation (Carriers' Liability) Act 1964 (No.24) (Q'ld.), sec.4. The other States' Acts also set out the same provision.

aerodrome B (both being situated not only in Australia but also in a single State of the Commonwealth) may fall within the scope of application of the Convention, for example a round trip ticket.

In determining the respective scope of application of the federal legislation and the State legislation, the presumption has been that the Commonwealth Parliament could not in general intrude into purely intra-State carriage by air. However, when the flow of passengers and goods is taken into account, there should be ample constitutional basis for the Commonwealth Parliament to enact a federal law establishing uniform rules throughout Australia for determining liability of air carriers to passengers and shippers, under the commerce power.

3. Common Law:

Since the civil liabilities of carriers in respect of damage to passengers, luggage or cargo are largely governed by statutory rules throughout Australia, the scope of application of the common law rules is limited; they apply only to some exceptional carriages which are not covered by the statutory definition, or supplement the gaps in statutory rules. One of the most important instances which are not covered by statutory rules is gratuitous carriage. In the case of 'international'

carriage governed by the international legislation, gratuitous carriage which is not performed by an air transport undertaking is outside the scope of application of the Convention: in the case of 'non-international' carriage (including purely intra-State carriages), it seems that no gratuitous carriage is governed by statute. Also, statutory provisions do not apply when there is no contract of carriage between the parties (e.g., stowaways or crew of aircraft). But, by virtue of the federal Act (sec.42), the limitation of liability (if any) of the carrier or of his servants or agents is made applicable to a person who travels in an aircraft without the consent of the carrier, although this does not impose any other liability on a carrier or a servant or agent of a carrier to which he is not subject. This provision concerning stowaways is made applicable to purely intra-State carriage, mutatis mutandis, by the States! Acts. However, since the rights and duties of the parties to a contract of air carriage is, in nearly every case (except in New South Wales), determined in accordance with the provisions of one or other of the federal and State enactments, it will be sufficient to describe the general rules of common law liability in carriage by air. common law rules to supplement deficiencies of the

statutory rules on various subjects which are covered by statutory carriage will be mentioned in more detail when we deal with main problems of this branch of law.

Carriers in common law are divided into common and private carriers; the definition of these two types of carriers is well established in English law, although it is always a question of fact whether a person is or is not a common carrier. Different rules of liability apply to A common carrier is bound to answer for the goods at all events unless the damage or loss arises from the act of God, the Queen's enemies, or from the fault of the consignor, or inherent vice of the thing carried; whereas a private carrier (and a common carrier of passengers) is not liable for loss or injury unless negligence is proved by evidence. We shall not consider here the question whether an air carrier should or should not be regarded as a common carrier at common law; the subject has been discussed elsewhere, and the scope of the problem depends in each case upon the contents of the contract and applicable legislation. It is sufficient to say that if, at the present stage of common law, an air

See Chapter I, <u>ante</u>. See especially <u>Aslan v. Imperial</u> <u>Airways Ltd</u>. (1933) 38 Com. Cas. 227 holding that there is no good reason why a carrier by air should not be a common carrier.

carrier carries goods for reward, he may in fact be a common carrier, incurring all the responsibilities and liabilities of a common carrier. However, carriers may in general limit or exclude liability at common law by a special contract, provided that, in case of a common carrier of goods, the terms of such a contract are reasonable, and in any case a clause purporting to exempting a party to a contract from liability for negligence must contain express language to that effect. In Martin v. Queensland Airlines Pty. Ltd., where the plaintiff's husband was killed while he was a passenger for reward in an aircraft operated and controlled by the defendant, the Court said:

A carrier of passengers has complete freedom at common law to make such contracts as he thinks fit, enlarging, diminishing, or excluding his common law obligations, Ludditt v. Ginger Coote Airways, Ltd. (1947, A.C.233)....I think it is clear that the defendant is relieved of that liability. By the contract it was provided in express terms that the passenger was carried entirely at his own risk and that the carrier accepted no responsibility for damage, including death, arising out of, or incidental to the carriage, and that the passenger renounced all claims against the carrier in respect thereof whether the same may be due to, or alleged to be due to negligence or misconduct on the part of the carrier, or not. In my opinion this language clearly relieves the defendant from all liability for the death of the passenger in this case.

^{1956,} Q.S.R., p.378.

Such was the situation in domestic carriage before the enactment of the federal Act of 1959, although most of the privately-owned companies voluntarily took out insurance policies providing a limited cover (usually £2,000) in the event of death or permanent disablement of a passenger, and lesser amounts for less serious injuries. Even now there is no specific aviation insurance legislation either of the Commonwealth or of the States, whether compulsory or not, and aircraft owners or operators voluntarily take out insurance policies to which the ordinary law of insurance ascertaining the rights and liabilities of the parties would be applicable. ²

L.R. Edwards, Some Aspects of the Liabilities of Airline Operators in Australia, 34 A.L.J. p.144.

Some aspects of the Commonwealth constitutional powers for the compulsory insurance legislation will be discussed when we deal with the topic in relation to the surface damage caused by aircraft. As to the American position, see S.G. Tipton and R.S. Bernhard, Compulsory Insurance For Air Carriers, 20 J.A.L.C. 1953, p.75, et seq. According to the writers' view, various reasons in support of compulsory insurance (e.g. protection of the public with respect to collection of judgments against air carriers, protection of the air carriers against the effects of excessive losses from accidents, furtherance of public safety, enhancement of public acceptance of commercial aviation) are not substantial and only superficially persuasive. But, in considering the justification of compulsory insurance, the differences in the economic and social factors affecting air transport industry in the United States and Australia must be taken into account.

The Australian National Airlines Act 1945 had made the Commission a common carrier of passengers and goods with the obligations and privileges of common carriers (sec.24), so that the Commission could not escape by 'contracting out' the obligation for the legal liability for damages for personal injuries suffered through the negligence of its servants. The provision was repealed by the Australian National Airlines Act 1959 and the Commission is now governed by the Civil Aviation (Carriers' Liability) Act 1959-62 which expressly nullifies and invalidates any provision of an agreement tending to relieve the carrier of liability or to fix a lower limit than the appropriate limit of liability provided by the Act. 3

Negligence on the part of carrier must be proved by the plaintiff; the damage suffered must be shown to be actionable in accordance with the ordinary rules relating to remoteness of damage, causation, etc., but the rule

No.31 of 1945 - No.71 of 1961.

No.3 of 1959.

Sec.32.

res ipsa loquitur would probably apply. In Forsbroke-Hobbes v. Airworks Ltd. and British-American Air Services Ltd., 2 it was held that the doctrine of res ipsa loquitur applied in an action for negligence by a passenger against an air carrier, and the Court rejected the argument that the doctrine should not be applied because carriage by air was comparatively new, on the grounds that aeroplanes had become a common-place method of travel and that the courts found no difficulty in applying the doctrine to railways when they were a new method of travel. In Arnold v. Evans³ where an action under the Fatal Accidents Act 1959 (W.A.) was brought by the plaintiff as the administratrix of the estate of her late husband who was a passenger in an aircraft piloted by the person of whose will the defendant was the executor, the Supreme Court of Western Australia (Virtue J.) referring to the Fosbroke-Hobbes Case entirely disagreed with the application

As to the detailed examples of aviation cases where the maxim has been applied, see Shawcross and Beaumont, op.cit., pp.320-24.

^{(1937) 1} All E.R. 108; W.N. 48; 53 T.L.R. 254; (1938) U.S.Av.R. 194, where the plaintiff was injured in an aircraft crash which took place immediately after the take-off and before the aircraft had attained the requisite height for its journey. See also 10 A.L.J. p.489.

3 (1952) 54 W.A.L.R. 15.

of the doctrine to aeroplanes generally. He pointed out that in the <u>Fosbroke-Hobbes Case</u> a positive cause of negligence had been made out by the plaintiff's witness so that the finding that the doctrine applied was unnecessary for the decision. Referring to the classic authority on the doctrine in <u>Scott v. London and St. Katherine Docks Co.</u>, ¹ the Court said: ²

Now, in a case where an aircraft simply obeys the law of gravity and crashes, I do not consider that there is any justification for saying that such an occurrence is one which in the ordinary course of things only happens through the negligence of the pilot or his servants. Structural and mechanical faults due to defects in manufacture or resulting from imperfect servicing and maintenance of an aircraft would, I should imagine, be quite a patent cause of air disasters and these in many, if not in most cases would not be attributable necessarily to the neglect of the pilot. I therefore hold that the doctrine does not apply to the circumstances of the present case and it is incumbent upon the plaintiff to establish his claim by positive evidence.

In this case, the Court eventually found the pilot negligent upon evidence of the heads of negligence particularised by the plaintiff. Virtue J.'s remarks seem

^{(1865) 3} H. & C. 596. 2 54 W.A.L.R. at pp.19-20.

to be in accord with the views taken by the U.S. courts, 1 but McNair regards such a situation (where the circumstances of the crash are clearly consistent with due care on the part of the defendant) as an only exception to the general application of the doctrine. 2 Neither the general application of the doctrine nor the total denial of the doctrine (i.e., the application of the ordinary law of negligence) is appropriate in view of the difficulty in most cases of establishing the cause of aviation accidents on the part of the claimant, for in any case the res ipsa loquitur rule cannot, by itself, impute liability to an air carrier. A drastical change of ordinary negligence law will be necessary in air law; statutory shifting of the burden of proof, as embodied in international legislation, would be one of such The doctrine may be applied more often in the future at common law, 4 but the inadequacy of the doctrine

E.g., Rochester Gas and Electric Corporation v. Dunlop (1933) U.S.Av.R. 511.

McNair, op.cit., p.53.

Cf. Davis, Surface Damage by Foreign Aircraft: The United States and the New Rome Convention, 38 Cornell Law Quarterly, 1952-53, p.576. As to the applicability of the doctrine in relation to the operator's liability to surface damage, see Chapter IX, post.

Shawcross and Beaumont, op.cit., p.321, p.323n.

is obvious in aerial collision cases where 'human experience is powerless to pin point the negligence'.

Whether an action against a carrier is an action of contract or tort depends upon whether the plaintiff must prove a contract, or whether he can show a good cause of action independently of contract. The distinction is relevant mainly in relation to the measure of damages² and choice of law.

II Main Provisions and Problems of the Law

In the following discussion of main provisions and problems of the law concerning carriage by air which is in force in Australia, each subject will be classified as 'international' carriage which is governed by international legislation, and 'non-international' carriage which is carriage other than international carriage, including international (in ordinary sense) carriage not governed by the Convention, inter-State and intra-State carriage.

G.N. Calkins, op.cit., p.255.

As to measure of damages by carriers, see Halsbury's Laws of England, vol.4, p.151, p.190, and cases cited there. As to the Australian legislation and cases, see Halsbury's Laws of England, Australian Pilot, third ed., vols. 1-5, Carriers (vol.4), p.382 (ss.399-406) and p.387 (s.470).

1. Carriers' Liability

(1) Principles of Liability

International Carriage: The Convention lays down the basic principles of civil liability of the carrier under a principle of negligence which, by reason of the onus it creates, approaches absolute liability; Art.20(1) provides that:

The carrier is not liable if he proves he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

Read together with Arts.17, 18 and 19, discussed below, this shifts the burden of proof from the plaintiff to the carrier. Calkins comments: 1

Reversal of the burden of proof is fair in the same way that res ipsa is fair. If time could be reversed and stopped at the first split second of impact, the carrier through its servants could far better explain the accident and how it occurred than could the passenger.

Res ipsa would require such an explanation to the then-living passenger. Death of all the participants should not deprive the plaintiff's executor of this advantage.

'All necessary measures' means 'all <u>reasonably</u> necessary measures' which are required to take at the present stage of development of aeronautical techniques. A paradox of

Calkins, op.cit., pp.255-56.

I.C.A.O. Doc.7450, vol.1, p.85.

this expression - if all 'necessary' means are proved to have been taken, the damage could not have occurred - has been pointed out in the parliamentary debates of the Commonwealth when the Act of 1959 was introduced in the form of a bill. A more difficult problem will arise when the real cause of damage cannot be found; the carrier seems to be freed from liability if he proves that he and his agents and servants have taken all necessary Damage caused by force majeure exempts the carrier means. from liability, and he is not liable for damage caused by the third person. Is he liable for the damage caused by an inherent defect of aircraft? He will be exempted from liability if he possesses a proper airworthiness certificate and has paid reasonable care to maintaining the aircraft.2

With respect to 'contributory negligence', Art.21 provides that if the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly

Parliamentary Debates, 7 April 1959 (H. of Rep.) p.914.

Ikeda, op.cit., p.135, citing as authority Goedhuis, La situation juridique du commandant de l'aeronef, Revue de droit int., p.203.

or partly from his liability. The exoneration of carriers! liability in contributory negligence is thus left to be decided by lex fori in view of the considerable differences of national laws on this matter. 1 Effect is given to Art.21 by sec.16 of the Commonwealth legislation: it provides that the court shall first determine the damages that would have been recoverable if there were no limit and there had been no negligence on the part of the passenger or consignor; the damages so determined are then reduced to such extent as the court thinks just and equitable, having regard to the share of the passenger or consignor in the responsibility for the damage; if the damages so reduced exceed the maximum liability of the carrier fixed by or in accordance with the Convention, then the court shall further reduce the damages to that maximum Under the common law rules of contributory negligence, there will be a complete defence to a claim even when the loss or damage was merely contributed to by the person who has suffered it. However, the legislation on apportionment of loss, which gives no longer a complete defence to a claim, is now established in all States of

Cf. Art.6 of the Rome Convention of 1952 (Art.3 of the Rome Convention of 1933) which established a uniform rule based upon the offset of negligence.

Australia except in New South Wales. Sec. 16 of the Commonwealth Act establishes a special rule concerning apportionment of loss caused by air carriers in international carriage. The most likely case of contributory negligence would be where a passenger fails to fasten his safety belt during turbulent conditions, after warning to do so.

The original Convention of 1929 provided in Art.20(2) that the carrier is not liable if he proves that the damage has been occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage. This exoneration clause was applicable only with respect to the carriage of goods and baggage, but even so was regarded as unfair to the consignor. The provision was eliminated in the Hague Protocol, and the same rule for disproving liability now prevails for cargo and baggage

Vic.: Wrongs Act, 1958, sec.26.

Q'ld.: Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act, 1952.

S.A.: Wrongs Act, 1936-51, sec.27a.

W.A.: Law Reform (Contributory Negligence and Tortfeasors Contribution) Act, 1947.

Tas.: Tortfeasors and Contributory Negligence Act, 1954, sec. 4.

A.C.T.: Law Reform (M.P.) Ordinance, 1955, sec. 15.

as for passengers. It should be remembered, however, that the earlier defence available to the carrier is still applicable to carriage to which the original Warsaw Convention applies (i.e., carriage governed by Part III of the Commonwealth Act).

Non-International Carriage: In carriage governed by Part IV of the Commonwealth Act, which is also extended to intra-State carriage by virtue of the State legislation, the carrier is liable for damage to passengers and baggages (sec.28). The carrier's liability for damage to cargo, and for delay, is not defined. Defences available to the carrier are laid down only with respect to liability for destruction, loss or injury to baggage of the passenger, as sec.29(1) provides:

the carrier is liable...unless the carrier proves that he and his servants and agents took all necessary measures to avoid the destruction, loss or injury or that it was impossible for him or them to take such measures.

In contrast with the carrier's liability in international carriage, this defence is therefore not available in the

Sec. 28 reads as follows: 'Subject to this Part, where this Part applies to the carriage of a passenger, the carrier is liable for damage sustained by reason of the death of the passenger or any personal injury suffered by the passenger resulting from an accident which took place on board the aircraft or in the course of any of the operations of embarking or disembarking'.

case of injury or death of passengers. The carrier's liability in respect of injury or death of the passenger is absolute, while his liability in respect of damage to cargo or delay is governed by the common law rules of negligence or by the terms of special contracts. Hence, in non-international carriage by air, insofar as it is governed by the statutory rules, three different sets of principles, viz. absolute liability, fault (the onus cast upon the carrier), and negligence (at common law), govern carriers' liability in accordance with the nature of the claims. The reason why the rule of disproving liability was omitted from non-international carrier's liability in respect of passengers is not clear, unless it was that such a provision would impair the uniformity of domestic law.

With respect to contributory negligence, the court may exonerate the carrier wholly or partly from his liability under the <u>Carriers' Liability Acts</u> (Commonwealth and States), and the principles of exoneration and assessment of damages recoverable is the same as in the case of 'international' carriage. 1

Sec.39.

This statutory liability for damage to passengers is in substitution for any civil liability for the carrier under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger. The same rule applies to carriage to which the Warsaw Convention as affected by the Hague Protocol applies, to carriage to which the original Warsaw Convention only applies, and to carriage governed by the States Acts incorporating the provisions of the Commonwealth Act. Hence, claims under the State Fatal Accidents Acts or similar legislation are excluded by the uniform State Acts (in relation to intra-State carriage) and by the Commonwealth Act (in relation to every other carriage). A similar rule is provided for injury to passenger. Since the Carriers' Liability Act

Secs. 12(2), 24 and 35(2).

There is no Commonwealth Legislation equivalent to the Fatal Accidents Acts, 1846-1908 (U.K.), but each State has equivalent legislation:

N.S.W.: Compensation to Relatives Act, 1897-1953

Vic. : Wrongs Act 1958, Part III.

Q'ld.: Common Law Practice Acts, 1867-1940

S.A.: Wrongs Act, 1936-59, Part II.

W.A. : Fatal Accidents Act, 1959

Tas.: Fatal Accidents Act, 1934-43

A.C.T.: Compensation (Fatal Injuries) Ordinance, 1938

Secs. 13, 24 and 36.

(Commonwealth and States) applies to 'passengers', the scope of application of the Act for damage incurred by workers employed by carriers (e.g., air crew), which is usually governed by the Workmen's Compensation Act, 1 is apt to be small.²

In New South Wales, the law governing the liability of intra-State air carriers is common law. The Common Carriers Act 1902 defines a common carrier as 'a common carrier by land', which would appear to exclude carriers by air, and in any event that Act has no provisions dealing with the carriage of passengers. Probably, the rule of res ipsa loquitur or ordinary rules of negligence would apply to the carriers' liability for passengers. But, as

Commonwealth: Commonwealth Employees Compensation Act, 1930-59; Seamen's Compensation Act, 1911-59.

N.S.W.: Workmen's Compensation Act, 1926-59.

Vic. : Workmen's Compensation Act, 1958.

Q'ld.: Workmen's Compensation Act, 1916-59.

S.A.: Workmen's Compensation Act, 1932-58.

W.A.: Workmen's Compensation Act, 1912-59.

Tas.: Workmen's Compensation Act, 1927-59.

A.C.T.: Workmen's Compensation Ordinance, 1931-59.

The application of the Workmen's Compensation Act will cause some difficult problems of jurisdiction. Even when the Carriers' Liability Act applies (e.g. an employee as a passenger in the course of his employment by an employer other than carriers), it is unlikely that the Carriers' Liability Act excludes the liability under the Workmen's Compensation Act, because the relation between employers and employees is totally different from the carriers' liability.

we will see later, the air carriers tend to exempt themselves from all liability by the conditions of carriage endorsed on their passenger tickets.

(2) Occurrence of Liability and Measure of Damages

International Carriage: (Passenger) The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking! (Art. 17). This provision, which was not altered by the Hague Protocol, clearly defines the scope of the place where the carrier's liability arises. 'Any other bodily injury' will include physiological shock or mal de l'air, but it is not clear whether it includes mental damage which ranges from temporary mental derangement to permanent one. While a causal relation should exist between the accident and the damage, it is also not clear whether it should exist between the accident and the operation of aircraft. Semble, it should. question whether the damage must be that which is directly

Ikeda, op.cit., p.121.

caused by the accident is also to be decided by the national law. The 'accident' includes an aerial collision, and it seems that the word covers such occurrences as loss of pressure or bumps. The implementing provisions of the Commonwealth Act (Parts II and III) does not define whether the 'damage sustained' includes 'moral damage' or 'remote damage!; hence, one must inquire into the ordinary rules of the English law. A general rule of remoteness of damage is that no damages are recoverable for any loss, injury or damage which is not the direct, immediate or proximate consequence of the act or omission complained of, although it is a question of fact which can in general only be decided on a review of the circumstances of each special case; 1 mere mental pain or anxiety unattended by any physical injury is too remote, 2 but there are possible. in air travel, injuries which cannot be called bodily injuries, the scope of which will depend on medical progress in aeronautics. With respect to the measure of damages recoverable in action, the Convetion is completely silent, and the Commonwealth legislation supplements it

Cf. Halsbury's Laws of England, third ed., vol.11, p.268, et seq.

Ibid.

only with regard to death of a passenger (including the injury that resulted in the death) by providing that the damages recoverable in the action include loss of earnings or profits up to the date of death and the reasonable expenses of the funeral of the passenger and medical and hospital expenses reasonably incurred in relation to the injury that resulted in the death of the passenger, and that in awarding such damages, the court or jury is not limited to the financial loss resulting from the death of the passenger (sec. 12 (7) & (8)). A new paragraph (4) of Art. 22 of the Convention as amended by the Hague Protocol permits the court, in accordance with its own law, to award court costs, attorney's fees and other costs incurred, but this does not apply if the carrier had made a timely offer to settle the claim at an amount equal to or exceeding the amount of judgment. The Commonwealth Act does not provide whether the damages recoverable include 'litigation expenses', but provides that the latter condition, mentioned above, does not apply to an action in respect of death of passenger that is wholly or partly for the benefit of a person or persons other than the plaintiff (sec. 12(11)). This means that even if the amount of the damages awarded, excluding court costs and other expenses of the litigation, exceeds the sum

timely offered by the carrier, the court may award, in addition to the limits prescribed in the Convention, the whole or part of the court costs and of the other expenses of the litigation. This provision of the Commonwealth legislation is carefully removed in Part IV so as not to be applicable in international carriage governed by the Convention as affected by the Hague Protocol, for, otherwise, such an apparent deviation from the Convention would be a breach of treaty obligations. It should be noted that this measure of damages is provided only with respect to death (including injury that has resulted in the death) of the passenger, but not with respect to mere injury to the passenger. In the latter case, an Australian court will measure damages in accordance with the ordinary law relating to measure of damages for personal injury, which will include the physical injury itself and, in case of loss of limb, disfigurement, or disablement, its effect upon the physical capacity of the injured person to enjoy life, as well as his bodily pain and suffering, and shock, or injury to health. Sec. 15 of the Act sets out a number of items which are not to be taken into account in assessing damages in respect of liability.

Cf. Halsbury's Laws of England, third ed., vol.11, p.255.

They are limited to carriers! liability to passengers only. They include proceeds of life insurance policies, superannuation payments and pensions, and the value of the interest in the dwelling house of a person killed in an air accident which passes to his spouse or child consequent upon his death.

(Goods) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air (Art. 18). The 'carriage by air' is defined as 'the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever. This period of carriage does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. The concept of 'aerodrome', particularly of 'water aerodrome', is not clear. A question will arise

as to what is the position of luggage or cargo kept by a customs office in or around an 'aerodrome'. A more exact definition of the term is therefore desirable. There is no provision concerning damages to the passenger's personal luggage which is not registered, in which case it is in practice quite difficult to prove the damage incurred, for the passenger does not receive any check to be issued by the carrier. The Commonwealth Act is also silent on this matter.

(Delay) The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo (Art.19). The Convention does not provide any standard as to what constitutes delay, and so this must be left to the national courts which, in different countries, may apply conflicting definitions. The carrier will probably be liable for delay when it was proved that the arrival of the aircraft was far exceeding the time-table. The period of the carriage by air should not be interpreted in a narrow sense in such a case, but it is controversial whether the period should be construed as equivalent to those provided for in Arts. 17 and 18. The Commonwealth Act does not lay down any definition of 'delay' nor any provision concerning the damage occasioned by delay.

Non-International Carriage: (Passenger) carrier is liable for damage sustained by reason of the death of the passenger or any personal injury suffered by the passenger resulting from an accident which took place on board the aircraft or in the course of any of the operations of embarking or disembarking (sec. 28). This purely domestic legislation reproduces Art. 17 of the Convention; by inserting the expression 'resulting from!, the necessity of a causal relation is made clear as between the damage and the accident, but remoteness of damage is left to be decided by the common law rules. Likewise, the meaning of 'any personal injury' which may be a broader concept than 'any bodily injury' is not defined. With respect to measure of damages, the Act lays down the same provisions as those applicable to the international carriage except 'litigation expenses', only in respect of death of passenger (including injury that has resulted in the death). The items which are not to be taken into account in assessing damages in respect of liability are also the same as those in the international carriage (sec. 38). Mention has already been made that the carrier's defence of disproving liability is not available to a carrier engaged in non-international carriage.

(Goods) Several provisions are set out in Part IV of the Act with respect to the liability for the destruction, loss or injury to baggage of the passenger, but none with respect to cargo. As to baggage, sec.29 provides that in such cases the carrier is liable, if the occurrence which causes the destruction, &c. takes place during the period of the carriage by air 'unless the carrier proves that he and his servants and agents took all necessary measures to avoid the destruction, &c. or that it was impossible for him or them to take such measures. For this purpose, the Act defines the expression 'the period of the carriage by air', as in the case of international carriage, either in relation to registered baggage or in relation to baggage other than registered baggage (sec.29(2)). Although there is no provision concerning cargo, sec.41 provides:

The regulations to be made by the Governor-General may provide for applying, with such exceptions, adaptations and modifications as are prescribed, the provisions of the Warsaw Convention and the Hague Protocol and any of

Both registered baggage and baggage other than registered one.

In the application of contributory negligence in relation to an action in respect of baggage other than registered baggage, the carrier shall be deemed to have proved that the damage was caused by the negligence of the passenger, except so far as the passenger proves that he was not responsible for the damage (sec.29(4)).

the provisions of the Act to and in relation to which, if it were the carriage of passengers, Part IV would apply.

Since no such regulation has been made, the occurrence of the carrier's liability and measures of damages in respect of cargo are still governed by the special terms of contract or by the common law rules.

There is no legislative provision concerning the carrier's liability for delay whatsoever. Generally speaking, in the case of carriage of goods, a carrier (common or private) is only bound to deliver within a time which is reasonable, having regard to all the circumstances of the particular case, unless he has contracted to deliver goods at a particular time. In the case of carriage of passengers and baggage, the air carrier's obligation is to use reasonable care to carry the passenger without unreasonable delay, and in the absence of negligence he is not as a rule liable for a mere failure to carry to destination within a reasonable It is submitted that in most cases on claims for delay in the carriage of passengers and baggage, the rights and obligations of the parties will depend on the terms of special contracts.

Cf. Halsbury's Laws of England, third ed., vol.4, pp.140-1; Shawcross and Beaumont, op.cit., p.363, and cases there cited.

(3) Limitation and Exclusion of Liability

International Carriage: The carrier's liability is limited. Apart from the discussion of the principal of limitation of liability in international air law, one of the principal changes made by the Hague Protocol to the Warsaw Convention was the doubling of the limit of liability for death or personal injury from 125,000

For full discussion of the principle of limitation of liability, see H. Drion, Limitation of Liability in International Air Law, Martinus Nijhoff, The Hague, 1954; his points of arguments are summarised in Report on the Warsaw Convention as Amended by the Hague Protocol, J.A.L.C. vol.26, 1959, pp.257-8. This Report comments: When the Warsaw Convention was enacted in 1929, the situation of world aviation was in early stage of development, and the principal problem facing the budding international airlines was the securing of capital, in the face of what appeared to be enormous hazards. absence of a limitation of liability one disaster might sweep away a large capital investment. Hence, the most important provision was a limitation of liability. The limitation of carriers! liability was the biggest point of argument in the United States when it considered whether it should ratify the Hague Protocol - that is to say, whether to continue the Warsaw principle or not. As to the U.S. position, see Sand, Limitation of Liability and Passengers' Accident Compensation under the Warsaw Convention, 1962, A.J.C.L. winter, vol.11, No.1. Calkins seems to support 'quid pro quo' argument (see also Poulton, Notes on Lectures in Air Law, p. 36), and the argument based on the possibility for the potential claimants to take insurance themselves (Calkins, op.cit., p.256).

gold francs (approximately £A7,500) to 250,000 gold francs (£A15,000). In the case of registered luggage and of goods, the limit is 250 gold francs (£A15) per kilogramme, unless the consignor has made a special declaration as to value. In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the limit is decided by the total weight of the package or packages concerned. However, when such a damage affects the value of other packages covered by the same baggage check or by the same air waybill (as for example, when the packages containing trousers were damaged while those containing coats were saved), the total weight of such package or packages must also be taken into account. As regards personal baggages of which the passenger takes charge himself, the limit is 5,000 gold francs (£A300) per passenger. There is no separate provision concerning the limit of liability for delay, but the above limits will

The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams gold of millesimal finess 900. These sums may be converted into any national currency in round figures (Art.22(4) of the original Convention). The Hague Protocol adds further that conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment (Art.XI of the Protocol).

be applicable respectively. But this principle of limitation of carrier's liability must be subject to the following two conditions. Firstly, any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Convention is null and void (Art.23); this provision does not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried (e.g. alcohol, fresh foods, &c.). Secondly, the limit of liability does not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result, provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment (Art.25, as amended by the Hague Protocol). The original Convention of 1929 provided:

The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct.

Cf. Art.12 of the Rome Convention of 1952.

It is worthy of note that the expression 'wilful misconduct! (an English translation of 'dol' in the French text) was deleted in the amended Convention. But, as a writer points out, the new formula follows closely the definition of 'wilful misconduct', as laid down by Courts applying English law, and includes the notion of recklessness with knowledge that damage would probably result. The authorities on the meaning of 'wilful misconduct' were cited in Royal Victorian Aero Club v. The Commonwealth. 2 It was provided under an agreement for the training of Air Force personnel by the plaintiff club that where damage arose from the 'wilful misconduct; of such personnel the Commonwealth would recompense the club for damage &c. to its property, and an aeroplane owned by the club crashed in fact while piloted by an Air Force trainee who was practising the technique required to make a forced landing. Webb J. said:

The new formula is the result of harmonizing the gross negligence in the Continental System and wilful misconduct in the English System.

^{(1954) 92} C.L.R. 236.

For the purpose of this agreement I think the meaning of 'wilful misconduct' is best expressed by Brett L.J. in Lewis v. Great Western Railway Co. 1 as follows:

In a contract where the term misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong....Care must be taken to ascertain that it is not only misconduct but wilful misconduct, and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission.

In the <u>Lewis</u> case <u>Bramwell</u> L.J. made an observation referred to by <u>Lindley</u> L.J. in <u>In re Mayor of London</u> and Tubb's Contract² that -

'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the <u>misconduct</u>, not the conduct, must be wilful....I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, 'Now this may or may not be a right thing to do.' He might say, 'Well, I do not know which is right, and I do not care; I will do this.' I am much inclined to think that that would be 'wilful misconduct', because he acted under the

^{(1877) 3} Q.B.D. 195, esp. at pp.210-11.

^{(1894) 2} Ch. 524; see also 3 Q.B.D. (1877) at p.206.

supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be wilful misconduct.

In this case, the trainee had been instructed that on fields on his own selection he was not to come below the height of 200 feet, but when he was about at that height he was not absolutely sure whether he would have made the field had he to come down or whether he was landing 'dead into the wind'; so he came down 'slightly' further to check on those two points; one of the wheel strust hit the wires running across the boundary fence, and the plane crashed nose down. Webb J. said further: 1

He was aware that he was flying below 200 feet; it was part of the exercise to be aware of it; but he did not think of the instruction about not coming below 200 feet. This limit was mentioned ... in lectures. It was a point, but by no means the most important point. It was emphasized but perhaps no more than landing into the wind. The limit did not occur to him during this exercise; his concentration was wholly on the manoeuvre which required a great deal of concentration. Concentration must be wholly on it: his concentration was solely on it. time during the manoeuvre did he remember the instruction about the 200 feet limit. He first recollected it after the crash... To employ the language of Johnson J. in Graham v. Belfast and Northern Railway Co., 2 the question is: did the trainee know and appreciate that it

⁹² C.L.R. at pp.239-43.

^{(1901) 2} I.R. 13, at p.19.

was wrong conduct on his part in the existing circumstances to do or fail or omit to do a particular thing and yet intentionally did or failed to do or omitted to do it? Or to employ the language of Lord Alverstone in Forder v.

Great Western Railway Co. did the trainee act with reckless carelessness, not caring what the results of his carelessness might be? The answer to both questions must be that he did not.

The defendant conceded that the trainee would have been guilty of wilful misconduct if he had recollected as he came below 200 feet that he was acting contrary to his instructions, but still continued to descent instead of going up again; but, in the Court's opinion, even if it should be found that the trainee knew he was disobeying instructions as he flew below 200 feet, still there is no evidence to support a finding that he also knew he was subjecting the aircraft to an actual danger in so doing; the onus of proof that the limit fixed the actual danger point was on the plaintiff and it was not discharged. In Horabin v. British Overseas Airways Corporation, where the wilful misconduct on the part of defendants

^{(1905) 2} K.B. 532.

⁹² C.L.R. at pp.243-4; cf. also <u>Transport Commission v.</u>
Neale Edwards Pty. Ltd. (1954) 92 C.L.R. 214, per <u>Kitto</u> J.

(1952) 2 All E.R. 1016.

was alleged in the carriage by air of passengers, <u>Barry</u> J.'s direction to the jury contained the following two points:

- (a) Even though an act or omission involves the breach of some statutory provision designed to secure the safety of air carriage or contravenes any general rules laid down or specific instructions given by the operator in relation to a flight or is a departure from generally accepted standards or aeronautical safety, it does not amount to wilful misconduct if the act or omission was genuinely, though erroneously, thought to be in the interests of all concerned; and
- (b) having regard to the dangers inherent in air carriage, a comparatively minor breach of regulations or instructions or a comparatively minor departure from accepted standards of safety may be misconduct, but it is not possible to prove misconduct by adding together a number of acts or omissions which individually do not amount to misconduct.

A problem will lie in the extreme difficulty for the court (or jury) to determine the existence of the carrier's intention to cause damage or his knowledge that damage would probably result; it is also an extremely difficult task for the plaintiff to prove such carrier's intention or knowledge in an aerial accident.²

See at pp. 1020, 1022-4.

Executors of William Kapell v. B.C.P.A. is the only outstanding claim arising out of an accident on 29 October 1953, near San Francisco, U.S.A., when an aircraft operated by British Commonwealth Pacific Airlines Ltd. (B.C.P.A.) crashed into a mountain killing all passengers and crew. William Kapell, a well-known concert pianist, was a passenger in the aircraft. The hearing of the action was heard in March and April of 1961 in the State of New York, (Continued on p. 436)

The Commonwealth Act implementing the provisions of the Convention in respect of the limitation and exclusion of the carrier's liability provides in sec.14 that nothing in the Convention or in Part II (as extended to apply to Parts III and IIIA) shall be deemed to exclude any liability of a carrier to indemnify an employer of a passenger or to pay contribution to a tort-feasor who is liable in respect of death of, or injury to, the passenger, but this shall not operate so as to increase the limit of liability of a carrier in respect of a passenger beyond the amount fixed by or in accordance with the Convention. This is because the Convention expressly limits the carrier's liability except in certain specified cases, discussed above.

^{2 (}continued from p.435) other actions brought by his executors in the courts of California and New South Wales having been discontinued. The rights of the passengers carried on the flight on which the accident occurred were governed by the original Warsaw Convention, so that the carrier's liability and its limits were to be determined by the Convention. proceedings are still pending before the United States court, and we shall refrain here from commenting on the case; suffice it to say that, at the conclusion of the first trial, the jury returned a verdict for the defendant, thus negativing the claim of wilful misconduct on the part of the company (whose assets are now transferred to Qantas), and that the trial Judge in a new trial reversed the jury decision and directed a new trial limited to the issue of damages. Appeals have been entered against the decision entering judgment for the plaintiff and the amount awarded as damages.

As we have seen already, the implementing provisions of the Act with respect to the Warsaw Convention as amended by the Hague Protocol (secs. 12-17) are also made applicable to the carriage to which Part III (the original Warsaw Convention only) applies, as if contained in the latter Part. But sec.23 is a unique provision to Part III, which provides that any sum in francs mentioned in Art.22 of the Convention shall for the purposes of an action against a carrier, be converted into Australian currency at the rate of exchange prevailing on the date on which the amount of any damages to be paid by the carrier is ascertained by the court or jury. This is because there were many controversies as to the interpretation of the expression these sums may be converted into any national currency in round figures! (Art.22(4)), whereas this was solved by the new paragraph in the same Article in the Protocol.

Non-International Carriage: In this case also, the carrier's liability is limited (sec.31). With respect to injury or death of each passenger, the limit is £A7,500, equivalent to the limit in the international carriage, or such higher sum as is specified in the contract of carriage. With respect to baggage of any one passenger, being baggage that is or includes registered baggage, the

limit is £A100, and with respect to baggage, other than registered baggage, of any one passenger, the limit is £A10, or in either case such higher sum as is specified in the contract of carriage. No provision has been made with respect to cargo or delay. In case of non-compliance with regulations relating to passenger tickets or baggage checks the limit may not be applicable (sec.40(c)), but no such regulations have as yet been made.

Sec. 66 of the <u>Australian National Airlines Act</u> 1945-61 limits damages to £A7,500 in <u>any</u> action brought against the Commission for death or personal injury. Prior to the 1959 amendment to the Act, the maximum limit was fixed as £A2,000. This section which seems to have been applicable to death or personal injury suffered on the surface in addition to actions in respect of death or personal injury of passengers, no longer applies in relation to the area of liability of the Commission governed by the <u>Civil Aviation (Carriers' Liability) Act</u> 1959-62. However, since the <u>Carriers' Liability Act</u> does not apply

Sec.22 (which was amended in 1959). This amount was equivalent to the limited sum of insurance cover taken out by the privately-owned companies in practice before the Civil Aviation (Carriers' Liability) Act 1959-61 was enacted.

See Chapter IX, post.

to <u>land</u> carriage of passengers (e.g., in the airline's coach between the airport and the city terminal), the maximum limit of the Commission's liability in sec.66 still applies to such cases.

The prohibition of 'contracting out' (i.e., exclusion or fixing a lower limit) of the carrier's liability is also provided (sec.32), and the exception in the case of the inherent defect, quality or vice of goods carried is same as in the case of international carriage.

In the case of at least one New South Wales operator, namely, Airlines of New South Wales, the description of 'common carrier' is expressly rejected by that Company in the conditions of carriage endorsed on its passenger By those conditions the Company exempts itself tickets. from all liability in the carriage of passengers and their baggage but stipulates that any liability which it may voluntarily assume shall be equivalent to that arising under the Commonwealth Civil Aviation (Carriers Liability) Act and in return for any payment of damages made to him the passenger is required to renounce any claim which may arise to any sum in excess of the maxima prescribed by that Act. In the absence of statutory regulation, a carrier may, by the contract of carriage, exclude altogether, or limit, his liability for injury to passengers, or for loss of or damage to goods. The question whether liability was excluded by contract containing a condition endorsed on tickets (ticket cases) or dockets was discussed in Swinton Industries Pty. Ltd. v. Rozsasi, where a condition contained in the docket handed to R. by S. Ltd. for drycleaning and dyeing of R.'s cloth read: 'These goods are accepted on condition that we are not responsible for any damage or loss through any cause whatever. goods not collected within three months of the date on which they are received may be sold by the firm...and expenses of sale will be deducted from the proceeds.! The trial judge, while disbelieving S. Ltd.'s evidence made a finding that the goods were lost, but held that the condition on the docket did not form part of the contract between the parties on the ground that the condition was not sufficiently brought to R.'s notice, and returned a verdict for R. An appeal was dismissed by the Supreme Court of New South Wales, on the grounds that there was no evidence to establish that the goods had been lost, and that it was open to the trial judge to find that S. Ltd. had not brought the conditions to R.'s notice. According to

Shawcross and Beaumont, op.cit., p.331.

^{(1959) 76} W.N. 442.

Else-Mitchell J., the rule laid down in the Railway

Ticket Cases (that a contract made by the issue and acceptance of a document containing conditions in common form binds the parties to its terms save in certain exceptional cases) apply only where there is no room for any contract other than one constituted by the ticket itself. The Judge made the following additional remarks:²

(T)he trend of modern authorities 'leans strongly against exemption clauses and attempts to protect the party who is at a disadvantage.' (Dr. C.M. Schmitthoff in 29 Canadian Bar Review, 868) and this trend is manifested by a series of decisions which establish inter alia that an exemption clause must be construed strictly and against the person who desires to rely upon it.... It seems to me that a document like the present, which is addressed to the defendant and is framed in terms designed to suggest that the customer is the author of it, will not in general be effective to bind the customer unless it is affirmatively shown that he has adopted its terms.

However, when the ticket was signed, the terms of the contract govern the parties and no question of notice arises. In <u>Jones v. Aircraft Proprietary Ltd.</u>, an aeroplane passenger, while being transported to an aerodrome in a motor vehicle belonging to the airway

See 76 W.N. 446 as to those cases. 2
76 W.N. at pp.446-7.

³ (1949) Q.S.R. 196.

company and driven by its servant, was injured in a collision with another vehicle caused by the negligence of the company's servant. The passenger had been given à ticket on which were a number of printed conditions, one being that the passenger was carried entirely at his own risk and the carrier accepted no responsibility for injury arising out of or incidental to the carriage or any service ancillary thereto, including transport of the passenger to and from the aerodrome, and the passenger expressly renounced all claims against the carrier. ticket was signed by the passenger and set out in addition to the printed conditions that it was issued to and accepted by the passenger subject to the conditions printed on the front and back, which were approved and agreed to by the passenger. It was contended for the defendant company that the document was an admitted written contract clearly distinguishable from the so called 'ticket cases' wherein there was no signed acceptance of any terms; those cases turned on whether the passenger really knew or should have known of the terms, i.e. notice or no notice. The Court held that, in the absence of any suggestion of fraud or misrepresentation, 1 the signed ticket clearly

Cf. L'Estrange v. F. Graucob (1934) 2 K.B. 394, at p.398.

constituted a contract and that the plaintiff was bound by all conditions printed thereon including the contracting out! words. However, the plaintiff contended that the contract was void as being contrary to public policy, or that it was void as being in conflict with the provisions of the Motor Vehicles Insurance Acts, 1936-45, so that it had the effect of nullifying the object and purpose of those Acts. The Court was of opinion that the contract was not void as being contrary to public policy, as it did not tend to injure public safety, the administration of justice, any legislative or executive function or the economic or social welfare of the State, or contravene any governing principle adopted by the community or do substantially incontestable harm to the public. The Court was also of opinion that the contract was not void as being contrary to the scope, policy, and purpose of the above-mentioned statutes, the benefits conferred by them not arising until legal liability had been incurred and their purpose being to ensure that

For the test of 'public policy' which a judge is entitled and bound to apply to an agreement the validity of which is impeached on that ground, the following cases were considered and applied by the Court: Janson v. Driefontein Consolidated Mines Ltd. (1902) A.C. 484; Fender v. St.John-Mildmay (1938) A.C. 1; Wilkinson v. Osborne (1915) 15 C.L.R. 89.

owners of motor vehicles, who became legally liable, should so indemnify themselves that the injured party would not be uncompensated, and not to confer a right which a person suffering injury by reason of negligence was unable legally to waive. Under the present <u>Civil Aviation</u> (Carriers' Liability) Act, 1964, of Queensland, any document contracting out the airway company's liability for passengers' death or injury resulting from an accident which took place on board the aircraft or in the course of the operations of embarking or disembarking, will be void, but such a contract is still valid in the case of <u>land</u> carriage of passengers between an aerodrome and a city terminal, as in the present case.

An important point in the statutory provisions of the Commonwealth <u>Carriers' Liability Act</u> and States' <u>Carriers</u>

<u>Liability Acts</u>, which apply to the non-international carriage, is that there is no equivalent to the 'wilful misconduct' provision of the Convention, or its successor in the Hague Protocol. Hence, the non-international carrier can avail himself of the advantages of the limited liability, even when he acts such wilful misconduct (or

Cf. Ludditt v. Ginger Coote Airways Ltd. (1947) 1 All. E.R. 328; Hedges v. Halliday (1947) 75 C.L.R. 42; Lieberman v. Morris (1944) 69 C.L.R. 69.

gross negligence). This might well be regarded as deplorable to the interests of passengers or cargo-owners.

If an action in respect of any damage is brought against a servant of a carrier, the servant or agent, if he proves that he acted within the scope of his employment or authority, is entitled to avail himself of the limits of liability, if any, which the carrier himself would be entitled to invoke under sec.31 of the Act in an action against him in respect of that damage. However, the aggregate of the amounts recoverable from the carrier, his servants and agents cannot exceed the limits fixed in the Act (sec.33(1) & (2)).

As in the case of international carriage (sec.14), it is laid down that certain liabilities (to indemnify an employer of a passenger or to pay contribution to a tortfeasor) may not be excluded from the carrier's liability (sec.37).

(4) Liability in Special Carriages

International Carriage: With respect to the liability of successive carriers, each carrier is subjected to the rules set out in the Convention, and is deemed to be one of the contracting parties to the contract of carriage insofar as the contract deals with that of the carriage which is performed under his supervision (Art.30(1)). A passenger

or his representative only has a right of action against the carrier who performed the carriage during which the accident or delay occurred, except where the first carrier, by express agreement, has assumed liability for the whole journey. The consignor of goods (i.e., baggage and cargo) has a right of action against the first carrier and the consignee entitled to delivery has a right of action against the last carrier; each has a right of action against the carrier who performed the carriage during which the loss, damage or delay took place. These carriers are jointly and severally liable to the consignor and consignee.

The liability of 'actual carrier' is defined in the Guadalajara Convention. Where an actual carrier performs the whole or part of such carriage, both the contracting carrier and the actual carrier are subject to the rules of the Warsaw Convention, the former for the whole carriage contemplated in the agreement, the latter solely for the carriage which he performs (Art.2). The effect of Art.2 is illustrated as follows:

Parliamentary Debates, H. of R., 15 May 1962, p.2291, et seq., when the <u>Civil Aviation (Carriers' Liability) Bill</u> 1962 was introduced.

A person in Sydney books with Qantas to travel or to ship cargo by that airline from Sydney to London via San Francisco. Qantas finds itself unable to continue the carriage past San Francisco in its own aircraft and arranges for the passenger or cargo to be carried from there to London, the passenger or consignor would have a right of action both Qantas and Pan American.

His rights would be governed by the terms of the original Warsaw Convention or by the Warsaw Convention as amended by the Hague Protocol, according to whether the carriage under the agreement made by the contracting carrier is governed by the one or by the other. In relation to the carriage which the actual carrier performs, Art.3 provides that the acts and omissions of the actual carrier and his servants and agents within the scope of their employment are deemed to be also those of the contracting carrier, and vice versa. A servant or agent of either carrier may avail himself of the limits of liability applicable to his employer, unless it is proved that he acted in a manner which under the Warsaw Convention (or the Convention as amended by the Protocol) prevents the limits of liability from being invoked (e.g., wilful misconduct or its successor in the Protocol). The rules concerning the limitation of liability, the prohibition of 'contracting out! or fixing a lower limit, and the exceptions (inherent defect of the cargo carried, &c.) is the same as those in the main Convention. Art.10 provides that

the Guadalajara Convention does not affect the rights and obligations of the carriers as between themselves except that if an action is brought against one only of the carriers, he has the right to have the other carrier joined in the proceedings in accordance with the law of the country hearing the case. Bringing of actions where damage has occurred during the carriage performed by the actual carrier will be discussed when we deal with the subject of 'action'.

Non-International Carriage: The provisions of
Part IV of the Commonwealth Act apply to the carriage
performed by successive carriers (sec.27(4)). When the
'registered baggage' carried by two or more carriers in
successive stages regarded by the parties as a single
operation to which Part IV applies, has been destroyed,
lost or injured in circumstances in which, if the carriage
had been performed by a single carrier, that carrier would
be subject to liability, the carriers (other than a
carrier who proves that the baggage was not in his charge
at the time of the destruction, loss or injury) are jointly
and severally subject to that liability (sec.29(5)). No
such specific provisions are laid down with respect to
the successive carriage of passengers, non-registered
baggage, or cargo, but the successive carrier is subject

to liability for the death or any personal injury of passengers as provided for in sec.28.

The rules of the Guadalajara Convention in respect of the liability of actual carriers have not been extended to non-international carriage. At any rate, Part IV applies only when there is a contract between the parties. Accordingly, the liability of actual carriers who caused damage to passengers or goods carried by them would be decided by the common law rules of charter or hire of aircraft. The rights and obligations inter se of the contracting carrier and the actual carrier would depend upon the individual contract.

(5) Commonwealth's Liability

The purpose of the Air Accidents (Commonwealth Liability) Act 1963¹ is to establish a legislative scheme for payments to the dependants of a person who is killed or injured in an air accident while travelling as a passenger on Commonwealth business or at Commonwealth expense. Since 1941, the Commonwealth had provided an ex gratia scheme to the similar effect; with the passage of the Civil Aviation (Carriers' Liability) Act 1959, the need for special cover ceased in respect of persons

No.74 of 1963.

travelling on Commonwealth business by inter-State airline, but similar cover was not necessarily available in the case of other flights. For this reason the ex gratia scheme administered by the Treasury had been continued in respect of persons travelling as passengers for the purposes of the Commonwealth or a Commonwealth authority on flights to which the provisions of the Civil Aviation (Carriers' Liability) Act 1959-62 did not apply. The Air Accidents (Commonwealth Liability) Act 1963 replaced the ex gratia scheme of air travel cover. The Act is divided into four parts, viz., Part I (Preliminary), Part II (Carriage in Aircraft operated by the Commonwealth or Commonwealth Authority), Part III (Carriage in Aircraft not operated by the Commonwealth or Commonwealth Authority) and Part IV (Regulations).

Part II applies to the carriage of passenger in an aircraft operated by the Commonwealth or a Commonwealth authority, not being carriage to which Part IV of the Civil Aviation (Carriers' Liability) Act 1959-62 applies (sec.6(1)) but the Act does not apply in relation to the death of, or injury to, a person in circumstances entitling any dependant of the person, or the person, to pension under the Repatriation Act 1920-62, the Repatriation (Far East Strategic Reserve) Act 1956-62 or the Repatriation

(Special Overseas Service) Act 1962 (sec.6(2)). The 'Commonwealth authority' is defined as 'an authority of the Commonwealth' (sec.4); this would include any authority set up under Commonwealth legislation. It should be noted that the Act applies only to those travelling as 'passengers' but not to members of the crew, &c. By sec.4, 'passenger', in relation to an aircraft, does not include -

- (a) a member of the crew, including a pilot, of the aircraft;
- (b) a member of the Defence Force, whether a member of the crew of the aircraft or not, who -
 - (i) is in receipt of flying pay; 2 or
 - (ii) is included in a prescribed class of members of the Defence Force, being a class as to whom the terms and conditions of their service include provision for risks arising out of the performance of duties in aircraft;
- (c) a person whose carriage in the aircraft is specifically and only for the purpose of his performing in the aircraft -
 - (i) duties or services for the performance of which is employed or engaged by the Commonwealth or a Commonwealth authority; or
- (ii) duties as a member of the Defence Force;
 (d) a person whose carriage in the aircraft is specifically and only for the purpose of his performing duties or services in the aircraft; or

See Chapter IV, ante.

^{&#}x27;Flying pay' includes flying instructional pay, flight pay and flying allowance and any other like pay or allowance (sec. 4).

(e) a person who is not lawfully entitled to be on board the aircraft.

It is pointed out that some difficulties will arise in determining where to draw the line between passengers and crew because there are some civil employees, members of the services and employees and others who, although not normally regarded as passengers (e.g. a scientist engaged in rain-making operations, air evacuation nurses in the services or the employee of a private contractor to the Commonwealth). The definition (c) and (d) seems to exclude all persons flying other than for the purpose of transport from place to place. Members of the war services travelling as passengers by air on active service during war or when engaged in warlike operations are also excluded. The basic principle of the Commonwealth liability under the Act is the same as that of a non-international commercial airline operator - that is, it is not necessary to prove negligence of the Commonwealth or its servants or agents. The maximum liability in respect of any one person, by reason of his death or injury, is £A7,500, as in the Carriers' Liability

Parliamentary Debates, H. of R., 39, 14 August 1963, p.96. 2 See sec.28 of the <u>Carriers' Liability Act</u>, supra.

Act, thus avoiding a distinction between persons travelling as passenger on Commonwealth business according to whether they fly in a Commonwealth aircraft or by commercial airline. The amount recoverable is reduced by any amount received or receivable by that person by reason of (a) insurance effected for the benefit of the deceased or injured person or his estate by the Commonwealth or the Commonwealth authority, or (b) insurance effected by the deceased or injured person that is referable to an allowance granted by the Commonwealth or the Commonwealth authority for the purpose of enabling him to effect such insurance (sec.8). Many provisions of the Civil Aviation (Carriers' Liability) Act 1959-62 are made applicable to the carriage to which this Part applies, such as, sec.28 (liability of the carrier for death or injury - absolute liability), sec. 32(1) (prohibition of an agreement tending to relieve the carrier of liability or to fix a lower limit), sec.33 (liability of servants and agents of carrier), sec.34 (time limitation of actions), sec.35 (liability in respect of death - measure of damages, action, &c.), sec.37 (certain liability not to be excluded), sec.38 (proceeds of insurance policies, &c. not to be taken into account by way of reduction of the damages), sec. 39 (contributory negligence). The liability of the

Commonwealth or a Commonwealth authority under this Part is in substitution for certain other liabilities, ¹ and the Act provides with respect to the relation between damages recoverable under this Part and such damages recoverable otherwise than under this Part. ²

Part III applies to the carriage in an aircraft operated by a person other than the Commonwealth or Commonwealth authority of a passenger being an employee who is travelling in the course of his employment (an employee within the meaning of the Commonwealth Employees! Compensation Act 1930-62, or a person to whom that Act applies as if he were such an employee; or a seaman to whom the Seamen's Compensation Act 1911-60 applies, being a seaman employed by the Commonwealth or a Commonwealth authority), any person properly travelling at Commonwealth expense, whether on Commonwealth business or not, and any person travelling by air for the purposes of the Commonwealth (sec. 11). The second category includes members of Parliament and their wives and children and persons visiting Australia at the invitation and expense of the Commonwealth. The third category includes a

Sec.9.

z Sec.10.

diplomatic head of mission travelling in an aircraft provided by a foreign government. But this Part does not apply to carriage to which Part IV of the Civil Aviation (Carriers' Liability) Act 1959-62 applies or to which any provisions of a State Act corresponding with the provisions of that Part apply, nor it apply to a person as provided for in $\sec .6(2)$, supra. Where this Part applies, the Commonwealth or a Commonwealth authority is liable for damage sustained by reason of the death of that person or any personal injury suffered by that person resulting from an accident that took place on board the aircraft or in the course of any of the operations of embarking or disembarking (sec. 12). The maximum liability is £A7,500, as in the case of Part II. The amount of damages recoverable is reduced by amount of any damages or compensation paid or payable from, the carrier, a servant or agent of the carrier or any other person other than the Commonwealth or the Commonwealth authority, as the case may be, and by any amount received or receivable by reason of insurance provided for in $\sec 8(2)(a) & (b)$ of Part II, supra. Certain provisions of the Civil Aviation (Carriers' Liability) Act 1959-62 are also made applicable to carriage to which this Part applies. Sec. 15 reproduces the same rules of sec. 10 of Part II, viz., the relation

between damages recoverable under this Part and such damages recoverable otherwise than under this Part. Certain circumstances in which damages are not recoverable if the person, or a person lawfully acting or entitled to act on behalf of that person, has, without the consent in writing of the Commonwealth or the Commonwealth authority, entered into a compromise, settlement or agreement whereby a person other than the Commonwealth or the Commonwealth authority has been discharged in whole or in part from the liability which he was, or might have been subject (sec. 16). An action against the Commonwealth or a Commonwealth authority for damages under this Part shall not be heard or determined if an action against a person other than the Commonwealth or the Commonwealth authority is pending in any court, whether in the Commonwealth or elsewhere (sec. 17). The whole structure of Part III is designed to supplement other recourse; that is to say, the Commonwealth assumes liability insofar as the rights, if any, existing against the operator of the aircraft or his servants or agents fall short of the rights that would exist had the flight been made by inter-State airline.

By Part IV (sec. 18), the Governor-General is empowered to make regulations for carrying out or giving effect to this Act. By this Act, all persons travelling

as passengers by air in the service of, or for the purposes of, the Commonwealth and authorities of the Commonwealth will have a uniform cover against death or injury, whether they are Commonwealth employees or not, whether they are travelling in Australia or abroad and whether in commercial aircraft or in aircraft owned by the Commonwealth. The constitutional basis for the legislation is sec.51(xxxix) of the Constitution, in association with powers in relation to the Commonwealth executive power, civil services and defence.

2. Documents of Carriage

International Carriage: Chapter 2 of the Convention contains provisions relating to the passenger ticket (Art.3), baggage check (or luggage ticket) (Art.4), and air waybill (or air consignment note) (Arts.5-16). The original Convention of 1929 contained meticulously detailed conditions of documents of carriage, but, in view of the fact that the principal object of the Convention was to establish uniform rules of air carriers' liability, and documents of carriage were in practice largely governed by the I.A.T.A. Conditions, they were much simplified in the Hague Protocol so as to meet the practical demands of

international air transport. Under the Convention, a carrier of passengers by air must deliver a passenger ticket containing various details set out in the Convention, e.g., places of departure and destination, &c. Similarly, a luggage ticket must be issued by the carrier, prescribing certain particulars. In the case of goods carried by air, the carrier may require the consignor to deliver to him an 'air consignment note' (or 'air waybill!) which must also contain certain particulars. One of the main amendments in the Hague Protocol in respect of air consignment notes is Art. IX, added to Art. 15 of the original Convention, providing that nothing in the Convention prevents the issue of a negotiable air waybill a subject which had been subject to considerable discussion under the original Convention. The carrier cannot avail himself of the provisions of the Convention (Art.22) which exclude or limit his liability if he accepts a passenger without a passenger ticket having been delivered, if he accepts luggage without a luggage ticket having been delivered, if the ticket does not contain certain of the prescribed particulars, or if he accepts goods without an air consignment note having been made out or if it does

As to those amendments made by the Hague Protocol, see Calkins, op.cit., pp.258-62.

not contain certain of the prescribed particulars. No implementing provision is laid down in the Commonwealth Act, and there are some uncertain points, e.g., whether the passenger ticket issued should be payable to order or not. 1

Non-International Carriage: Part IV of the Commonwealth Act does not contain any provision relating to the passenger ticket, baggage ticket or air waybill to be issued. However, under sec.40, the regulations may make provision relating to passenger tickets and baggage checks for -

- (a) the circumstances in which such tickets and checks must be issued by carriers;
- (b) matters to be included in such tickets and checks; and
- (c) the non-application of limitation of liability where such regulations relating to the issue, form and contents of such tickets or checks have not been complied with.

By sec.41, the regulations may also provide for waybill as well as for cargo. No such regulations have been made to date, so that the subject of documents of carriage in non-international carriage is governed largely by the special terms of contracts between the parties.

Ikeda, op.cit., p.109.

3. Action against Carriers

International Carriage: (Subjects of Action) questions as to who are the persons having the right to bring suit for damage arising from carriage of passengers and what are their respective rights, are decided by the private international law of the lex fori. 1 Commonwealth Act sets out several provisions on this The liability is enforceable for the benefit of matter. such of the members of the passenger's family as sustained damage by reason of his death (sec. 12(3)). For this purpose, the 'members of the passenger's family' are defined in the Act as the 'wife or husband, parents, stepparents, grandparents, brothers, sisters, half-brothers, half-sisters, children, step-children and grand-children of the passenger', and, in ascertaining the members of the passenger's family, an illegitimate person or an adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father or, as the case may be, of his adoptors ($\sec.12(5)$). Sec. 12(6) provides that the action to enforce the liability may be brought by the personal representative of the passenger or by a person for whose benefit the liability

Cf. Act 24(2).

is enforceable, but only one action shall be brought in Australia in respect of the death of any one passenger, and the action, by whomsoever brought, shall be for the benefit of all persons for whose benefit the liability is so enforceable who are resident in Australia, or not being resident in Australia express the desire to take the benefit of the action. This provision reproduces with slight modifications paragraph 2 of the Second Schedule of the Carriage by Air Act 1935 adopting the original Warsaw Convention. In Feher v. British Commonwealth Pacific Airlines (in liq.), the Supreme Court of New South Wales had to interpret this paragraph. A passenger in an aircraft owned and operated by the defendant company was killed when the aircraft crashed near San Francisco. His father, on behalf of himself and the mother and widow of the deceased, sued the defendant for damages for the loss of the passenger's life pursuant to the 1935 Act. It appeared at the hearing that the widow, who had gone to the United States at the expense of the defendant company to attend the funeral of the deceased, had remained there,

^{(1957) 74} W.N. 447.

As to the British Commonwealth Pacific Airlines, see Appendix III, post.

and had instituted proceedings in that country to recover compensation for the death of her husband, and had repudiated the Australian proceedings. Manning J. said:

In my view, any desire that she has expressed to take the benefit of this action has at all times been subject to her failing to obtain a verdict for a greater sum in one or other of her American actions, than she might recover in this one. Such an expression of desire is not in my view 'a desire to take the benefit of the action' within the meaning of par.2 of the Second Schedule to the Act. Accordingly, I am of opinion that this action is not one which is brought for the benefit of the widow of the deceased, and the only parties who may recover in this action are the plaintiff and his wife.

Then, the Court referred to paragraphs 3 and 4 of the Second Schedule of the 1935 Act which are, in almost identical terms, reproduced in sec.12(9) and (10) of the present Commonwealth Act. Sec.12(9) now provides that the amount recovered in the action, after deducting any costs not recovered from the defendant, shall be divided amongst the persons entitled in such proportions as the court (or, where the action is tried with a jury, the jury) directs. Sec.12(10) now provides that the court may at any stage of the proceedings make any such order as appears to the court to be just and equitable in view of

^{74,} W.N. at p.449.

the provisions of the Convention limiting the liability of the carrier and of any proceedings which have been, or are likely to be, commenced against the carrier, whether in or outside Australia. It was held that a fair estimate of the damage which had been suffered by the parents of the deceased, having regard to all the circumstances, was £2,500 and that on the evidence the widow was dependant upon the deceased at least to the same extent as were his parents. Finally, in view of the difficulty in ensuring that the carrier's liability should be limited as prescribed where actions were instituted in different countries, 1 which was amply demonstrated by the circumstances of this case, the Judge said:

If I make an award in this case in the sum of £2,500 it is almost certain that the carrier will suffer a verdict in America, if not for the whole of the permissible limit at least some substantial part of it, and I think the course I should take, which will be just and equitable in all the circumstances, is to scale down the amount which I would otherwise award to the parents of the deceased so that the total sum awarded to them will approximate one-half of the sum which the Convention fixes as the total liability of the carrier. In all circumstances, I think that the best I can do, having regard to the interests of the respective parties, is to enter a verdict for the plaintiff for the sum of £1,850 and I apportion such sums as to £750 to the plaintiff and as to £1,100 to the plaintiff's wife,

Cf. D. Goedhuis, National Air Legislation and the Warsaw Convention, 1937, at p.291, as cited by Manning J.

The Convention does not provide for the persons who can bring action for the damage arising from carriage of goods. It seems that consignor as well as consignee can bring action, but this must be read together with Art.12(4) prescribing their respective rights. 1

The Convention (and the Commonwealth Act) do not define the meaning of 'air carrier' against whom action is to be brought. In cases where the Guadalajara Convention applies, in relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately (Art.7). In the case of the death of the person liable, an action for damages lies in accordance with the terms of the Convention against those legally representing his estate (Art.27). In these respects, the Commonwealth Act provides only that a Party to the Convention which has not availed itself of the provisions of the Additional Protocol to the Convention with reference

Art.12(4) (unamended by the Protocol) provides that the right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Art.13; nevertheless, if the consignee declines to accept the air waybill or the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition.

to Art.2 (i.e. the reservation of the right to declare the non-application of the Convention to international carriage performed directly by the State, &c.) is, for the purposes of an action brought in a court in Australia to enforce a claim in respect of carriage undertaken by that Party, deemed to have submitted to the jurisdiction of that court (sec.17). However, this does not authorize the issue of execution against the property of a Party to the Convention.

(Jurisdiction) An action for damages must be brought, at the option of the plaintiff, in the following three jurisdictions:

- (a) the place where the carrier is ordinarily resident or has his principal place of business, 1
- (b) the place where the carrier has an establishment by which the contract has been made, or
- (c) the place of destination.

These places must be located in the territory of one of the Parties to the Convention (Art.28). This right of option for an action is further guaranteed by Art.32 providing for the prohibition of any clause in the

Cf. Mott v. Pan-American Airways (1954) U.S. & CA.Av.R. p.70 (the place where the air carrier registered its business).

contract and special agreement entered into before the damage occurred by which the parties purport to infringe the rules laid down by the Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction. However, for the carriage of cargo, arbitration clauses are allowed, provided that the arbitration is to take place within one of the three jurisdictions mentioned above. It should be noted that an action for damages cannot be brought in the jurisdiction of the court where the damage has actually occurred, except when it falls within the above-mentioned jurisdictions. In contrast with the Rome Convention of 1952 concerning surface damage caused by aircraft, the Convention does not provide for the reciprocal recognition and enforcement of foreign judgments; this may cause difficult problems if the action is brought in the several courts having jurisdiction, as Feher's Case shows.

Sec. 19 of the Commonwealth Act provides that, for the purpose of sec. 38 of the Judiciary Act 1903-55, 1 an

Judiciary Act sec. 38: 'The jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:

⁽a) matters arising directly under any treaty; The jurisdiction is given by sec. 75(i) of the Constitution, but is not thereby rendered exclusive.

action under the Convention shall be deemed not to be a matter arising directly under a treaty. This is to preserve the jurisdiction of Australian State courts.

(Procedure, &c.) The procedure of action is laid down in Arts.26-30; Art.28(2) provides that question of procedure must be governed by the law of the court seised of the case. Limitation of action is two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped (Art.29(1)).

Non-International Carriage: (Subjects of Action)

Part IV of the Commonwealth Act provides for the subjects of action in respect of death (including the injury that resulted in the death) of a passenger in the exactly same way as provided for in Part II in respect of 'International carriage'. There is no provision concerning the rights of the persons in action in respect of the damages to cargo, nor is any mention made as to successive carriage.

(Jurisdiction) No legislative provision has been made for jurisdiction of action for damages arising from the non-international carriage. Ordinary rules of private international law either of torts or of contracts, 1

Cf. Shawcross and Beaumont, op.cit., pp.310-12; McNair, op.cit., pp.122-34, 149-54.

would apply. However, with respect to inter-State and some international carriages as to which the Commonwealth has legislative competence, the Commonwealth Parliament could have specified the jurisdiction of action for settling claims for damages arising from the Commonwealth Act. There is little doubt that the Commonwealth could give the fullest effect to the federal legislation under the 'incidental powers', so as to ensure that the carrier's liability is limited as prescribed where actions are instituted in different State's courts, and so as to prevent plurality of actions on the same issue. Moreover, under the more general Constitutional power as to 'full faith and credit, the Commonwealth could probably designate a specific State law (preferably the Commonwealth statute by virtue of the uniform adoption of State Acts except in New South Wales) for the settlement of claims for damages arising from intra-State carriages, which would replace the rules of private international law on the inter-State level within Australia.

(Procedure, &c.) Limitation of action is the same as in the case of international carriage; sec. 34 provides that the right of a person to damages under Part IV is

See Chapter V, ante.

extinguished if an action is not brought by him or for his benefit within two years after the date of arrival of the aircraft at the destination, or, where the aircraft did not arrive at the destination -

- (a) the date on which the aircraft ought to have arrived at the destination, or
- (b) the date on which the carriage stopped, whichever is the later.

Sec.30 sets out detailed provisions relating to complaint to be made in respect of baggage (e.g., receipt of registered baggage without complaint is evidence that the baggage has been delivered in good condition and in accordance with the contract of carriage, etc.)

In New South Wales, in the absence of special legislation, actions against carriers are governed by the general State law (e.g., Compensation to Relatives Act 1897-1953, Workmen's Compensation Act 1926-59), or by common law rules.

To sum up:

A considerable number of rules of international legislation have been adopted in the federal statute not only as to the so-called 'international' carriage but also as to carriage within the Commonwealth's legislative competence, which has further been extended to the purely intra-State carriage under the uniform State Acts of all

States except New South Wales. The predominance of the international air law over, and its permeation into, the national law is conspicuous in this field of air law.

Whether over-all codification of the law would be desirable for the proper regulation of carriage by air in Australia is a question of the policy of law, the discretion thereto being left to the Parliament. Yet, considering the various merits to be obtained by uniformity of the law, one can easily see the advantages of the statutory rules in express terms, particularly in such a legal relation as carriage by air in which the public in general are closely involved in everyday life.

The provisions of the Convention are by no means complete, and, above all, they are applicable only to the 'international' carriage as defined. The Commonwealth Act to carry out them cannot replace them, but can implement to give to them the fullest effect in their application to Australia. From this point of view, the implementing provisions of the Commonwealth Act are also incomplete. It would be superfluous to repeat their deficiencies which have already been pointed out in the foregoing discussions on each subject matter of the law. Suffice it be to say that, in general, the Commonwealth Act is almost silent in supplementing the provisions of the

Convention concerning carriers' liability in respect of cargo and delay. Regulations are supposed to be made, but have not been issued yet. Hence, in applying the international rules of carriers' liability in respect of cargo and delay, Australian courts will have to refer frequently to the rules of common law or special terms of contracts.

The scope of application of the Commonwealth Act in Part IV relating to the non-international carriage could be extended to the utmost of the Commonwealth legislative competence. Even though the Commonwealth power could not be regarded as overriding the State's residuary powers totally in this field, the 'inter-State' commerce power is wide enough to comprise in its application the combined carriages, border-hopping carriages, and other special carriages, &c., if those types of carriages fall within the ambit of the nature of 'inter-State' commerce which we have expounded in Chapter II.

The characteristic deviations of the Australian legislation relating to the non-international carriage from international rules are those concerning the basic principles of carriers' liability which vary according to whether the damages are to passengers, baggage, or

cargo or are due to delay or to other causes, or due to 'wilful misconduct' or similar act of the carrier. The omission of the rule as to wilful misconduct in the national legislation is questionable; should the carrier be protected by limited liability at the sacrifice of the public, even when the carrier causes an accident wilfully or recklessly?

The silence of the legislature is more remarkable in domestic legislation concerning damages to cargo and delay in non-international carriage.

The law governing this field in Australia varies in accordance with different applicable statutory rules.

Indeed, one would feel lost in a maze when trying to find the proper rules for varying occasions of damage, unless he could put in order the scope of application of those rules. This complex situation is partly caused by the lack of uniform adoption of international conventions by States and partly by incomplete adaptation of international rules to the national laws, which are also divided into several different jurisdictions in the case of Australia. One possible general suggestion: Part IV should be amended so as to incorporate all the rules of the Convention in the form of a Schedule to the Act; if amendments or modifications are necessary for special

domestic reasons, they should be added to each provision, as has been done in the United Kingdom legislation relating to non-international carriage. There seems to be no reason why the Commonwealth should not take advantage of the scope for securing uniformity of the law, especially since the uniform State Acts ensure the application of Commonwealth legislation in five States, and it may be expected before long in all.

CHAPTER IX

Surface Damage by Aircraft

I General Background of the Law

1. <u>International Legislation:</u> Rome Convention

As early as 1926 C.I.T.E.J.A. started studying third party surface damage and liability of aircraft operators in international flight for such damage, as well as associated questions of insurance. It should be emphasized that here we are not concerned with damage to persons or goods in an aircraft, or as between aircraft, or, with damage to an aircraft or its contents caused by activities of persons on the ground; we are solely concerned with damage to persons, goods or land on the ground caused by an aircraft in flight. The Third International Conference on Private Air Law held in Rome adopted the 'Convention on the Unification of Certain Rules Relating to Damages Caused by Aircraft to Third Parties on the Surface on 29 May 1933, the draft of which had been prepared by the Third Commission of C.I.T.E.J.A. The Convention was generally known as the Rome Convention of 1933.

Owing to the difficult problems arising from insurers' defences against the payment of insurance claims, the Rome Conference of 1933 referred those questions to C.I.T.E.J.A. for further study, and in 1938 an additional protocol to the Rome Convention of 1933 allowing the aviation insurers a limited number of defences was adopted at the Fourth International Conference on Private Air Law held in Brussels on 19-30 September 1938. However, this Protocol had never been ratified.

The Rome Convention of 1933 was ratified by only five States and its further ratification was interrupted by the World War II. After the War, the sub-Committee of the Legal Committee of ICAO which took over the functions of C.I.T.E.J.A., was charged with the revision of the Rome Convention and the Brussels Protocol, in view of the later development of the international civil aviation. After two drafts were prepared in 1950 and in 1951 respectively, a Diplomatic Conference on International Air Law held in Rome on September 9 - October 7, 1952, drew up a new

Belgium, Brazil, Guatemala, Roumania and Spain.

For the texts of those drafts, see 17 J.A.L.C. (1950) 194-99 and 18 J.A.L.C. (1951) 98-108. As for the history of the Rome Conventions of 1933 and 1952 generally, see, e.g., E.G. Brown, The Rome Conventions of 1933 and 1952: Do They Point A Moral? 28 J.A.L.C. (1961-62) 418 et seq.

'Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface' which replaced the 1933-38 conventions. This Convention has been generally known as the Rome Convention of 1952.

The Rome Convention of 1952 was signed on 7 October 1952, initially by 15 States and on subsequent dates by many States including the United Kingdom, Canada and Australia. As of June 1964, 7 States including Australia ratified the Convention, and 9 States deposited instruments of adherence. The Convention went into effect on 4 February 1958, ninety days after the deposit of the fifth instrument of ratification. However, the major aviation countries, e.g. U.S.A. and the United Kingdom, have not ratified the Convention up to date. As between the contracting States which were the parties to the Rome Convention of 1933, the new Convention upon its entry into force superseded the old Convention.

Flights by aircraft above the surface can always cause direct danger to the subjacent inhabitants, not only by the fall of aircraft themselves but also by the fall of a person (including a parachutist) or an article from

Ratified countries; Australia, Brazil, Canada, Luxemberg, Pakistan, Spain and United Arab Republic. Adhered countries; Ceylon, Ecuador, Haiti, Honduras, Italy, Mali, Mauritania, Niger and Tunisia.

aircraft in flight. The national laws governing this legal relation varies from State to State. It is apparent in such situations that the aircraft operator is subject to unstable and fluctuating liabilities which change each time a border is crossed, and wherever the legislation in the country overflown is varied or modified. The Preamble to the Rome Convention of 1952 declares that the object of the Convention is to tensure adequate compensation for persons who suffer damage caused on the surface by foreign aircraft, while limiting in a reasonable manner the extent of the liabilities incurred for such damage in order not to hinder the development of international civil air transport; and to 'meet the need for unifying to the greatest extent possible, through an international convention, the rules applying in the various countries of the world to the liabilities incurred for such damage. 2 The old Convention established the three principles, viz.

F.B. Davis, Surface Damage by Foreign Aircraft: The United States and the New Rome Convention, 38 Cornell Law Quarterly (1952-53) p.571. This article stm ngly recommends the ratification of the Convention by the United States.

It is pointed out that need for unification was the only purpose mentioned in the Preamble of the Rome Convention of 1933 while it is a secondary object in the Preamble of the 1952 Convention (cf. Drion, Limitation of Liabilities in International Air Law, 1954, p.88n).

'absolute liability' of aircraft operators irrespective of their negligence, 'limited liability' the amount of which is measured in accordance with the weight of aircraft, and 'compulsory insurance' of all aircraft when flying over foreign territory. These basic principles have not been changed in the Convention of 1952, but appropriate amendments were made particularly with respect to the extent of liability and the insurance system.

Above all, the Convention of 1952 introduced three new principles of special importance; firstly, no compensation for mere flight in accordance with applicable regulations, secondly, 'single forum' for actions, and thirdly, 'recognition and enforcement of foreign judgments'.

The Convention applies to surface damage caused in the territory of a contracting State by an aircraft registered in the territory of 'another' contracting State; the aircraft must be 'foreign' aircraft flying over a contracting State's territory, thus excluding aircraft registered in a contracting State engaged in international flight but flying over its own territory. For the purpose of the Convention, a ship or aircraft

^{&#}x27;Contracting State' means a ratified state or deposited state (Art.30).

on the high seas is regarded as part of the territory of the State in which it is registered. 1

The Convention does not apply to damage on the surface if liability for such damage is regulated either by a contract between the person who suffers such damage and the operator or the person entitled to use the aircraft at the time the damage occurred, or by the law relating to workmen's compensation applicable to a contract of employment between such persons. It does not apply to damage caused by military, customs or police aircraft, but does apply to all other aircraft even though they are owned by the State.

An aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends. In the case of an aircraft lighter than air (e.g. balloon), the expression 'in flight' relates to the period from the moment when it becomes detached from the surface until it becomes again attached thereto. 4 Thus, the scope of application of the Convention is limited to the damage

Art.23(2). See also Arts.30 and 36.

Art.25.

³ Art.26.

⁴ Art.1(2).

caused by aircraft during the period thus defined, which excludes, for example, damage caused by an aircraft during its taxiing term on an aerodrome.

As compared with the Warsaw Convention, the scope of application of the Rome Convention raises fewer difficulties, but some uncertain points remain, as for example, in the definitions of 'aircraft' and 'surface'.

2. Australian Legislation

The Commonwealth Government did not sign the Rome Convention of 1933 or the Insurance Protocol to the Convention of 1938, but had the matter under favourable consideration. Australia signed the Rome Convention of 1952 on 19 October 1953, and enacted the Civil Aviation (Damage by Aircraft) Act 1958 whereby approval was given to ratification of the Convention. Until then, there had been no Commonwealth legislation in force regulating

As to the definition of 'aircraft', see reg.5(1) of the Air Navigation Regulations. 'Surface' will include 'water areas', but it is not clear whether it includes things beneath the water or ground (e.g., fish, oil, gas).

Semble, the word 'surface' covers them (cf. F. Ikeda, The Outline of International Air Law, Kokusai-koku-ho Gairon, p.170). But see Jeffrey v. Spruce-Boone Land Co., W. Vd. 164, S.E. 292-3, limiting the scope of 'surface' to 'superficial part of land'.

Cf. H. Poulton, Notes on Air Law, 1955, p.29.3
No.81 of 1958.

the basis of liability for surface damage or providing for limitation of liability for surface damage or requiring aircraft to be insured against such liability. Moreover, as we have already seen, there has been no federal legislation excluding liability for trespass and nuisance by aircraft flying in innocent passage; on the contrary, sec.90 of the <u>Air Navigation Regulations</u> has provided that 'nothing in these Regulations shall be construed as conferring on any aircraft, as against the owner of any land, or as prejudicing the rights of remedies of any person in respect of any injury to persons or property caused by the aircraft'. 1

Adoption of the Convention will be of advantage to Australia's international operator, since eventually it will establish uniform rules of liability in many countries over which Qantas operates, thus facilitating insurance arrangements and ensuring a limit of liability in the event of an unprecedented catastrophe. It will also be substantial advantage to Australian victims of damage caused by aircraft,

1

See Chapter VI, ante.

Parliamentary Debates (H. of R.), 21, 22 Parliament 3rd Session, pp.1685-6.

since they will be able to recover from foreign operators without proving negligence and without the necessity of suing in foreign courts up to relatively very high limits.

However, the Commonwealth Act applies primarily only to 'foreign' aircraft of a contracting State engaged in international flight over Australian territory, and by the extension of the principles of the Convention it is made applicable to two further classes of aircraft engaged in international air commerce, namely, Australian aircraft on the domestic portion of an international flight, and foreign aircraft of a non-contracting State in flight over Australian territory. Hence, purely domestic flight, whether inter-State or intra-State, is governed by State The Commonwealth and the States communicated legislation. on a number of occasions prior to 1952, and subsequently New South Wales and Victoria in 1952 and 1953 respectively enacted legislation on the subject, which exactly followed the provisions of the United Kingdom Act. The question of the Commonwealth's extending the liability principles of the Convention to domestic aircraft (at least to aircraft engaged in inter-State trade) has since been

N.S.W.: Damage by Aircraft Act, 1952 (No.46). Victoria: Wrongs (Damage by Aircraft) Act 1953, repealed and replaced by Wrongs Act 1958 (No. 4420), Part VI (Damage by Aircraft). Cf. United Kingdom: Civil Aviation Act 1949 (sec.40).

pending, because according to the Minister's statement, 1 'a number of policy questions must be resolved before a decision is reached on the desirability and scope of further legislation'. In 1963 and 1964 Tasmania and Western Australia respectively passed legislation in similar terms to the United Kingdom Act. 2 In other States of Australia, the liability of aircraft operators for surface damage is governed generally by common law and partly by relevant general legislation, e.g. <u>Fatal</u>

<u>Accidents Acts</u> or <u>Wrongs Acts</u>, not dealing specifically with aircraft.

(1) Commonwealth Legislation

The <u>Civil Aviation</u> (<u>Damage by Aircraft</u>) Act 1958 is divided into four Parts, viz. Part I (Preliminary), Part II (Damage to which the Rome Convention applies), Part III (Other Damage to which this Act applies) and Part IV (Regulations). In Part I, approval is given to ratification of Rome Convention of 1952, and the Crown in right of the Commonwealth is bound by the Act. Part IV (sec.20) gives regulation-making power to the Governor-General.

Civil Aviation Report, 1960-61, p.23.

Tasmania: Damage by Aircraft Act 1963 (No.7). Western Australia: Damage by Aircraft Act 1964.

Part II gives the force of law in Australia to the provisions of the Convention and contains a number of additional provisions necessary to supplement and give proper effect to the provisions of the Convention itself. By sec.15 of the Act, the regulations may prescribe all matters that are necessary or convenient to be prescribed for carrying out or giving effect to the Convention. This regulation-making power, differing from a general regulation-making power (sec.20), is specifically directed to certain important subject-matters requiring Commonwealth implementation, for example, insurance and enforcement of foreign judgments. The constitutional basis for this power flows from the 'external affairs' power (sec.51(xxix)) and incidental power (sec.51(xxxix)) of the Constitution. This Part came into operation on 2 March 1959.

Part III extends certain of the basic principles of the Convention to Australian aircraft on the domestic portions of international flights and aircraft of a non-contracting State in flight over Australia, but not to aircraft engaged in domestic trade and commerce between the States or between a State and Territory. Sec.16 provides:

Sec.8.

- (1) This Part applies to an aircraft registered in Australia which, while being used for the purposes of, or moved in the course of, trade and commerce between Australia and another country, is in flight in Australia -
 - (a) in the course of a journey of the aircraft between a place in Australia and a place outside Australia (either with or without intermediate stopping places in Australia); or
 - (b) in the course of a journey of the aircraft between two places in Australia, if passengers or goods are being carried in the aircraft in part performance of a contract for their carriage by a single carrier between a place in Australia and a place outside Australia.
- (2) This Part also applies in relation to an aircraft, not being an aircraft registered in Australia or in a Contracting State, which is being used for the purposes of, or moved in the course of, trade and commerce between Australia and another country and is in flight in Australia.

The constitutional basis for this extension of rules of the Convention is the 'trade and commerce with other countries' power (sec.51(i)), but the power with respect to 'trade and commerce between the States' or 'air navigation to or from the Commonwealth Territory' has not been exercised. It is not clear whether this was the result of policy objections to the application of similar principles in the domestic sphere, or to a conservative view of federal powers in the latter sphere. The federal

commerce power might have been regarded as being too narrow for regulating the liability problems of aircraft operators and other associated questions, in respect of surface damage caused by domestic operators to third parties on land or waters located within a State jurisdiction. However, as we have mentioned before, the clarification of liability principles, standardization of extent of damages, promotion and security of fair compensation therefor, etc. are not only advantageous for both operators and victims but also essential for the control of normal and regular flow of aircraft operation which would ultimately be conducive to the development of domestic aviation. Hence, insofar as the constitutional power is concerned, it is submitted that the Commonwealth could regulate this legal relation at least in respect of aircraft engaged in inter-State flights. For the extension of the rules of the Convention, we must examine the principles of the Convention in comparison with the scope of the federal commerce power. Certain provisions of Part II, which implement the Convention from domestic point of view, are also made applicable to Part III (sec. 18). Part III came into operation on 1 July 1959.

See Chapter V, ante.

It is worthy of note that the Australian National Airlines Act 1945-61 limits damages in 'anv' action brought against the Commission for death or personal injury. 2 Prior to the 1959 amendment of the Act, the maximum limit was fixed as £2,000, but now the limit is This provision seems to have applied in respect £A7,500. of death or personal injury suffered on the surface (in addition to actions in respect of death or personal injury of passengers). This was the sole federal Act governing aircraft operators (or carriers) liability before the enactment of Civil Aviation (Damage by Aircraft) Act 1958. By the amendment in 1959, however, this provision no longer applies in relation to the liability of the Commission by virtue of the Civil Aviation (Damage by Aircraft Act or Civil Aviation (Carriers Liability) Act 1959-62. In the case of aircraft carriers! liability to air-borne passengers, the latter Act will cover the Commission's liability, but the activity of the Commission normally confined to inter-State (and intra-State 4) flights

No.31 of 1945, as amended.

² Sec.66 (1).

Sec.66(2).

The Commission can operate 'intra-State' services if enabled to do so by an Act of the Parliament of the particular State referring the powers of air transport to the Commonwealth, or as incidental to an authorized service. See Appendix III, post.

does not fall within the scope of application of the former Act which expressly limits its application to aircraft engaged in 'international' flights and certain flights incidental thereto. What, then, is the 'liability of the Commission' governed by the former Act? This must be read together with sec. 19(3) of the Australian National Airlines Act, which empowers the Commission, with the approval of the Minister, to have and exercise in relation to airline services between any place in Australia and any place outside Australia the like powers as it has in relation to inter-State services. Hence, the provision limiting the Commission's liability for death or personal injury under the Australian National Airlines Act still applies to surface damage caused by the Commission's activity in the course of inter-State (and intra-State) air services, at least until the Civil Aviation (Damage by Aircraft) Act is amended so as to be applicable to purely domestic flights. If the constitutional basis for this limitation of the Commission's liability for surface damage is derived from, or incidental to, the federal 'commerce' power, then the same can be done with respect to other aircraft operators engaged at least in inter-State flights. But, if it is derived from the Commission's nature as a Commonwealth instrumentality,

the same basis would not be available with respect to the other inter-State operators. It is true that the Commission derives its power to operate at all from sec.51(i) or sec.51(xxxvii). But it is arguable that the incidental power, plus the general executive power (sec.61), and the power to regulate federal liability (sec.78), may enable the Commonwealth to go further in the regulation of mutual relations between its own air instrumentality and other parties, than it can go in the case of other operators.

(2) State Legislation

In New South Wales, Victoria, Tasmania and Western Australia, statutory enactments in almost identical terms with the United Kingdom Act govern the basic principles of liability for ground damage caused by aircraft and certain matters connected therewith. However, they do not cover other relevant subject matters dealt with in the Convention, e.g. limitation of liability, insurance system, actions, etc., so that these Acts leave plenty of room for common law rules. These enactments merely establish, first, no liability for technical legal injury (which we have discussed in Chapter VI), and, secondly, strict liability for material loss or damage caused by aircraft on the surface. Although in those statutes there

is no express limitation on the words 'an aircraft', the provisions must be read subject to the territorial limitations of the powers of the State Parliament, while sec.109 of the Commonwealth Constitution renders the provisions inoperative where the flight of the aircraft which gives rise to the damage falls within one of the categories set out in Parts II and III of the Commonwealth Act; hence those State statutes are practically confined to damage caused by aircraft engaged in inter-State and intra-State flights passing over or within their respective territories.

Common law and relevant general legislation govern this legal raltion in other States, viz. Queensland and South Australia, and in the Commonwealth Territories. Since the common law rules occupy a large portion of the substantive law in this field, as contrasted with the carriers! liability in respect of their passengers or shippers, we shall discuss them in comparison with the main topics of statutory rules.

II Main Provisions and Problems of the Law

The following discussions dealing with main topics of the law will be divided in accordance with the classes of

L.R. Edwards, Some Aspects of the Liabilities of Airline Operators in Australia, 34 A.L.J. p.147.

flights into 'international flights' (which whenever necessary is further divided into 'Rome flights' governed solely by the Convention and 'Non-Rome flights' to which the rules of the Convention are extended with certain modifications) and 'domestic flights' (which is also divided into 'flights in N.S.W., Victoria, Tasmania and Western Australia' and 'flights in other States'), whether inter-State or intra-State. The purpose of dividing the law into these categories is first to define clearly the present legal system prevailing in several jurisdictions respectively, and secondly to point out the differences of the law among them with the view of finding out possibilities of unifying the rules in Australia.

1. Operators Liability

(1) Principles of Liability

<u>International_Flights</u>: Art.1(1) of the Convention sets up a basic principle of civil liability of the operator for surface damage:

Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention. Nevertheless there shall be no right to compensation if the damage is not a direct consequence of the incident giving rise thereto, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations.

The principal difference in respect of civil

liability between the Warsaw Convention and the Rome

Convention is that the latter applies the doctrine of

'absolute liability' while the former is based on the

principle of 'negligence' with a transfer of burden of

proof to the carrier. Hence, the operator is liable even

when the damage is caused by <u>force majeure</u>; this extremely

rigid application of 'absoluteness' of the operator's

liability has been one of the main reasons why the United

States has not ratified the Convention. It is suggested

that a compromise might be reached by allowing the operator

to set up the defence of <u>force majeure</u> (not including

specific aviation risks). However, the following

exceptions to this absolute liability are recognized:

- (a) The operator is not liable if the damage is not a direct consequence of the incident giving rise thereto (Art.1(1)).
- (b) Compensation is denied if the damage results from the mere fact of passage of aircraft through the airspace in conformity with 'existing air traffic regulations', which, in the case of Australia, are embodied in Parts X, XI and XII (regs. 108-90) of the Air Navigation Regulations, and Annex 2 (Rules of the Air) of the Chicago Convention (Art.1(1)).

The United States sought a convention predicated on a rebuttable presumption of fault. Cf. Davis, op.cit., p.575.

G. Rinke, Damage caused by Foreign Aircraft to Third Parties, 28 J.A.L.C. (1961-62) p.415.

- (c) There is no liability if the damage is the direct consequence of armed conflict or civil disturbance, or if the person has been deprived of the use of the aircraft by act of public authority (Art.5).
- (d) There is no liability if it is proved that the damage was caused solely through the negligence or other wrongful act or omission of the person who suffers the damage or of the latter's servants or If the damage was partly contributed agents. to, the compensation is reduced to that extent proportionately. Nevertheless there is no such exoneration or reduction if, in the case of the negligence or other wrongful act or omission of a servant or agent, the person who suffers the damage proves that his servant or agent was acting outside the scope of his authority (Art.6).

The exception (b) above is specially noteworthy.

There is no right to compensation under the Convention for 'damage resulted from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations'. In order to prevent such a mere flight from causing any direct damage, much will depend upon the national regulations, such as, provision of a maximum unit of noise or vibration, or amendment to existing regulations so as to prevent such damage from occurring subsequently. Even without such preventive measures, it is unlikely that physiological injuries to human bodies or injuries to domestic animals are in fact often caused by noise or vibration of aircraft in ordinary cases, for today most national regulations

require an aircraft to fly at a certain height. However, some actual damage may unavoidably be caused by nuisance around the vicinity of an aerodrome even though the aircraft taking off from or landing on the aerodrome complies with air traffic rules. In these limited occasions, Art.1(1) of the Rome Convention and sec.17 of the Commonwealth Act extending the rule of Art.1(1) to other types of international flights deny (in a rather drastic way) the right to claim for material damage in nuisance which otherwise would have been given to the landowners under the State statutory rules or common law This legislative interference with liability for actual damage must be distinguished from the grant of the innocent passage right which denies any action in trespass or nuisance by reason only of the mere passage of aircraft but does not deal with damage caused by such passage. We said in Chapter VI that the Commonwealth in establishing liberty to fly could also authorize noise and vibration to be caused by aircraft on or around aerodromes, so that any action in nuisance by reason only of such noise and vibration in such areas should also be denied. The present Commonwealth regulations providing for operation of aircraft in the vicinity of aerodrome

Reg. 143.

and rules for landing and take-off at aerodrome are nothing but traffic rules for aircraft operation in respect to conduct of pilots and general public safety, as reg.90 avoids in express, but rather ambiguous, terms any impact of the Regulations upon the rights of remedies of any person in respect of any injury to persons or property caused by the aircraft!. The establishment of the innocent passage right at specified altitudes (including the altitude necessary for taking off from or landing on an aerodrome) goes a step further and operates as a legislative limitation upon the landowner's property rights 'in airspace' in relation to aircraft passage over the land; it does not, however, affect liability for actual damage. Aircraft flying under the privilege or liberty to fly remain subject to tort liability for any actual damage; recourse will be had to tort claims against the Commonwealth under the Judiciary Act 2 or against private aviators under the State statutory or common law tort rules. There may be a constitutional remedy under the compulsory acquisition clause (sec.51(xxxi)) if the damage occurs around the vicinity

¹ Reg. 146.

No.6 of 1903 - No.32 of 1960, sec.56.

of Commonwealth-owned aerodromes. Aircraft flying in accordance with the rule contained in Art.1(1), establishing a non-liability principle in the stated circumstances, will be exempt from tortious liability for resulting damage, and redress can be obtained if at all only on the constitutional level.

Probably, foreign aviators of the contracting States would rely upon the privileges of Art.1(1) of the Convention, but other international aviators' defense that they also have privileges under the Commonwealth Act may be assailed on the ground that such an enactment is ultra vires the Commonwealth 'foreign commerce' power. In the present writer's opinion, however, the 'commerce' power is wide enough for establishing such authorized nuisance for the benefits of the public and commerce by air, provided that the rationale of fixing the circumstances for such authorization (e.g. the way of approaching to an aerodrome) is subject to judicial Moreover, once the Commonwealth interferred review. positively with the actual damage relation between landowners and aviators, some adequate compensation for the acquisition of property must always be provided under sec.51(xxxi) of the Constitution; as we have already seen, the 'taking' theory may be invoked whenever such

noise and vibration cause serious and frequent damage to the landowner's property rights, irrespective of whether the intrusion of the upper airspace strata has established an air easement. Upon these views, the present Commonwealth legislation establishing a drastic exception to the absolute liability principle but having no standard of authorized circumstances or no measure for adequate compensation upon just terms is of doubtful constitutionality. On the contrary, if these conditions are fulfilled, there is no reason why the exception cannot also be extended to inter-State flights under the same power, as it is done with respect to flights engaged in 'foreign' commerce. Similarly, under sec.52(i) of the Constitution, the Commonwealth could permit authorized nuisance to be caused on its own aerodromes and, if necessary for their effective operation, around these aerodromes with respect to any flight. The widest approach to sec.52(i) will suggest that the Commonwealth in operating its own aerodromes can set out such non-liability exception for the purpose of the public using the aerodromes, provided that the above-mentioned conditions are duly observed in such authorization. It must be noted, however, that all regular international air transport flights take off from or land on the Commonwealth-owned aerodromes but the extension of this non-liability rule

to inter-State flights will involve some local aerodromes to which sec.52(i) does not apply. It seems that the present Commonwealth Act is based mainly on the 'commerce' power.

It is contended that, in view of the later development of new technical standards, damage caused by a sonic boom, which could not have been considered in the Rome Conference in 1952, falls outside the privilege granted in Art.1(1), makes the operator liable under the broad principle of the same article. There is, however, authority for the view that the intent of the members of the Rome Conference was to deny compensation even for 'unusual noise' and for damages resulting from concentrated noise in the vicinity of an airport. 2 It is said that in Australia there is not the same intensive use of airports by heavy jet aircraft as occurs at the major airports in America and there has been no litigation involving claims for damages arising from the use of airports or the noise of aircraft. An action brought by some 800 landowners in the vicinity of Idlewild

Rinck, op.cit., pp.408-9.

Ibid.

³ Second Civil Aviation Annual Report, p.27.

International Airport, New York, against the Port Authority operating the airport and some 40 international (including Australian Qantas) and American domestic airlines is pending before the Supreme Court of the State of New York; proceedings were commenced in December, 1961. The damages sought are for depreciation in value of their properties because of noise from aircraft flying at low heights over the properties while landing at and taking off from the airport. It is not the place to comment on this case in the absence of any detailed report or ruling on the application; since the United States is not a party to the Rome Convention, the decision will depend upon American domestic law, particularly the State law defining the liability principle of aircraft operators, and upon the Court's attitude to the constitutional problems of deprivation of private property for public purposes. As we have already seen the problem in Australia is largely governed by the Commonwealth Act insofar as

Trippe and Others v. The Port of New York Authority and numerous Airlines including Qantas. As to the outline of the facts of this case, see Second Civil Aviation Annual Report, p.27, and Third Civil Aviation Annual Report, p.30. It is reported that the Port Authority has obtained an order striking out all references to complaints based on nuisance and trespass arising more than one year before the action was commenced under a provision contained in the Statute setting up the Port Authority, which requires action against the Authority to commence within one year.

international flights are concerned, and so long as aircraft engaged in such flights comply with the existing air traffic regulations there would be no compensation whatsoever. However, the constitutional problem of acquisition of property remains relevant under the Australian law.

Domestic Flights

(N.S.W., Victoria, Tasmania and W.A.) The four States' <u>Damage by Aircraft Acts</u> provide for the basic principle of operators' liability for ground damage in common terms:

- (1) No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case is reasonable or the ordinary incidents of such flight so long as the provisions of the Air Navigation Regulations are duly complied with.
- (2) Where material loss or damage is caused to any person or property on land or water by, or by a person in, or an article or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owner of the aircraft....

As we have already discussed sub-sec.(1) in Chapter VI in connexion with the landowners' property rights in airspace, it is sufficient here to say that even a flight in conformity with sub-sec.(1) which is exempt from action of trespass or nuisance is liable under sub-sec.(2) if it causes material loss or damage on the surface. What constitutes 'material loss or damage! will be discussed later, but its scope will be extensive, as sub-sec.(2) would certainly appear to be intended to provide 'the widest remedy'. These State statutory provisions have an impact on the operation of the Rome Convention. As we have seen, under that Convention there shall be no right to compensation if the damage results from the mere fact of passage of the aircraft through airspace in conformity with existing air traffic regulations (Art.1(1)). But that provision is not an international recognition of innocent passage of aircraft over privately held lands, so that, in the absence of any (Commonwealth or State) legislation establishing liberty to fly, the landowner, while unable to claim compensation for resulting damage, may claim injunctive prohibition of aircraft passage over his land.

McNair, The Law of the Air, second ed., pp.84-5.

The problem is solved in these four States' jurisdictions by virtue of sub-sec.(1).

The juristic character of the liability contained in sub-sec.(2) has been discussed by English writers in respect to the equivalent provision of the United Kingdom Act. 1 It is in substance different from other tortious liabilities at common law modified by statutes. The statutory imposition of strict liability in aviation is a drastic change of the law of negligence, and, except for analogies in the field of industrial injuries (e.g. workers' compensation), it is unique legislation in Australia in the accident field.²

In the United States where several States enact a statutory absolute liability rule with respect to aircraft damage on the surface, questions were raised as to its constitutionality. The absolute liability of the aircraft owner under sec.5 of the (State) Uniform Aeronautics Act 3

E.g. Shawcross and Beaumont, Air Law, second ed., p.431.

Cf. Fleming, The Law of Torts, second ed., p.282.

Uniform Law Ann.XVI. In the United States, about one-half of the States have solved the aircraft-operators' liability problem through legislation. Of those States which do have statutes several impose strict liability through laws modeled primarily on sec.5 of the <u>Uniform Aeronautic Act</u>, which was promulgated by the Commission on Uniform State Laws in 1922, but was withdrawn by the (continued on page 503)

was attacked as unconstitutional on the grounds that it deprived aircraft owners of their property without due process of law contrary to the Fourteenth Amendment of the Constitution, and also as violative of the inter-State commerce clause of the Constitution. However, the absolute liability principle was held not to be a deprivation of the owner's property without due process of law, and also not to be an unreasonable burden upon inter-State commerce so as to be unconstitutional. The latter question is relevant to the present Australian State legislation, but there is no doubt that such legislation is not contrary to the absolute freedom of inter-State trade. If the Commonwealth introduces similar legislation in respect of inter-State aircraft flights,

^{1 (}continued from p.502)
Commissioners in 1943. In other States in which statutes on this point have been enacted the liability imposed varies from absolute liability for forced landings only, to a presumption of negligence, to recovery only upon proof of negligence. The jurisdictions which rely upon common law principles are about equally divided between strict liability and ordinary negligence. The States which apply the rule of strict liability follow the attitude found in the Restatement of Torts published in 1938, i.e., strict liability based upon the notion of 'ultra-hazardous' nature of aviation. Cf. R.L. Trimble, Liability for Ground Damage caused by Aircraft - Trespass - Ultra-Hazardous Activity - Negligence, 28 J.A.L.C. (1961-2), pp.315-7.

W.C. Wolff, Liability of Aircraft Owners and Operators for Ground Injury, 24 J.A.L.C. (1957) p.210. See Prentiss v. National Airlines, Inc. (1953) 112 F. Supp.306.

the above-mentioned two questions might arise, but the High Court is likely to proceed upon the same line as the United States court's decision.

Whether the common law relating to the effect of contributory negligence is applicable, or whether the statutory defence is a creature sui generis, is by no means clear, but the common law rule would probably be applied under the State statutes. Hence, even if the loss or damage was merely contributed to by the person who has suffered it, there will be a complete defence to an action under sub-sec. (2). However, since the legislation on apportionment of loss concerning accidents on land is now established in all States of Australia except New South Wales, 3 it is no longer in these States a complete defence for the operator to a claim under the statutory rule. In considering the applicability of the apportionment legislation under the State Damage by Aircraft Act (or the Wrongs Act) something might turn on the order of legislation in the

The court will probably apply the tests established in the <u>Hughes & Vale Case</u> (1955, 93 C.L.R. 1; A.C. 241). See Chapter II, <u>ante</u>.

Shawcross and Beaumont, op.cit., p.439.

See Chapter VIII, ante.

various jurisdictions in Australia. In Victoria, for example, the apportionment legislation (Part V of the Wrongs Act 1958) is apt to cover the matter; sec.25 defines 'fault' to include any 'act...which...would, apart from this Part, give rise to the defence of contributory negligence. There seems to be no reason why this should not cover the situation of damage by aircraft which is now described in Part VI of the same Act. The matters relevant to the application of the apportionment legislation will be discussed later in relation to the occurrence of liability and measures of damages, but it will be seen that in New South Wales the common law rule of a complete defence in contributory negligence would still apply under the Damage by Aircraft Act.

Operator's liability for third party surface damage is governed by common law in two States of Australia (i.e. Queensland and South Australia) and in the Commonwealth Territories. It is improbable that aircraft would be regarded nowadays as things dangerous in themselves at common law, and therefore there is probably no strict liability at common law for damage or injury done by an aircraft by reason only of the notion of 'ultra-hazardous' nature of aviation. As aviation has developed and

progressed, the judicial trend has been to discard the application of strict liability based upon such a notion. The rule of evidence known as res ipsa loquitur would probably apply. 1 Strictly speaking, however, res ipsa loquitur creates a mere inference of negligence and does not relieve the plaintiff of the burden of showing the cause of damage, so that the rule cannot, by itself, impute liability to the aircraft operator. The desirability of applying a strict liability rule in aviation accidents originates from the unusual difficulties which a claimant may have in establishing the cause of an aviation mishap, especially if he was on the ground; the machine is usually travelling at high speed and a high altitude, out of sight, and under conditions of operation involving great technological complexity. Another reason for applying strict liability may also be found in the fact that the third party on the surface does not assume any aviation risk, and so he deserves better protection than the user of an aircraft.³

Cf. e.g. McNair, op.cit., p.70; Winfield, Textbook of the Law of Tort, fourth ed., 1948, p.321.

Davis, op.cit., p.576.

Rinck, op.cit., p.407.

The introduction of the statutory absolute liability in this field, whether by Commonwealth legislation or by their own legislation, would not necessarily be incompatible with the policy of common law principles in these State jurisdictions. Probably, however, the common law cannot, or is too slow to, extricate itself from the ordinary law of negligence, modified by res ipsa loquitur, so that in these States the basic rule remains liability only for negligence. The rules of contributory negligence modified by apportionment legislation will also apply.

International Flights: The Convention requires only that the person suffering damage proves the damage to have been caused by an aircraft in flight, but, in order to be entitled for compensation, the damage must be a direct consequence of the incident giving rise thereto. Generally speaking, this is in accord with the common law rules relating to remoteness of damage which apply not only to wrongs of negligence, but to wrongs of all kinds, whether wilful, negligent, or of absolute liability. In any case, it is submitted that the expression 'direct' in the Convention is intended only to narrow the

scope of damage in causal relationship, but not to

enforce it as a uniform principle on the causal relation theory in national laws. 1

The Convention does not apply to damage caused by aircraft during the taxiing terms on the aerodrome. It is desirable for the Commonwealth Act to have supplementary provisions on this, but the 'external affairs' power might not be sufficient to support such provisions. However, sufficient power could be derived from the foreign commerce power (sec.51(i)) and the power over Commonwealth-owned aerodromes (sec.52(i)).

The Convention entrusts to each contracting State to apply its own rules as to what elements of damage are recoverable. The <u>Civil Aviation (Damage by Aircraft) Act</u> 1958 sets out provisions to fill this gap with respect to liability for death <u>only</u>, in which case the damages recoverable in the action include 'loss of earnings or profits up to the date of death and the reasonable expenses of the funeral of the deceased person and medical and

Ikeda, op.cit., pp.175-6.

R. v. Burgess; Ex parte Henry (the first Henry Case), 55 C.L.R. 608, established the test that a considerably rigid accordance to the languages of the Convention is necessary for the domestic implementation of the Convention. A more rigid test will be applied to the Rome Convention which deals with a more specific subject than the Chicago Convention.

hospital expenses reasonably incurred in relation to the injury that resulted in the death of the deceased person! (sec.11(3)). In awarding damages, the Court is not limited to the financial loss resulting from the death of the deceased person (sec. 11(4)). By virtue of sec. 18 of the Act, these provisions are made applicable to other 'international flights' to which the Rome Convention does not apply. It will be noted that the recoverable damages are not prescribed with respect to injury of a person (that has not resulted in death) or damage to property, to which common law rules of measure of damages apply. The Act provides for a number of items not to be taken into account in assessing damages in respect of liability under the Convention in relation to the death of, or personal injury to, a person, viz. (a) contract of insurance, (b) superannuation, provident or like fund, or benefit from a friendly society or trade union, or (c) premium under a contract of insurance in the case of death (sec.12); by virtue of sec.18, this applies to other 'international' flights. Unlike the Civil Aviation (Carriers! Liability) Act 1959-62, the Civil Aviation

Sec.16; see also sec.39, extending the measures to the domestic carriages.

(Damage by Aircraft) Act 1958 does not prescribe what kind of steps the Court should take in apportioning loss or damages in the case of contributory negligence.

(New South Wales, Victoria, Tasmania Domestic Flights: and Western Australia) In those States' jurisdiction, liability occurs once material loss or damage is caused. 'Material loss or damage' is deemed to be 'injury to persons or property which is of a physical nature. as distinct from injuria sine damno for which 'nominal damages' are awarded. 2 It will relate to the loss or damage actually suffered by the plaintiff and is assessed and awarded as real damages and not simply by way of mere recognition of a legal right. It will include all such damage or loss as can be recovered in a common law action on negligence, since 'proof of actual damage is essential to an action of negligence. 3 It would certainly be difficult to contend that damages ought to be given for the mere sensation of fear, but when fear or any other sensation produces a definite illness, that consequence

Halsbury's Laws of England, third ed., vol.5, p.246.

For the meaning of 'nominal damages', see Salmond,
On Tort, 12th ed., by R.F.V. Heuston, 1957, p.705.

McNair, op.cit., p.88.

is no more remote than a broken bone or an open wound. Although liability for nervous shock is now well established, as in the case of Bourhill v. Young, 2 where the shock was caused by the tort of negligence, the plaintiff may be so hypersensitive as to exclude him from the scope of the defendant's duty to take care. But this common law rule is not applicable to the statutory liability of sub-sec. (2) of the State statutes, where the person caused physical shock need only prove that he has in fact suffered shock from the sight of accident,3 irrespective of the scope of the defendant's duty to take It is also submitted that the spectator need only prove that he has in fact suffered shock from reasonable apprehension of danger to themselves, or to some other person, or even to property. In cases other than such physical shock, the owner of the aircraft will normally be liable for every material damage on the surface due to the contact, fire, or explosion caused by the aircraft

Winfield, op.cit., p.78.

⁽¹⁹⁴³⁾ A.C. 92. See also <u>Farrugia v. G.W. Ry</u> (1947) 2 All E.R. 565.

Shawcross and Beaumont, op.cit., p.426.

Ibid.

or things dropped from it, unless they are interrupted by a new intervening cause.

In the case of contributory negligence, the apportionment legislation applies in Victoria, Tasmania and Western Australia but not in New South Wales. following two points are important in the application of the apportionment legislation under which, where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage. but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: Firstly, a claimant may recover a proportion of his loss irrespective of whether the degree of negligence was 'slight' for the plaintiff and 'gross' for the defendant in comparison, 2 and secondly. where apportionment of the liability is required, the

In the State Acts, 'article' is defined as including 'mail or animal', and 'loss or damage' including, in relation to persons, loss of life and personal injury. 2

As to the difference on this point between English law and some American experiments, see Fleming, op.cit., pp.228-9.

claimant's share in the responsibility is determined not only by the causative potency of his acts but also by their blameworthiness, and in such cases both the amount of the reduction of damages and the costs of the partially successful plaintiff are in the discretion of the trial judge. Is the doctrine of 'last clear chance' (or 'last opportunity' or 'last clear opportunity') applicable under the State Damage by Aircraft Acts? The doctrine places its emphasis upon the time sequence of events, and holds the defendant wholly liable if he had, immediately prior to the harm, the superior opportunity to avoid it, even though the plaintiff was also careless. One of the main criticisms of its applicability to the general cases of contributory negligence at common law is the difficulty of defending a rule which absolves the plaintiff entirely from his own negligence, and places the loss upon the defendant whose fault, though in one sense determinative, may be the lesser of the two. Now that apportionment legislation has abolished the stalemate rule of the common law in respect of contributory negligence, 'last opportunity! is capable of application to either party.2

Halsbury's Laws of England, Vol.28, p.91.

Cf. Fleming, op.cit., p.229. Note however that in Western Australia, the Act expressly provides that last clear chance is not to debar a plaintiff; Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act, 1947, s.4.

Hence, that notion, because it is a remoteness notion, does survive the apportionment legislation. In practice, however, the courts tend to have regard to all the causes and apportion the damages accordingly, and it has become very rare for a plaintiff or defendant to be deprived of all claim under 'last opportunity'. Semble, the contributory negligence and last opportunity rules at common law govern damage caused by aircraft in New South Wales. But in practice it is not easy to conceive of circumstances in which conduct on the surface could be contributory negligence or provide 'last opportunity' vis-a-vis an aircraft in flight.

Some more questions arise from the State statutory rules. First, there is a divergency of opinion as to whether the expression 'person or property on land or water' envisages damage caused by aircraft, even though the aircraft would not, apart from the Act, be open to a possible complaint of trespass or nuisance. McNair, assuming that sub-sec.(2) is intended to provide the widest possible remedy, considers it does so apply, while Shawcross and Beaumont regard this as 'extremely doubtful'.

McNair, op.cit., pp.84-5; Shawcross and Beaumont, op.cit., p.437.

Judging from what the whole section intends to protect, the former view is here maintained, although the clarification of the point by amending legislation is very desirable. Secondly, is 'inevitable accident' available as a defence for damage in sub-sec.(2)? Shawcross and Beaumont consider that the defence other than 'act of God' will not be available to a defendant under the statutory rule. It is submitted that, in practice, in every case of aircraft accident, many so-called 'acts of God' should be treated as inevitable accidents and no defence (e.g., lightning, sudden fog, bird damaging propeller, &c.), and that only such extraordinary cases as collision with a meteorite would amount to an 'act of God'. 1

In Queensland and South Australia and in the Commonwealth Territories where the above statutory provisions have not been adopted, the ordinary rules of torts, remoteness of damage and assessment of damages apply to damage by aircraft flying in the course of inter-State and intra-State flights. Mention has already been made as to apportionment of loss in connection with contributory negligence.

Cf. Shawcross and Beaumont, op.cit., p.440.

(3) Persons made liable

International Flights: Under the Convention, the liability attaches to the 'operator' of the aircraft, who is defined as the person who was making use of the aircraft at the time the damage was caused, but if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person is considered the operator; a person is considered to be making use of an aircraft when he is using it personally or when his servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority; the registered owner of the aircraft is presumed to be the operator. 1 However, if the person who was the operator at the time the damage was caused had not the exclusive right to use the aircraft for a period of more than 14 days, the person from whom such right was derived is liable jointly and severally with the operator. This provision is particularly for 'charter' flights.

Art. 2.

²

Art.3.

³ Ikeda, op.cit., p.189.

person makes use of an aircraft without the consent of the person entitled to its navigational control, the latter, unless he proves that he has exercised due care to prevent such use, is jointly and severally liable with the unlawful user for damage. When two or more aircraft have collided or interfered with each other in flight and damage results, or when two or more aircraft have jointly caused such damage, each of the aircraft concerned is considered to have caused the damage and the operator of each aircraft is liable, each of them being bound under the provisions and within the limits of liability of the Convention.² A problem will arise when the damage is caused by two aircraft, one of them being registered in another contracting State, the other not (being either an aircraft of a non-contracting state or of the state where the damage is caused). By Art. 23(1), the Convention applies to damage contemplated in Art.1 caused in the territory of a contracting State by an aircraft registered in the territory of another State. Drion suggests that the literal interpretation of the Article is to be preferred, making the Convention

Art.4.

[~] Art.7.

applicable to the liability of aircraft which are registered either in the state where the damage occurred, or in another non-contracting State, if such aircraft caused the damage jointly with aircraft of another contracting State. But the soundness of this expansive interpretation of the scope of application of the Convention is doubtful. Difficult problems may therefore arise in collision cases where the Australian aircraft engaged in international flights collide or interfere with other Australian aircraft engaged in inter-State or intra-State flights.

<u>Domestic Flights</u>: (New South Wales, Victoria, Tasmania and Western Australia). The following proviso is attached to the State statutory rules establishing the absolute liability principle (sub-sec.(2)):

Provided that where material loss or damage is caused as aforesaid in circumstances in which -

- (a) damages are recoverable in respect of the said loss or damage by virtue only of the foregoing provisions of this sub-section; and
- (b) a legal liability is created in some person other than the owner to pay damages in respect of the said loss or damage; the owner shall be entitled to be indemnified by that other person against any claim in respect of the said loss or damage.

Drion, op.cit., p.89.

Hence, the liability is imposed upon the 'owner', subject to his right of indemnity against any other person on whom legal liability can be shown to rest. Where the aircraft concerned has been bona fide demised, let or hired out for a period exceeding fourteen days to any other person by the owner thereof, and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner, liability of the owner is substituted by that of the person to which the aircraft has been demised, let or hired out. 1

(Other States) At common law, liability falls upon the person actually responsible for the ground damage, namely, in normal cases the pilot who may be the owner or operator (who has perhaps chartered the machine), and also upon any person, such as the owner or operator, if not the pilot, who is vicariously responsible for the pilot's actions. Here, the ordinary rules concerning the relation between master and servant becomes relevant.²

This is expressly provided in the State Damage by Aircraft Acts.

Cf. Shawcross and Beaumont, op.cit., Part X (Law of Master and Servant in connection with use and operation of aircraft).

(4) Limitation of Liability and its Exceptions

International Flights: The liability of the operator for surface damage is limited in international air law, whatever justifications for or criticisms against it may be. The limits increase with the weight of the aircraft, but the rate of increase becomes progressively lower as the weight increases. Art.11 of the Rome Convention of 1952, which amended Art.8(2) of the 1933 Convention fixing a rigid ceiling irrespective of the weight of the aircraft, lists the limits fixed in accordance with the weight of the aircraft in five categories. For the purpose of illustration, the limits amount to £A253,000 for an aircraft

^{&#}x27;Weight' means the maximum weight of the aircraft authorized by the certificate of airworthiness for take-off, excluding the effect of lifting gas when used (Art.11(3)). The Commonwealth Regulations relevant to the weight of aircraft are, regs.227, 225(b), 227(3).

⁽a) 500,000 francs (approximately £A15,000) for aircraft weighing 1,000 kgs. or less;

⁽b) 500,000 francs plus 400 francs (£A12) per kg. over 1,000 kgs. for aircraft weighing more than 1,000 but not exceeding 6,000 kgs.;

⁽c) 2,500,000 francs (£A75,000) plus 250 francs (£A7/10/-) per kg. over 6,000 kgs. for aircraft weighing more than 6,000 but not exceeding 20,000 kgs;

⁽d) 6,000,000 francs (£A180,000) plus 150 francs (£A4/10/-) per kg. over 20,000 kgs. for aircraft weighing more than 20,000 but not exceeding 50,000 kgs;

⁽e) 10,500,000 francs (£A315,000) plus 100 francs (£A3) per kg. over 50,000 kgs. for aircraft weighing more than 50,000 kgs.

of the size of Vicount, and £A550,000 for an aircraft of the size of a Boeing 707. In addition to the over-all limit, there is a sub-limit of approximately £A15,000 (500,000 francs as opposed to 200,000 francs in the 1933 Convention) in respect of the death or personal injury of any person. It is pointed out that the limits generally exceed the amount of surface damage so far experienced in any civil accident, not only in Australia but also elsewhere, so that any reduction of the compensation payable to persons suffering damage, due to the limitation provisions, would only arise in the most exceptional catastrophe. 2 If the total amount of the claims established exceeds such limits, the rules as prescribed in the Convention apply, and the claims in respect of loss of life or personal injury are appropriated preferentially more than those in respect of damage to property. 3

There are two exceptions to the limitation of liability. First, if the person who suffers damage proves that it was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage.

Edwards, op.cit., p.147. See also Parliamentary Debates, H. of R. 21, p.1684.

Ibid.

ر Art.14.

the liability of the operator becomes unlimited; provided that in the case of such act or omission of such servant or agent, it is also proved that he was acting in the course of his employment and within the scope of his authority (Art.12(1)). This rule is not in harmony with Art.25 (a rule akin to wilful misconduct) of the Warsaw Convention as amended at the Hague, because there the passenger gets unlimited indemnification if the damage resulted from an act 'done with intent to cause damage or recklessly and with knowledge that damage would probably result', while the third party, who did not agree to bear any risk, is in a poor position before the court and has to prove intent of the operator or pilot. It is submitted that the wording was adopted in order to make sure that in all cases of negligence or wilful misconduct, the liability should remain limited, while unlimited in the case of criminal acts. 2 Since any proof of such an intent is extremely difficult, this would in practice exclude the case of unlimited liability. In any case, there is only limited liability however careless the operator may have been; thus to take off when in violation of safety

Rinck, op.cit., pp.410-11.

Ibid.

regulations or with knowledge of some engine trouble gives rise to only limited liability. Secondly, if a person wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it, his liability becomes unlimited (Art.12(2)).

Those provisions in Chapter II of the Convention relating to the limitation of liability are extended to the Australian aircraft engaged in international flights while flying over Australian territory, but not to aircraft of non-contracting States of the Convention which are engaged in trade and commerce between Australia and another country and in flight in Australia, partly because the operator of the non-contracting States would enjoy the benefit of limited liability without granting such benefit to the Australian aircraft, and partly because the limited liability system is closely related to the compulsory insurance system which is prescribed in the Convention only as between the contracting States.

<u>Domestic Flights:</u> There is no special legislation limiting the aircraft operators! liability for surface damage either in the States which enacted the <u>Damage by</u>

Ibid.

² Sec.17(3).

Aircraft Acts, or in the other States of Australia. In the United States, the limits established by the new Rome Convention (to which the United States has not adhered) is greater, in practically every case, than the limits imposed by the States either in workmen's compensation death recoveries or under wrongful death statutes. The situation seems to be still more so in Australia; although the Wrongs Act or similar legislation of the States has no limitation on the recoverable amount, the Workmen's Compensation Act of the States fixes the awards according to the nature of death or injury, which are far lower than those under the Convention. The Civil Aviation

Davis, op.cit.,pp.580-3.

N.S.W.: Compensation to Relatives Act, 1897-1953.

Vic. : Wrongs Act, 1958 (Part III).

Q'ld.: Common Law Practice Acts, 1867-1940, s.12 ff.

S.A.: Wrongs Act, 1936-59, Part II.

W.A. : Fatal Accidents Act, 1959.

Tas.: Fatal Accidents Act, 1934, as amended in 1943.

A.C.T.: Comp. (Fatal Inj.) Ord., 1938.

Cf. Chapter VIII, ante.

For example, under the Workmen's Compensation Ordinance (A.C.T.), where the death of the workman results from the injury and if the workman leaves any dependants wholly dependent upon his earnings, the amount of compensation is £A3,000 and, in addition, an amount of £A100 in respect of each such child (under the age of 16) (First Schedule).

Act, 1949, 1 of the United Kingdom sets out provisions concerning limitation of liability for surface damage, by which the owner's liability to pay damages by reason of the loss or damage is limited in accordance with the provisions of the Fifth Schedule of the Act, the limits of liability varying according to the description of aircraft; but the provision has not yet been brought in force.

(2) Security for Operators! Liability:

International Flights: (i) 'Rome' Flights: The insurance system to secure operators' liability in the international sphere traces back to the 1933 Rome Convention and 1938 Brussels Protocol, but, for the present purposes, it will be enough to examine the relevant provisions of the 1952 Rome Convention. The system of liability would be worth little if an operator turns out to be insolvent, and therefore those provisions relating to insurance &c. are 'an essential adjunct to the strict liability philosophy underlying the Convention'. The

Sec.42.

²

Rinck, op.cit., p.413.

Poulton, op.cit., p.31.

outline of the security system under the Rome Convention is as follows:

(Financial Responsibility of the Insurer). contracting State may require that the operator of an aircraft registered in another contracting State be insured in respect of his liability for damage by means of insurance up to the limits prescribed by the Convention. Insurance is to be accepted as satisfactory if it conforms to the provisions of the Convention and if it has been effected by an insurer (including a group of insurers) authorized to effect such insurance under the laws of the State where the aircraft is registered or of the State where the insurer has his residence or principal place of business, and whose financial responsibility has been verified by either of those States. 2 The overflown country is given safeguards against such financial irresponsibility on the part of foreign insurers; 3 one of these safeguards is that any contracting State may refuse

Art.15(9).

It is submitted that many States, first of all the United States, claimed the right to verify for themselves the solvency of each foreign insurance company (Rinck, op.cit., p.413, citing de Juglart, 1953 Revue Generale de l'Air 353, note 10, at 133).

See Art.15.

to accept the insurer as financially responsible if a final judgment remains unsatisfied by payment in the currency of that State (Art.15(2)(b)). It is said:

Another matter of great importance in relation to insurance is the provision of the appropriate currency to meet claims. Many attempts have been made in the past to devise some machinery which would guarantee that the claims of victims would in all cases be met in their national currency. The new Convention has, on this point, adopted a realistic approach. It was recognized that national treasuries could hardly be expected, in relation to this particular matter of damage caused by aircraft, to give an unconditional assurance, in the convention, that the necessary currency would be made available. On the other hand, it is well known that, in practice, commercial selfinterest, founded on the desire to obtain or retain insurance business, secures that, in fact, claims are always met. It has, therefore, been thought sufficient to provide that if any claim is not satisfied by payment in the currency of the State where the claim is made, the insurer in question may be regarded as not financially responsible.

By Art.27, contracting States are obligated to facilitate, as far as possible, payment of compensation under the provisions of the Convention in the currency of the State where the damage occurred.

(Certificate of Insurance). The State overflown may also require that the aircraft shall carry a certificate issued by the insurer certifying that insurance has been

Parliamentary Debates, Vol.H. of R. 21, p.1684.

effected in accordance with the provisions of the Convention, and specifying the person or persons whose liability is secured thereby, together with a certificate or endorsement issued by the 'appropriate authority in the State! where the aircraft is registered or in the State where the insurer has his residence or principal place of business certifying the financial responsibility of the insurer. 1 The phase 'appropriate authority' in a State includes the appropriate authority in the highest political subdivision thereof which regulates the conduct of business by the insurer (Art. 15(9)). This wording was adopted so as to satisfy the United States objection that, if a certificate of verification of the insurer's financial responsibility be issued by a 'State' (in the sense of a 'nation-State'), it creates problems in the federal structure of the United States where the authorities of

Any requirements in those respects must be notified to the Secretary General of the ICAO who shall inform each contracting State thereof (Art. 15(8)). This certificate need not be carried in the aircraft if a certified copy has been filed with the appropriate authority designated by the State overflown or, if the ICAO agrees with that Organization, which furnishes a copy of the certificate to each contracting State. The State which has issued or endorsed a certificate must notify the termination or cessation, otherwise than by the expiration of its term, of the insurance or other security to the interested contracting States as soon as possible. The Convention prescribes several rules relating to the measures to be taken in the case of change of operators (Art.16(3)).

the several States regulating insurance would have to issue the required certificates. 1

(Defences of Insurer) The insurer or other person providing security for the liability of the operator may, in addition to the defences available to the operator, and the defence of forgery, set up only the following defences against claims:

- (a) that the damage occurred after the security ceased to be effective;
- (b) that the damage occurred outside the territorial limits provided for by the security, unless flight outside of such limits was caused by force majeure, assistance justified by the circumstances, or an error in piloting, operation or navigation.

The insurer cannot avail himself of any grounds of nullity or any right of retroactive cancellation with regard to the policy underwritten, but the insurer or guarantor has a right of recourse against any other person.

(Other Securities) The Convention enumerates the following three securities other than insurance which must be deemed satisfactory:

(a) a cash deposit in a depository maintained by the contracting State where the aircraft is registered or with a bank authorised to act as a depository by that State;

¹ Cf. E.G. Brown, op.cit., p.433. 2 Art.16(1).

- (b) a guarantee given by a bank authorised to do so by the contracting State where the aircraft is registered, and whose financial responsibility has been verified by that State;
- (c) a guarantee given by the contracting State where the aircraft is registered, if that State undertakes that it will not claim immunity from suit in respect of that guarantee.

The requirements as to certificate and security amount are the same as in the case of insurance.

The <u>Civil Aviation (Damage by Aircraft) Act</u> 1958 to give effect to the Convention leaves these requirements concerning security for operators' liability to be carried out by the regulations to be made by the Minister (sec.15(1)), the reasons for which were stated in the Parliament:

There are a number of specific procedural and evidentially matters which could not be conveniently provided for in the bill or the need for which will only be determined in the light of experience. The regulation-making power expressly includes matters of this nature. For example, Chapter III of the Convention, as we have seen, leaves it to each State to decide whether it will require foreign operators to insure against liability under the Convention. If a State so decides, its insurance requirements must comply with principles laid down in the Convention. In the event of Australia requiring such matters a number of detailed rules will be necessary in relation to such matters as the

Parliamentary Debates, Vol. H. of R. 21, p. 1685.

carriage in aircraft of documents relating to insurance, the exercise of discretionary powers to decide whether the insurance effected is satisfactory or whether certificates will be required from appropriate authorities as to the financial stability of an insurer, and the form of documents required in connexion with insurance. These requirements can be prescribed by the regulations.

(ii) 'Non-Rome' Flights: The aforesaid rules of the Convention concerning security of operators: liability do apply to the damage caused by aircraft engaged in international flights other than those governed by the However, the Minister is empowered to Rome Convention. require operators engaged in 'Non-Rome' Flights to be adequately insured (sec. 19); the Minister may, by notice in writing, prohibit a person from operating an aircraft engaged in such flights unless there is in force a certificate in writing issued by the Minister certifying that that person is insured to the satisfaction of the Minister against liability to an extent corresponding to the extent to which an operator may be required to be insured under Chapter III of the Convention. This power has never been exercised.

Cf. A letter from the Assistant Crown Solicitor (Civil Aviation) of the Commonwealth of Australia, dated on 13 October 1965, to the present writer. The Assistant Crown Solicitor points out also that the Australian authorities have accepted foreign airlines into Australia as being qualified to meet any claims for surface damage, in view of the fact that in practice most of well-established international airlines insure against their liability for such risks.

Domestic Flights: Truly the rapid progress of aviation has brought about a corresponding development in the insurance market, and progress in aircraft insurance is essential to the progress of civil aviation. Various types of civil liability involved in air transport are imposed upon the aircraft owners or operators by the statutory provisions either of the Commonwealth or of the States, or by common law. The Commonwealth enactments on those civil liabilities do not provide for any control over aviation insurance, except where in the case of 'international' ('Rome') flights causing damage to the third parties on the surface a regulation-making power is given to the Minister which has not so far been exercised. In fact, aviation insurance covering domestic flight is governed generally by common law rules in respect of operation, effect and performance of insurance contracts, and partly by relevant general legislation relating to insurance companies. 2 Since the Civil Aviation (Damage by Aircraft) Act 1958 does not extend the rules of the Convention to domestic flights, there is no extent and

See e.g. Shawcross and Beaumong, pp.538-51.

As to the Australian cases and statutes concerning insurance, see Halsbury's Laws of England, third ed., Australian Pilot, Vols. 17-23, p. 307, et seq.

limitation of liability, so that an injured party; is put in an unsatisfactory position because while liability of the defendant is unlimited his financial resources certainly are not. 1 There is some compulsory insurance legislation in Australia, such as, workers' compensation insurance or motor vehicle (third party) insurance, but these are found not in a single Commonwealth statute but in the several States statutes. Apart from the economic and social problems involved, the question of introducing a compulsory insurance system in respect of domestic aviation involves constitutional problems. Sec.51(xiv)of the Commonwealth Constitution gives the Commonwealth Parliament power to make laws with respect to 'insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned. case of banking, this power extends to any form of insurance, covering every phase thereof, throughout the Commonwealth, save and except insurance carried on by a State Government and confined to the limits of the State.2 It has been argued that 'insurance' in sec.51(xiv) merely

McNair, op.cit., p.269.

Wynes, Legislative, Executive and Judicial Powers in Australia, third ed., p.198.

refers to the regulation of insurance contracts in their ordinary sense, and does not contemplate a compulsory levy or tax on the community for the purpose of a national insurance pool. 1 However, compulsory aviation insurance cannot in any sense be compared with 'social services' insurance legislation, for it affects only small groups of aircraft owners or operators and it does provide for 'insurance' in its ordinary commercial sense. It is now well established that sec.51 is not confined to regulation. 2 Moreover, with or without the aid of the 'insurance' power, the constitutional basis for justifying this kind of insurance should be sought in the inter-State commerce power for the normalization and effective control of inter-State aviation in Australia. unlikely that this imposition of compulsory insurance system would be held to impair the freedom of inter-State commerce as guaranteed in sec. 92 of the Constitution. In view of the fact that there is no compulsory insurance system in aviation, it is not proposed to examine this

Cf. M.E.L. Cantor, National Insurance in its Constitutional Aspects, 2 A.L.J. 219. It is submitted that this question has been solved in effect by the introduction of paragraph (xxiiiA) relating to 'social services' into sec.51 (Wynes, op.cit., p.199n).

Melbourne Corporation v. Commonwealth (1947) 74 C.L.R.31.

subject further; suffice it to say that the aircraft owners or operators voluntarily insure and ordinary law of insurance policies governs the rights and liabilities of the parties. The situation is the same in the United Kingdom where the limitation of liability and compulsory third party insurance was embodied in the <u>Civil Aviation</u>

<u>Act</u> 1949 (sec.42 et seq.) but has not been put into force.

3. Action against Operators

International Flights:

(i) Subjects of Action: The Convention is entirely silent as to who can be a claimant for damages; the Commonwealth Act supplements on this point by providing that the action to enforce the liability may be brought by the personal representative of the deceased person or by one of the persons who suffered damage by reason of the death, but only one action shall be brought in Australia in respect of the death or any one person and the action, by whomsoever brought, shall be for the benefit of all persons for whose benefit the liability is enforceable who are resident in Australia or, not being resident in

Australia, express the desire to take the benefit of the action. 1

However, with respect to the person who is made liable, the provisions of the Rome Convention are more precise than those of the Warsaw Convention. has already been made as to the 'operator' and 'unlawful user'. The person suffering damage may furthermore bring a direct action against the 'insurer' or 'guarantor' in certain cases. In the event of the death of the person liable, an action lies against those legally responsible for his obligations. The mutual rights and liabilities of operators and other persons in a plane who actually caused the damage in question - for example, a crew member or a passenger - is left to be regulated by the national law concerned. The Convention does not apply to damage caused by military, customs or police aircraft, but it is recognized that it applies to the aircraft engaged in commercial air services

Sec.11(2). Cf. similar provisions in the <u>Civil Aviation</u> (Carriers' Liability) Act 1959. See also <u>Feher v. B.C.P.A.</u> (1957) 74 W.N. 447.

Cf. Art. 16(5).

The Convention expressly provides (Art.10) that such a right of indemnity is not inconsistent with its provisions.

operated by a State or public entity, so that the State may become a subject of compensation for damage; the Commonwealth Act provides that in such a case the contracting State is deemed to have submitted to the jurisdiction of a Court in Australia in which an action was brought, but this does not authorize the issue of execution against the property of a contracting State. 1

(ii) Jurisdiction: Actions may be brought only before the courts of the contracting State where the damage occurred. The selection of the competent national court is left to the national laws of each State in order to make it easier for them to adhere to the Convention. However, when read together with Art. 30 defining the territory of a State! as the metropolitan territory of a State and all territories for the foreign relations of which that State is responsible, it might be possible to sue the operator in far distant courts, even in the same territory. It is submitted that this situation can only be avoided if such a State has a national procedural law according to which the court in that part of the State where the accident happened has an exclusive

Sec.13.

competence of jurisdiction. In order to make this 'single forum' system more effective, the Convention imposes upon a contracting State two procedural obligations; firstly, each contracting State must take all necessary measures to ensure that the defendant and all other parties interested are notified of any proceedings concerning them and have a fair and adequate opportunity to defend their interests, and secondly each contracting State 'so far as possible' must ensure that all actions arising from a single incident are consolidated for disposal in a single proceeding before the same court. To meet those express obligations, the Commonwealth Act sets out several supplementary provisions (secs. 9 & 10) concerning the single forum and consolidation of actions within its judicial system, which are also made applicable to international flights other than 'Rome' flights. There is one exception to the single forum system: actions may also be brought before the courts of any other contracting State by agreement between any one or more claimants and any one or more defendants, but such proceedings cannot have the effect of precluding in any way the rights of other persons who bring actions in the

Cf. A Toepper, Comments on Article 20 of the Rome Convention of 1952, 21 J.A.L.C. (1954) p.422.

State where the damage occurred. This provision for the agreed jurisdiction is said to be practically worthless if it is read together with Art.20(9) providing that the court to which application for execution is made shall refuse execution of any judgment rendered by a court of a State other than that in which the damage occurred until all the judgments rendered in that State have been satisfied. The parties may also agree to submit disputes to arbitration in any contracting State.²

(iii) Recognition and Enforcement of Foreign

Judgments: Art.20(4)-(12) established comprehensive (but complicated) rules for the recognition and enforcement of foreign judgments in respect of surface damage caused by aircraft to which the Convention applies.

Where any final judgment (including a judgment by default) is pronounced by a competent court on which execution can be issued according to the procedural law of that court, the judgment is enforceable upon compliance with the formalities prescribed by the 'laws

Toepper, op.cit., p.423.

As to the question whether all the parties must consent to the agreement for arbitration or not, <u>Toepper</u> thinks that arbitration can take place between a single party suffering damage and an operator (Toepper, op.cit., p.424).

of the contracting State, or of any territory, State or province thereof: (the phrasing having been adopted apparently for the purpose of some federal countries), where execution is applied for;

- (a) in the contracting State where the judgment debtor has his residence or principal place of business, or
- (b) if the assets available in that State and in the State where the judgment was pronounced are insufficient to satisfy the judgment, in any other contracting State where the judgment debtor has assets. 1

Then, the foreign judgment must be enforced unless, broadly speaking, one of the following five exceptions is proved;

- (a) if the defendant was not given a fair opportunity to defend his interests,
- (b) if there was a final and conclusive judgment in respect of the same cause of action.
- (c) if the judgment has been obtained by fraud.
- (d) if the foreign judgment is contrary to the public policy of the other State, or,
- (e) if the right to enforce judgment is not vested in the person by whom the application for execution is made.

Art.20(4). This paragraph gives an order of priority in which execution can be levied, so that the plaintiff is not allowed to levy execution immediately on the defendant's assets anywhere. An application for execution of a judgment must be made within 5 years from the date when such judgment became final (Art.20(12)). The merits of the case may not be reopened in proceedings for execution of a judgment (Art.20(6)).

If the execution of any judgment is refused on any of the grounds (a), (b) or (d), the claimant is entitled to bring a new action before the courts of the State where execution has been refused, in which case the new judgment may not increase the total compensation above the limits of liability under the Convention and the previous judgment shall be a defense to the extent to which it has been satisfied. At the same time, the previous judgment ceases to be enforceable. The Convention provides further for other procedural matters, including payment of costs, and relation of costs to the quantum of judgments.

In order to carry out or give effect to this international obligation, various arrangements of the judicial system within the Commonwealth are necessary; for example, specification of competent courts in Australia, procedure, domestic jurisdictional problems (i.e., conferring original jurisdiction on the High Court, investing any Court of a State with federal jurisdiction, or conferring jurisdiction on a court of a Territory of the Commonwealth), registration system for judgments, competence of the Court to refuse registration of the judgment upon certain grounds prescribed by the Convention, and prevention of the use of actions or proceedings as a

means of evading the limitations (provided by the Convention) on rights of execution of the judgments.

A regulation-making power is specifically granted to the Minister for such matters arising from Art.20 of the Convention.

These provisions are only applicable to damage caused by aircraft to which the Rome Convention applies, <u>not</u> to other types of aircraft engaged in international flights.

(iv) Procedure: The limitation of action is two years from the date of the incident which caused the damage. However, if a claimant has not brought an action to enforce his claim or if notification of such claim has not been given to the operator within a period of six months from the date of the incident, the claimant is only entitled to compensation out of the amount for which the operator remains liable after all claims made within that period have been; met in full. The grounds for suspension or interruption of such period is to be determined by the law of the court trying the action; in any case the right to institute an action is to be extinguished on the expiration of three years from the date of the incident which caused the damage. Commonwealth Act, those provisions concerning procedural matters are made applicable to damage caused by Australian aircraft engaged in its international flight within

Australian territory, but not to damage caused by aircraft

of non-contracting State so engaged.

Domestic Flights

- (i) Subjects of Action: The State Damage by Aircraft Acts are silent as to who can be a claimant for damages, and, therefore, as in other States having no legislation, common law rules of action modified by enactments similar to Lord Campbell's Act would be applicable in the case of death of the person; 1 by this legislation, action is maintenable against any person causing death through wrongful act, neglect, or default, notwithstanding the death of the person injured. Mention has already been made elsewhere of the persons made liable under the State Damage by Aircraft Acts and under the common law rules.
- (ii) Jurisdiction: The conflict-of-law rule governing torts is the law of the place where the injury occurred, namely, the law of the State where the aircraft was flying over. An action will normally be brought before

N.S.W.: Law Reform (M.P.) Act 1944;

Vic. : Admin. & Prob. Act, 1958, sec.29;

Q'ld.: Common Law Practice Amend. Act, 1940;

S.A. : Survival of Actions Act, 1940; W.A. : Law Reform (M.P.) Act. 1941:

W.A. : Law Reform (M.P.) Act, 1941; Tas. : Adm. & Probate Act, 1935-47, s.27;

A.C.T.: Law Reform (M.P.) Ordinance, 1955, Part II.

the courts of the State where the plaintiff suffering damage lives or his property situates. Although there are numerous advantages in the single forum system on the inter-State level, this can hardly be attained by the Commonwealth legislative intervention unless the broadest concept of the 'incidental' power of the federal 'commerce' power were relied upon. But, with respect to actions arising from the international flights other than 'Rome' flights, which are quite independent of the obligations imposed upon by the Convention, the Commonwealth applying its own rules of liabilities, &c., has relied upon the commerce power for attaining the single forum and consolidation of actions. Apart from the exercise of the commerce power, the Commonwealth Parliament may be able to designate a law of a particular State for the settlement of claims for damages under the 'full faith and credit' powers, in respect of the damage caused not only by inter-State aircraft but also by intra-State aircraft, if the claim relates to any conflict-of-law elements within the Federation. But it is assumed that the commerce power can attain the uniformity of applicable principles and rules in this legal field under the Commonwealth legislation, at least insofar as the damage caused by inter-State flights is concerned.

(iii) Recognition and Enforcement of Foreign Judgments: With respect to damage caused by 'non-Rome' flights and purely domestic flights, ordinary rules of conflict-of-law govern the recognition and enforcement of other States' judgments. However, the matter is largely affected with by the Commonwealth, Service and Execution of Process Act 1 and State and Territorial Laws and Records Recognition Act. 2 Sec. 3(h) of the latter Act defines 'judgment' as including 'any judgment, decree, rule or order given or made by a Court in any suit whereby any sum of money is made payable or any person is required to do or not to do any act or thing other than the payment of money. By sec. 21(2), the judgment, after registration required by the Act, has the force and effect of a judgment of the court in which it is so registered. There is no provision excluding a judgment not final from the scope of the Act, but the American pattern of judicial experiences will be followed - that is, judgments of a penal nature or not final are generally regarded as exceptions to the operation of the full faith and credit requirement, whereas judgments on

No.5 of 1901.

[~] No.11 of 1901.

taxation liability or not for a sum of money are not exceptions thereto. 1 As regards judgments obtained by fraud, it is submitted that when the decree could be made the subject of an attack in collateral proceedings in the home State, on the score of fraud, such fraud could be set up as a defence in the proceedings in the second State as were it otherwise, the home State judgment would be given greater credit than it would possess at home.² However, while the American decisions show that full faith and credit has not been regarded as precluding an inquiry into jurisdiction and jurisdictional facts, the Harris Case has expounded the Australian rule that, in the absence of such a constitutional restriction as the due process clause, a judgment having a final and conclusive force in the original State should be recognized and cannot be challenged in other States on the ground that it had been pronounced without jurisdiction, if that challenge was no longer open in the State of origin.

Cf. E.I. Sykes, Full Faith and Credit - Further Reflections, Res Judicatae, 1954, Vol.6, p.354, et seq.

Sykes op.cit., p.356, citing Levin v. Gladstein, 1906, 142 N.C. 482.

Harris v. Harris (1947) V.L.R. 44.

This interpretation is derived from a rather literal approach to sec.18 of the <u>State and Territorial Laws and Records Recognition Act</u> which provides:

All public acts, records, and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken.

The most difficult problem will be the recognition and enforcement of judgments contrary to public policy of the forum, but, as we have already seen in Chapter V dealing with the scope of the constitutional power of full faith and credit within the Commonwealth, it is to be determined ultimately by weighing the relative interests of the two disputing States, a final arbiter being the High Court; the Commonwealth Parliament can be a policy-maker in fixing the measures for such considerations. Another difficult problem will be the procedural requirements as to the service of process and enforcement of judgments, which are reserved by the States. The Service and Execution of Process Act gives a power to make rules of court to carry into effect the provisions of the Commonwealth Act. This rule-making power is vested in

But sec.27(2) of the Act provides: 'Until such rules have been made and as far as any made do not provide for the circumstances of any particular case, the practice and (cont. next page)

the Supreme Court of each State or such of the judges as may make rules of court in other cases. Some such doubts based on Le Mesurier v. Conner exist as to the constitutionality of federal interference with State power to make rules of court, but the matter relates to the nature and scope of incidental powers of the Commonwealth powers. There is room for sec. 109 of the Constitution to operate where the procedural rules and requirements made by the forum impose such burdens as to nullify the objectives of federal regulation of the recognition and enforcement of the judgments of sister-States.

In short, the rules of the Rome Convention concerning this topic are not incompatible with the Australian constitutional and judicial system, if similar rules were adopted in the sphere of domestic flights. Owing to the comprehensive powers of the Commonwealth power based upon the full faith and credit clause, a more speedy and fair trial of suits for ground damage caused by aircraft can

^{1 (}cont.)
procedure of the State in which the process is issued or
in which the service is effected or the execution is
enforced respectively shall apply as far as possible.

Part V of the Act.

^{(1929) 42} C.L.R. 481.

be provided by the effective control of the Commonwealth within Australia than under the Convention in which national sovereignty is apt to be claimed in retaining the public policy or procedural laws concerning recognition and enforcement of foreign judgments.

(iv) <u>Procedure</u>: At present, there is no legislative provision concerning procedural matters in suing the aircraft operator for his liability for surface damage. These matters are entirely subject to the judicial proceedings of the States and of the Territories, respectively. An action arising from the <u>Wrongs Act</u> is subject to a fixed time of commencement.

To sum up:

(1) In this modern age of aviation when aircraft fly often across many States' borders in a short time, it is against one's sense of justice if damage relations between aviators (owners or operators of aircraft) and persons (or property) on the ground be regulated by different principles and rules of liability under various national jurisdictions. Unlike the Warsaw Convention, the Rome Convention has not received wide support, but the need for the uniformity of relevant rules is important in this

E.g., under the <u>Wrongs Act</u> (South Australia), the time limit is one year (sec.21).

field no less than in international carriage by air. The present Australian legislation on this subject is lacking both in the uniformity of the law of several jurisdictions and in the consolidation of relevant rules in legislation. The applicable rules differ in accordance with whether the aircraft was at the very moment of an accident engaged in international flights (divided further into two categories - 'Rome' and 'non-Rome' flights) or in inter-State or intra-State flights. They also differ in accordance with which Australian State's territory the aircraft was then flying over. This unreasonableness is further aggravated by the fact that third parties on the surface who are involved in the accident against their will, must in some cases or places establish negligence of an operator but in other cases need not prove negligence; plaintiffs may or may not be compelled to insure, and so on. Whether and how far the law should be made uniform in this field would depend upon careful examination of economic and social factors in the Australian aviation industry, but, from the legal points of view, some remarks can be drawn from the foregoing discussions on the main provisions and problems of the law with respect to the extent of the Commonwealth legislative powers of attaining such uniformity and the

possible impacts of the rules of the Convention upon the domestic legal system.

The wide scope of the Commonwealth tcommercet power in respect of this field needs no repetition in order to deny the presumption that the States should retain power to regulate the legal relations of liability for surface damage as between aircraft owners or operators and third parties resident in the respective territories of the States. The power to perform the investigation of accidents and incidents and the other powers relating to safety of aircraft operations are exclusively vested in the Commonwealth authority. Collecting evidence of the causes of accidents and incidents is a function of the Commonwealth aviation administration, and various administrative procedures have been established for these purposes under Commonwealth supervision. Aided by such functions and technical knowledges in dealing with the subject, the Commonwealth is in a better position to determine what are the most suitable rules and policies for liability problems. This suggests that the Commonwealth should be empowered to deal with damage cases involving every aircraft including even aircraft solely engaged in intra-State operations.

Regs. 270-97. See also Appendix II, post.

The introduction of absolute liability on Rome Convention principles would not cause serious impacts upon the present Australian legal system, where similar statutory rules are embodied in four jurisdictions and some justifications are provided in common law analogies. However, the exception to the principle whereby the operator is given complete immunity from claims to compensation for the damage resulting from the mere fact of passage of aircraft through the airspace in conformity with existing air traffic regulations is, as we have seen, contrary to the State and Territory law in the two States and Territories which, have not adopted a statutory 'right to fly' provision, and is not completely in accord with the law of the four States which have the 'Damage by Aircraft Act! type of provision. It is possible that nevertheless the Commonwealth could supersede all these State provisions, at least in the field of interstate flight, by suitable legislation. But there seems little likelihood of its doing so and in any event the more extensive liability for damage under the four State Acts may be more in accord with Australian sentiment in these The most serious problems can be solved by the matters. adequate regulation of air traffic around aerodromes, by the proper selection of new aerodrome sites, or by just

compensation for the acquisition of easements of flight around such aerodromes.

- (4) In establishing uniform liability principle, a difficulty will probably arise from the law of New South Wales which has not adopted the apportionment of loss or damages in contributory negligence. It might be contended that the Commonwealth could at most lay down a rule that the Court may, in accordance with the law of the State, exonerate the operator (or the owner) wholly or partly from his liability. The possibility of attaining uniformity on this point depends upon the scope of Commonwealth incidental legislative powers. It is worthy of note that New South Wales seems to be prepared to adopt apportionment rules in respect of the carriers! liability for passengers and goods, keeping in step with other States in that respect.
- (5) Various arguments may be put forward as to whether the principle of limited liability should be introduced in this field of domestic law. It will be noted, however, that the liability of the Australian National Airlines Commission has been in fact limited for the past twenty years for the death or injury compensation arising from its domestic activities. An account should also be taken as to whether the rule of limited liability

should be based on the weight of aircraft or on the single-limit system in which ceilings are fixed in accordance with the nature of accidents. The limits should be fixed as high as possible; it is submitted that since there has been a steady decrease of accident rates in aviation, higher limits will not greatly affect the premiums for insurance against third party risks. 2

(6) A system of limited liability for both commercial and private planes, coupled with compulsory liability insurance to be established by federal legislation, was considered to be 'the most feasible and desirable solution of the aviation liability problem and would be in the best interest of aviation and the general public'. From the viewpoint of constitutional law, the Commonwealth could certainly provide for a compulsory insurance system to the extent of the interstate commerce power, and might be able to go further under the insurance power.

It is said that under the weight system there is not necessarily a proportion-relation between the 'weight' of aircraft and the 'gravity' of accident, nor between the 'weight' of aircraft and the compensation capacity of the aircraft owners (because several aircraft with different weights might be possessed by one company or person) - cf. Ikeda, op.cit., p.185.

Rinck, op.cit., p.409.

The so-called Sweeney Report, the 1941 proposal for a federal aviation liability act, cited from Billyou, Air Law, p.223.

(7) With respect to jurisdiction of actions and recognition and enforcement of foreign judgments, the Australian legislation need not necessarily follow the rules of the Rome Convention. Relying upon secs.77(iii), 51(xxiv) and (xxv) and 118 of the Constitution, some fruitful developments can be provided in federal aviation legislation on this subject.

CHAPTER X

Aircraft Crimes

The question as to which State should exercise jurisdiction over criminal offences committed on board an aircraft involves the broader subject of choice of law. The problem is so complicated and gives rise to so many views because aircraft pass at high speed over many States, each of which has under the present international law complete and exclusive sovereignty in the airspace above its territory. While a general rule may be that acts which are criminal under the law of a State are only criminal if done within the State, the territoriality of criminal law is not an absolute principle of international law and by no means coincides with territorial sovereignty, because all or nearly all systems of law extend their action to offences committed outside the territory of the State, in ways which vary from State to State. There is

See, S.S. Lotus Case (1927) Permanent Court of International Justice, (P.C.I.J.), Series A, No.10, p.20; Edward Hambro, The Case Law of the International Court, 1952, p.85; for a brief summary of this case and judgment, see Lauterpacht, Oppenheim's International Law, seventh ed., vol.1, pp.300-02.

much argument about sec.62(1) of the U.K. Civil Aviation Act, 1949, which provides that any offence committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be!. McNair takes the wider view that, notwithstanding the narrow wording of the section, a court would apply English criminal law to crimes committed in aircraft as contemplated by the section in all respects as though the offence had been committed in England. Upon this view, the effect of the section is not limited to question of venue but is to render amenable to trial, wherever in the United Kingdom the offender may be, any person, whether British, foreign or stateless, who commits any offence on board an aircraft registered in the United Kingdom, or contravenes any of the relevant statutory provisions on civil aviation. This is not only to assert a total application of 'jurisdiction' but also application of the law of flag in the choice of applicable laws. In R. v. Martin, however, an English court construed the section

^{12, 13} and 14 Geo. VI, c.67.

McNair, op.cit., p.121. This position is maintained in the third edition of the same book.

^{(1956) 2} W.L.R. 975; 1956 U.S. Av. Rep. 141; (1956) 2 Q.B. 272; (1956). All E.R. 86.

strictly, and held that the section did not apply to a statutory offence (i.e., in this case, a conspiracy to contravene the provision of the Dangerous Drugs Act, 1951, and the Dangerous Drugs Regulations, 1953) which was local and not universal in character. The Court, however, said that it did not follow that the same principle necessarily applied to common law crimes which were offences against the moral law (e.g., murder and theft), and were not thought of as having a territorial limit. In R. v. Navlor, where the accused on a British aircraft in flight over the high seas stole three rings, it was argued that that was not an offence known to English law for which the accused could be tried in England. Court followed McNair's wider approach, saying that any act or omission which would constitute an offence if done in England is made an offence if done on a British aircraft, subject to this, that if the offence in question is clearly one of domestic application only, then, as in Martin's Case, section 62 does not apply.

The Legal Committee of I.C.A.O. prepared a draft convention at Rome in 1962, which related to the jurisdiction of states to deal with such offences and also

See also Note, 72 Law Quarterly Review 318 (1956), by Prof A. Goodhart.

^{(1961) 3} W.L.R. 898; 1962 U.S. Av. Rep. 306.

the powers of the aircraft commander to deal with persons who committed offences during international flights or acted or threatened to act in a manner which would jeopardize the safety of the aircraft. An international diplomatic conference convened by I.C.A.O. in Tokyo adopted this 'Convention on Offences and Certain Other Acts Committed on Board Aircraft' on 14 September 1963; the Convention is generally known as the Tokyo Convention.

Twelve ratifications are needed to bring the Convention into force, but there has been so far only one ratification, by Portugal. Hence, the matter is still largely governed by the national laws which vary from State to State. In these circumstances, it is intended here only to point out the main provisions and objects of the Convention.

With respect to the question of 'jurisdiction', the State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board; each contracting State is obligated to take such measures as may be necessary to establish its jurisdiction as the State of registration. However, the Convention does not exclude any criminal jurisdiction exercised in

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Art.21.

² Art.3(1) and (2).

accordance with national law, even perhaps that of a non-contracting State, but special obligations are imposed upon contracting States under Art.4. Art.4 provides that other contracting States (than a contracting State in which the aircraft is registered) may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:-

- (a) the offence has effect on the territory of such State;
- (b) the offence has been committed by or against a national or permanent resident of such State;
- (c) the offence is against the security of such State;
- (d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;
- (e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.

By Art.16, offences committed on aircraft registered in a contracting State are treated for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of

¹ Art.3(3).

the State of registration of the aircraft; hence, if the offender be or has taken refuge in a country which is party to the Convention and which is also a party to an extradition treaty with the country of registration, under which the offence or act in question is an extradition crime, the offender can be duly extradited. So the Convention renders it unlikely that there will be no State legally competent and ready to apprehend and try the offender, and also removes certain technical impediments relating to prosecution or extradition. These provisions apply in respect of offences committed or acts done by a person on board any aircraft registered in a contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.

With respect to powers of the aircraft commander,

Art.6 provides that the aircraft commander may impose

upon offenders reasonable measures including restraint

which are necessary to protect the safety of the aircraft,

Cf. International Legal Notes, 39 A.L.J. pp.33-34, by J.G. Starke.

For the purposes of the Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends (Art.1(3)).

or of persons or property therein, or to maintain good order and discipline on board, or to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of the Convention. By Art. 6(2), the assistance of the crew or passengers may be obtained for the restraint of the offender, and in certain cases a crew member of passenger may take action which is immediately necessary for the safety of the aircraft, or persons or property abroad. The Convention provides further for the continuance of such measures of restraint (art.7), disembarkation of offenders in the territory of any State in which the aircraft lands (Art.8), delivery of offenders to the competent authorities of any contracting State in the territory of which the aircraft lands (Art.9), protection of the aircraft commander, crew, and passengers from any proceedings arising out of action taken by them under the Convention (Art.10). provisions do not apply to offences and acts committed or about to be committed by a person on board an aircraft in flight in the airspace of the State of registration

Notwithstanding Art.1(3), an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the provisions of Chapter III continue to apply with respect to offences and acts committed on board until competent authorities of a State take over responsibility for the aircraft and for the persons and property on board (Art.5(2)).

or over the high seas or any other area outside the territory of any State unless the last point of take-off or the next point of intended landing is situated in a State other than that of registration, or the aircraft subsequently flies in the airspace of a State other than that of registration with such person still on board.

The Convention deals with the 'hijacking' of aircraft (Art.11): When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed. contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft; the contracting State in which such aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession. Convention provides also for powers and duties of States for procedural problems, such as disembarkation or delivery of offenders, etc. It is worthy of note that, if contracting States establish joint air transport operating organizations or international operating agencies, which operate aircraft not registered in any one State, those States shall, according to the circumstances of the case,

designate the State among them which, for the purposes of the Convention, shall be considered as the State of registration. The Convention does not apply to aircraft used in military, customs and police services. 2

Although Australia attended the Tokyo Conference, it has not signed nor ratified the Convention. However, the Commonwealth passed the <u>Crimes (Aircraft) Act</u> 1963³ dealing with the subject immediately after the Tokyo Conference. The Commonwealth Act deals in Part II with crimes on board aircraft and in Part III with crimes affecting the aircraft themselves. As with most of the Commonwealth civil aviation legislation, the scope of the Act is limited to aircraft engaged in the flights within federal jurisdiction; that is to say, the Act does not apply to aircraft which are in wholly and exclusively intra-State flights. Some complementary legislation by States will be necessary for the regulations of aircraft engaged in such flights.

Victoria, Queensland and Western Australia have already passed legislation to create offences closely related to

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Art.1(4).

³ No.64 of 1963.

those created under the Commonwealth Act. However, the terms and conditions under the States' legislation amending their own criminal codes differ from State to State and are by no means identical with those under the Commonwealth Act.

Part II relating to crimes on board aircraft applies to any aircraft (including a foreign aircraft) that -

- (a) is engaged in a flight between two States in the course of trade and commerce with other countries or among the States;
- (b) is engaged in a flight within a Territory, between two Territories or between a State and a Territory;
- (c) is outside Australia while engaged in a flight that commenced in Australia; or
- (d) is engaged in a flight between a part of Australia and a country or place outside Australia.

The Part also applies to -

- (a) an Australian aircraft² that is engaged in a flight wholly out of Australia; and
- (b) a Commonwealth aircraft or a defence aircraft that is engaged in any flight, including a flight wholly out of Australia.

Vic.: Crimes (Aircraft) Act, 1963 (No.7088). Q'ld.: Criminal Code Amendment Act 1964 (No.14). W.A.: Criminal Code Amendment Act, 1964 (No.53).

^{&#}x27;Australian aircraft' means - (a) an aircraft registered or required to be registered in accordance with the <u>Air Navigation Regulations</u> as an Australian aircraft, (b) a Commonwealth aircraft, or (c) a defence aircraft (sec.3(1)).

Sec.7 establishes the principle that any act, which would be an offence against the laws of the Australian Capital Territory if it took place there, is an offence against the Act if committed on board an aircraft to which the Act applies. It should be noted, however, that conduct affected by the Act can be a crime both under the Commonwealth Act and under the Acts and Ordinances of the various States or Territories. Its legislative intention was explained in the Parliament:

The basic principle of law is that where an aircraft is flying above the territory of any particular country the law applicable to events occurring on board is the law in that country, that is, in the country immediately below the aircraft at the time. So that if one passenger in an aircraft assaults another whilst the aircraft is flying, for example, above Victoria, he is guilty of an offence against the laws of that State dealing with assaults: and this is so regardless of the nationality of the aircraft. That position remains the same even though the aircraft simply flies over Victoria without, on that particular flight, either landing or taking off in Victoria. This bill does not attempt to alter that position. The powers above their respective territories will remain unaffected.

The A.C.T. law consists of (a) laws of the Commonwealth in force in that Territory, (b) the <u>Crimes Act</u>, 1900 of the State of New South Wales, in its application to that Territory under the <u>Seat of Government Acceptance Act</u> 1909-38, s.6., as amended or affected by Ordinances from time to time in force in that Territory, (c) the <u>Police</u> Offences Ordinance 1930-61 of that Territory, as amended from time to time.

Parliamentary Debates, Vol.H of R. 39, 1963, at p.97, by Sir Garfield Barwick, Minister for External Affairs and Attorney-General.

The Commonwealth Government described it as a *policy decision! to allow State offences to run in duality with Commonwealth offences, while it maintains the views that the Commonwealth, if wished, could have by this legislation over-ridden State legislation insofar as State legislation relates to a flight within the federal jurisdiction. sec.21, prosecutions of an offence against the Act shall not be instituted except with the consent in writing of the Attorney-General or a person authorized by the Attorney-General, by writing under his hand, to give such consents. Hence, if the Commonwealth does not elect to prosecute in a case, the State concerned may do so. is evidenced further by sec.28 prohibiting the double conviction for the same act or omission: the section provides that where an act or omission of a person is both an offence against this Act and an offence under the law of a State or Territory and that person is convicted of either of those offences, he is not liable to be convicted of the other of those offences.

Perhaps, the only aviation case involving a conflict between Federal and State criminal law is an American case, Grace v. MacArthur, where the question before the

United States District Court, Eastern District of Arkansas (1959) 170 F.Supp. 442.

court was whether, for the purpose of service of summons, the defendant passenger on a commercial aircraft was within the territorial limits of the State of Arkansas over which the plane happened to be flying at a particular Having referred to a leading case of Smith v. New England Aircraft Co., Inc., 1 and others 2 which established the principle that the sovereign power and jurisdiction of a State was not confined to the ground but extended to an aircraft in the air flying over the territory of the State, the Court concluded that at the time the Marshall served the summons on the defendant, the plane and its passengers were within the 'territorial limits' of the State of Arkansas, so that the defendant's motion to quash service of summons upon him was denied. In doing so, the Court relied upon the Uniform Aeronautics Act, a version of which had been adopted by Arkansas, providing that all crimes, torts, and other wrongs committed by or against a pilot of passengers while in flight over the lands and waters of the State shall be governed by its laws, and that the question of whether damage occasioned by or

^{(1930) 270} Mass. 511, 170 N.E. 385, 389; (1930) U.S. Av. Rep. 1.

E.g., State v. Northwest Airlines, 213 Minn. 395, 7 N.W. 2d 691; Erickson v. King, 218 Minn, 98, 15 N.W. 2d 201, 204; People v. Katz, 140 Misc. 46, 249 N.Y.S. 719; United States v. One Pitcairn Biplane, D.C.N.Y., 11 F. Supp. 24, 25.

to an aircraft while over this State constitutes a tort, crime or other wrong shall be governed by Arkansas law. According to the Court's opinion, it did not follow from Congressional declarations of national sovereignty over the navigable airspace of the United States, or from Congressional regulation of air traffic, that the States had been denuded of all of their sovereignty and jurisdiction with respect to such airspace or that the same had been excluded from their boundaries or limits. No particular explanation will be necessary here for these points, but the important points are, first, that the State jurisdiction over crimes, etc., is valid only where it does not conflict with controlling federal legislation, and secondly that aircraft fly over the territory of a State with tremendous speed and height at a particular time. The Court mentioned the latter point:

It cannot seriously be contended that a person moving interstate commerce is on that account exempt from service of process while in transit, and we think it makes no practical difference whether he is travelling at the time on a plane, or on a bus or train, or in his own car. True, if he is going by plane the duration of his presence in the State will probably be much shorter than if he were availing himself of some other means of transportation, but that is a difference of degree only, not of principle.

Ark. Stats., Section 74-101 et seq.

It may be conceded, perhaps, that a time may come, and may not be far distant, when commercial aircraft will fly at altitudes so high that it would be unrealistic to consider them as being within the territorial limits of the United States or of any particular State while flying at such altitudes. But no such situation is here presented. We have an ordinary commercial aircraft, flying on an ordinary commercial flight in the ordinary navigable and navigated airspace of 1958....

Australian courts in pin-pointing the location of an aircraft flying in the air at a particular time, but we are more concerned with the former question as to whether the Commonwealth can deny, or cover the field of, State legislation or jurisdiction on aircraft crimes under its legislative powers. Although the Commonwealth has no express power of legislation with respect to criminal law and procedure as such, the Commonwealth may, in the exercise of the incidental power, enact penal provisions designed to secure effective operation of valid legislation. This must be qualified in the point that there is no reason why the actual existence of some legislation relating to a subject should be required before any matter can be called incidental to its execution. The Commonwealth

Wynes, op.cit., p.167.

See Chapter V, ante.

Crimes (Aircraft) Act has been enacted under various legislative heads in respect of foreign and inter-State commerce by air, Territorial aviation, etc., as aided by their incidental powers. That this Commonwealth legislation is squarely incidental, and important, to carry into execution these aviation powers is beyond doubts. have already seen, it can intrude into what is prima facie the province of the State constitutional powers, such as criminal jurisdiction of States; hence, it can specify an applicable law for an offence committed on an aircraft engaged in flights within the federal jurisdiction. However, as stated before, the Commonwealth legislation allows State offences to run in duality with Commonwealth offences; perhaps, the Act is primarily intended to be administered so as to deal with crimes that may be committed in international flights or in such circumstances that it is difficult to determine exactly where the acts constituting an offence were committed, such as, when the aircraft is at the time close to a border between two States.

In relation to certain aircraft flying outside

Australia, the Act gives extra-territorial effect to

Similar results may be attained by the exercise of the 'full faith and credit' power (sec.51(xxv)) of the Constitution, but here we do not develop the problem further.

Australian law in respect of aircraft registered in Australia, even if the law of some other country is, by virtue of the aircraft's presence in or over that country, also in force on board the aircraft. Australian law applies on board foreign aircraft while they are within Australia, but the Act goes further and applies Australian law to them while they are outside Australia when their flights begin or end in Australia. The questions which offences are indictable and what are alternative verdicts are also governed in accordance with the law of A.C.T. (secs. 8 and 9).

Part III relating to crimes affecting aircraft themselves applies to -

(a) an Australian aircraft (other than a Commonwealth aircraft or a defence aircraft) that is used principally for the purpose of prescribed flights, or is engaged, or is intended or likely to be engaged, in a prescribed flight;

In the case of flights beginning in Australia, if there is any doubt which law is to be applied (e.g., aircraft over the high seas), if no other law is applicable or if the authorities administering another applicable law are not willing or feel themselves unable to enforce it, there should be an Australian law ready to be applied. In the case of flights ending in Australia, a person who commits an offence whilst on board the aircraft might very well need to be dealt with in Australia, in the first instance at any rate, and legal provisions to enable this to be done are needed (Parliamentary Debates, op.cit., at p.98).

- (b) a Commonwealth aircraft;
- (c) a defence aircraft; and
- (d) a foreign aircraft that is in Australia, or is outside Australia while engaged in flight that commenced in Australia or was, at its commencement, intended to end in Australia.

'Prescribed flight' means a flight -

- (a) between two States, in the course of trade and commerce with other countries or among the States;
- (b) within a Territory, between two Territories or between a State and a Territory;
- (c) between a part of Australia and a country or place outside Australia; or
- (d) wholly outside Australia. 1

Various crimes affecting such aircraft are created; taking control of an aircraft without lawful excuse (sec.11(1)), seizing control of an aircraft, without lawful excuse, while there are persons on board (i.e., aircraft piracy, or 'hijacking') (sec.11(2) and (3)), destruction of aircraft (sec.12), destruction of aircraft with intent to kill persons or with reckless indifference to the safety of the life of persons (sec.13), prejudicing safe operation of aircraft with intent to kill persons, &c. (sec.15), assaulting, intimidating or threatening with violence a

l Sec.10(1) and (2).

member of the crew (sec.16), endangering safety of aircraft, to his knowledge (sec.17), taking or sending dangerous goods on aircraft (sec.18), threats and false statements to destroy, damage or endanger the safety of aircraft, or to kill or injure persons on board the aircraft (i.e., bomb hoaxes) (sec.19). We shall discuss the following points in relation to new crimes affecting aircraft under the Commonwealth Act.

Australian aircraft (other than a Commonwealth aircrafr or a defence aircraft) that is 'used principally for the purpose of prescribed flights, or is engaged, or is intended or likely to be engaged, in a prescribed flight'.

In view of the rigid distinction between inter-State and intra-State commerce adopted by the present High Court, some doubts might be felt as to the scope of the Commonwealth commerce power (sec.51(i) of the Constitution). In the present writer's opinion, however, a danger to an aircraft as such affects directly the safety of other aircraft, and so it is possible that the Court might hold

Unlike sec.17, the words 'to his knowledge' were omitted from sec.18. It is submitted that a person on board an aircraft may do something accidentally, whereas carrying dangerous goods on board an aircraft would be an act which he obviously intended to do (cf. Parliamentary Debates, op.cit., p.1499).

valid the Commonwealth regulation of crimes affecting <u>every</u> aircraft, as distinct from <u>usual</u> crimes committed on aircraft in flight, under a doctrine similar to that of the <u>Airlines of N.S.W. Case (No.2).</u>

Secondly, by sec. 11(1), a person cannot, without lawful excuse, take or exercise control, whether direct or through another person, of an aircraft to which Part III applies. It will be applicable to aircraft on the ground as well as aircraft in flight, but the person who was charged under the section may be competent to argue that the aircraft was on the ground and therefore was not on an inter-State journey. It is said that the draftsman was very aware of this problem and defined 'flight' in a very narrow meaning - that a flight commences with the closing of the last door before take-off and ends with the opening of the first external door after landing (sec. 3(2)). This is an extremely narrow approach to the inter-State commerce power and its incidental powers; the provision should extend to aircraft engaged in inter-State commerce, wherever it may be.

Thirdly, sec.18 does not apply in the case of a Commonwealth aircraft to or in relation to the carrying or placing of dangerous goods on board the aircraft by the

³⁸ A.L.J.R. 388.

governmental officers, &c. 'Commonwealth aircraft' is defined as an aircraft, other than a defence aircraft, that is in the possession or control of the Commonwealth or an authority of the Commonwealth ($\sec .3(1)$). includes an aircraft operated by Trans-Australia Airlines of the Australian National Airlines Commission, so that the effect of sec.18 may have placed aircraft operated by T.A.A. in a different position from aircraft operated by private airline companies (e.g., Ansett-A.N.A.). However, the section was amended in the course of the Parliamentary debates in the Senate so as to insert after 'Commonwealth aircraft the words '(not being an aircraft that is being used for commercial transport operations). Hence, aircraft operated by T.A.A. will, for the purpose of sec.18, be in the same position as any other aircraft engaged in commercial transport operations. As a result, only aircraft operated by the Department of Civil Aviation or other departments or authorities of the Commonwealth which operate their own aircraft are excluded from the operation of sec. 18.

Fourthly, penalties are imposed in relation to these crimes affecting aircraft which, according to the nature of offences, range from seven years imprisonment to death.

During the Parliamentary discussion of the bill, use of the death penalty was vigorously debated.

Fifthly, the creation of such new crimes in relation to aircraft does not conflict with sec.92; such provisions would certainly be treated as regulatory and not as imposing a burden.

The Commonwealth Act contains a number of miscellaneous provisions of a procedural nature, covering jurisdiction of courts, venue, etc.

In short, the Australian enactment concerning aircraft crimes is generally in line with the Tokyo Convention, save provisions concerning the powers of an aircraft commander and matters ancillary thereto. It will not be difficult for the Commonwealth to ratify the Convention, particularly in reliance upon the external affairs power (sec.51(xxix)) of the Constitution. No such uncertainty as to the limits of the territorial effect of national

^{&#}x27;I mention here that although the question of the retention of the death penalty is a controversial one, it is still retained by the Commonwealth in the Crimes Act and in certain other Commonwealth laws, and it is retained in all the Commonwealth Territories. The inclusion of the death penalty in this bill is in line with existing Commonwealth and Territory provisions. It has seemed inappropriate to deal with the general question of the retention of capital punishment, which, it seems to me, can be reserved for some occasion of general revision of the criminal law. I mention, however, that of the States, only Queensland has abolished the death penalty completely, although it has virtually been abolished in New South Wales'. Cf. Parliamentary Debates, op.cit., p.98.

criminal law as contained in the ambiguous provisions of sec.62 of the U.K. <u>Civil Aviation Act</u>, 1949, exists under the Australian legislation, which clearly assimilates the status of aircraft to that of ships.

Offences relating to civil aviation are thus now governed by two different sets of the Commonwealth enactments; one is the <u>Air Navigation Act</u> and Regulations made thereunder in respect of offences in breach of air navigation rules or regulations, and the other is the <u>Crimes (Aircraft) Act</u> in respect of any crimes on board aircraft and special crimes affecting aircraft themselves.

See, esp. sec.27 of the Act providing for extra-territorial operation of air navigation regulations.

CHAPTER XI

Conclusion

Tension between an existing legal system and an emerging new field of law in solving newly created social problems is universal, and not peculiar to federal systems. The fact that reported aviation cases in the Courts are few has tended to obscure the development of a generic branch of air law in Australia, but in this as in many subjects of the law, special enactments containing special principles and rules, largely independent of the existing common law or other relevant fields of law, have come into existence.

However, the whole system of legal control of civil aviation in Australia is inescapably circumscribed by the federal Constitution. The historical condition that the Commonwealth of Australia had not experienced an aviation age at the time of its birth has exerted farreaching influences on the development of the law. The lack of a specific power over the subject has put the Commonwealth in the position of having no express/ constitutional basis for generally intruding into intra-State aviation matters, and has brought about a dual system of Commonwealth and State law. On another view

the system is triple - common law, State statutory law and Commonwealth statutory law are basic features of air law in Australia. Owing to the nature of the Commonwealth powers specifically enumerated in the Constitution which are relevant, the scope of Commonwealth authority in respect of various subjects incidental to aviation has become extremely obscure and complicated.

The movements towards centralization of power over aviation have been fluctuating and intermittent, though there have been always some outcries for uniformity of the law. Such uniformity has been attempted by a parallel, co-operative effort of the Commonwealth and the State Legislatures working on this topic with unusual intimacy, at all times under the guidance of the Commonwealth Government. It is surprising that the subject was not covered by amending the Constitution, but attempts have failed and the issues depend finally on peoples' views or politicians' ideologies as to the general structure of Australian federalism, or on temporary political factors, rather than on the specific problems of aviation.

Short of constitutional amendment, an attentive inquiry into the exact limits of the Commonwealth powers in respect of aviation and their application to each subject of the law suggests ways in which the Commonwealth might assume more legislative jurisdiction in various

aspects of the law. In each of the foregoing Chapters of Parts II and III, some concluding remarks have been made as to the interactions between the branch of law in question and Australian federalism, and possible Commonwealth action to promote uniformity of the law has been suggested. Among the topics on which, it has been suggested, the Commonwealth could take bolder initiatives are: every citizen's and foreign aviators! liberty to fly as against landowners' property rights or States' jurisdictional rights in airspace above their lands or territories; economic controls of intra-State aviation activities having an effect on the safety, regularity and efficiency of the aviation industry as a whole; carriers' liability for damage to passengers and cargoes and other ancillary matters in certain types of carriages by air within the ambit of the nature of inter-State commerce; aircraft operators' liability for damage to third parties on the ground and other ancillary subjects in inter-State, if not all, aircraft flights; establishment of the federal recording system of rights in every Australian aircraft and designation of applicable law of aircraft transactions in conflict of laws; extension of newly created criminal offences affecting aircraft under Commonwealth legislation to every Australian aircraft, and so on.

These suggestions depend partly on basic approaches to the Constitution which are somewhat different from those maintained by the High Court of Australia. Above all, a comprehensive concept of 'commerce' and of 'external affairs' corresponding to the composite realities of the aviation industry cannot properly be achieved without due regard to the <u>dynamic</u> changes in social factors relevant to the working of the Federal Compact.

The effects of international legislation deserve special emphasis. Because of the inherent internationality of aviation, a positive participation in and effective implementation of international agreements is a main resort for the development of civil aviation in any country. The permeation of international law into national law has occurred on an unparalleled scale in the law of civil aviation, where a unitary system of regulation not only for one but for all countries is essential and inevitable. Due largely to their impact upon existing common law rules and Australian State laws, there are some difficulties in the way of domestic implementation of international rules in some subject-matters of air law. While it is true that most of the rules of international air law do not directly regulate purely domestic aviation problems, the trend of international legislation and

international administrative regulation of air navigation will in time deepen awareness of the need for central control in Australia, and provide many of the standards by which that central control needs to be governed.

APPENDIX I

Some Problems of Rights in Aircraft

Commercial aircraft are expensive objects and most of them are bought by airlines under some form of credit arrangement. It is important to the manufacturing industry, to financial institutions and to the users of aircraft that means should be found of reducing the attendant risks of using aircraft as security which result from their very great mobility. In the absence of some form of international recognition of rights in aircraft, a financial institution may find that it lacks an effective means of satisfying an unpaid debt by claim on the security. the 'Convention on the International Recognition of Rights in Aircraft' was adopted at Geneva in 1948. The Geneva Convention has now been ratified by, and is in force between, 22 countries including most of the important aviation countries except U.K., Canada and Australia.

Under the Geneva Convention there are broad categories of rights which contracting States undertake to recognize mutually. They are: (a) rights of property in aircraft, (b) rights to acquire aircraft by purchase coupled with possession of the aircraft, (c) rights to possession of

aircraft under leases of six months or more, and (d) mortgages, hypotheques and similar rights in aircraft which are contractually created as security for payment of an indebtedness (Art.1(1)). However, it is left to each of the contracting States to determine the precise form of the rights it will allow on its register for the purpose of seeking their recognition in the other contracting States. These rights are recognised by other contracting States, provided that such rights have been constituted in accordance with the law of the contracting States in which the aircraft was registered as to nationality at the time of their constitution, and are regularly recorded in a public record of the contracting State in which the aircraft is registered as to nationality. The Convention provides for ways in which these rights and interests in aircraft are recorded, for priority claims against such aircraft rights and for the settlement of the question of sale of aircraft in execution.

Australia has not ratified the Geneva Convention, and the subject is governed entirely by the domestic legislation which has no special enactment relating to the subject either in Commonwealth or in State legislation. The Commonwealth <u>Air Navigation Regulations</u> setting up provisions concerning registration and nationality of Australian aircraft is only for purposes of public law and does not

affect title or property interests in aircraft. Sale, mortgage and hire-purchase of aircraft are governed by ordinary law (mostly in statutory forms) of sale of goods, bills of sale or hire-agreements, which are regulated under the State legislation. Moreover, conflict of laws arising from aircraft transactions on an inter-State level is governed by ordinary common law rules of private international law (i.e., proper law of contract and proper law of transfer). Hence, the law governing the constitution and recording of aircraft charges is wholly governed by the State law, so that the other countries must look into the law of Australian constituent States for the validity of constitution and recording of such rights.

The possibility of adopting the rules of the Convention or of extending them into domestic aviation depends upon the following two key-questions.

Firstly, the Geneva Convention if adopted would not impose upon Australia an express obligation to maintain a public record, in respect of proprietary rights in every national aircraft, but the assumption of the Convention is that the contracting States would themselves maintain a record in their own interest to attract other contracting States' recognition. The scope of the 'external affairs' power (sec.51(xxix)) would cover such a 'situation' as implied in the Convention, but there is some uncertainty

as to the exact scope of the power for the establishment and maintenance of a public record in respect of rights in all Australian aircraft, due largely to the uncertainty of international 'obligations'. Perhaps, the federal 'commerce' power (sec.51(i)) would more amply justify Commonwealth occupation of the whole field. Precedents for the exercise of the commerce power in this field have been provided in shipping and aviation legislation and iudicial decisions in the United States where a federal recording system of rights in every civil aircraft of the U.S. nationality have been firmly established. 2 questions arising from the application of the Australian 'commerce' clause are whether the recording of titles or interests in Australian aircraft engaged in inter-State or overseas operations is sufficiently 'incidental' to commerce, and whether such recording system can be

72 Stat. 731).

⁽Shipping cases) White's Bank v. Smith (1869) 7 Wall 646, 74 U.S. 646, 19 L.ed.211; Aldrich v. The AEtna Insurance Co. (1869) 8 Wall 491, 75 U.S. 491, 19 L.ed. 473; Howe v. Tefft (1887) 15 R.I. 477, 8 A 709; Haug v. Third National Bank (1889) 77 Mich. 474, 43 N.W. 939. (Aviation cases) Aviation Credit Corp. v. Gardner et al. (1940) 174 Misc. 798, 22 N.Y. Supp. 2nd ed. 37; Re Veterans' Air Express Co. Inc. (1948) D.C., N.J., 76 F. Supp. 684; U.S.A. v. United Aircraft Corp. (1948) D.C., Conn., 80 F. Supp. 52; Blalock v. Brown (1949) 78 Ga. App. 537, 51 S.E. 2d. 610, 9 A.L.R. 2d. 476.

extended to 'intra-State' aircraft. In short, the status of aircraft which is a necessary means of traffic carrying on of 'commerce' as property <u>sui generis</u> similar to the status of ships would justify the recording system as incidental to federal regulation of air commerce activities, and the extension of such federal regulations to intra-State aircraft must be justified under sec.109 of the Constitution to such a large extent that the effects of recorded rights in inter-State and overseas aircraft should have substantial continuity irrespective of diversion of aircraft operations.

Secondly, the provisions of the Geneva Convention refer frequently to the 'law of the contracting State', which is prima facie divided into several States' jurisdictions in Australia, and an applicable law must be ascertained by ordinary rules of conflict of laws in such matters as constitution of rights in aircraft, effects of recorded rights against third parties, etc. Although there are some confusions between contract and transfer in English law, one thinks naturally of the Lex situs when concentrating on the security aspects, and when concentrating on the contractual relations between the parties, one thinks naturally of the proper law, thus leaving some room for choice of law by the parties themselves. The possibility of federal action in this

field depends upon the scope of sec.118 and sec.51(xxv) of the Constitution which we have already discussed in Chapter V. The common law rule on the conflict of laws admitting party 'autonomy' in choosing the law to govern their contract is not always compatible with the constitutional requirements of 'full faith and credit', for their selection of a particular law might disregard the State law with which the contractual transaction has the most substantial connection in the interests of the Federation. The Commonwealth Parliament as a policymaker should be competent to give guidance for choosing the proper law of the contract under sec.51(xxv). Similarly, the selection of the law governing the aircraft conveyances by which property in aircraft is transferred falls within the legislative competence of the Commonwealth Parliament under the same power; owing to the high-speed mobility and novelty of aircraft, common law rules of private international law cannot offer an adequate solution, and a State tends to assert the dominion over property transactions within its borders upon some jurisdictional nexus. In either case, the law of the domicile of the airline, or the law of the State where the principal business place of the airline or aircraftowner exists, gives the most satisfactory solution.

The Commonwealth is now giving serious consideration to the ratification of the Geneva Convention. Such ratification, especially if combined with a more adventurous approach to 'full faith and credit' than has hitherto been displayed either by text-writers or governments, could produce at least an alleviation of the difficulties now facing airline operators and their creditors in the matter of title to aircraft.

APPENDIX II

Main Topics of the Governmental Regulations of Air Navigation

1. Aircraft

Part III of the Regulations sets out provisions concerning registration of <u>aircraft</u>, 1 viz. register and certificates of registration, declarations as to the truth of the statements by applications, duration of certificates, change of ownership of aircraft, procedure of registration in the case of destruction etc. of aircraft, inspection of register (regs. 14-19). Note reg.332 providing that, unless Director-General directs, an aircraft shall not be registered to a person not a British subject ordinarily resident in Australia or a corporation substantially owned or controlled by such persons, 2 and reg.14(3) providing that the certificate of registration shall be in accordance with the form adopted in pursuance of the Convention. An aircraft shall not be registered while it is registered in any other country (reg.20(3)). An

^{&#}x27;Aircraft' means any machine that can derive support in the atmosphere from the reactions of the air (reg.5(1)).

Cf. Nationality and Citizenship Act 1948-60 (No.83-No.82) and Aliens Act 1947-59 (No.22-No.32).

aircraft is deemed to possess the nationality of the contracting State on the register of which it is entered, and an aircraft registered in accordance with the Commonwealth Regulations is deemed to be an Australian aircraft (reg. 20(1) and (2)). An aircraft must bear nationality and registration marks, and marking of aircraft is prescribed in regs. 22-25A, viz. location of marks, type and measurements of letters for marks, marking of heavierthan-air aircraft, advertisements and owners marks: cf. Annex 7 (Aircraft Nationality and Registration Marks). Australian aircraft shall not fly unless it is certified as airworthy and complies with the conditions of its certificate of airworthiness in accordance with Part IV of the Regulations, which provides for airworthiness requirements and type approval as a prerequisite to certificate of airworthiness, and supervision of aircraft design: 2 cf. Annex 8 (Airworthiness of Aircraft).

¹ Cf. Flags Act 1953-54 (No.1-No.58).

Certain information as to design must be submitted to the Department of Civil Aviation by the designer of an Australian designed and constructed aircraft or items of equipment. Aircraft and equipment designed overseas are accepted primarily on the basis of certification by the Civil Aviation Authority of the country of design against the design standards of the country, but, additional standards are further applied in the case of Australia. Then, a 'Permit to Fly' for the purpose of testing flight (in the case of complete aircraft), a 'Certificate of Type Approval', and a 'Certificate of Airworthiness' are issued subsequently.

The Air Navigation Regulations do not provide for the import and export of aircraft, but the Customs Act 1901-63 and Regulations made thereunder deal with the topic. Reg.4(2) of the <u>Customs</u> (<u>Prohibited Imports</u>) Regulations provides that the importation into Australia of the goods (specified in the second column of the Third Schedule to the Regulations) is prohibited unless the conditions, restrictions or requirements to the description of the goods are complied with. Item 1 of the Third Schedule is 'Aircraft, airframes and aircraft engines! and the condition specified is expressed in the following words: 'The importer shall produce to the Collector the permission in writing of the Director-General of Civil Aviation to import the goods! . By means of such an import control of aircraft, the Commonwealth Government may affect to a large extent the economic pattern of the domestic aviation industry, as shown in the most recent case, the Queen v. Anderson; Ex parte IPEC-Air Pty. Ltd. 2 The company applied to the Director-General for permission to import five Douglous DC.4 aircraft and for a charter licence under the Air Navigation Regulations to conduct an inter-State air freight service. Neither the permission

¹ 1901 (No.6) - 1963 (No.48). 2 (1965) 39 A.L.J.R. 66.

nor the licence was granted. With respect to the charter licence which we will discuss later, the High Court held (by majority) that a writ of mandamus should go commanding the Director-General to issue a charter licence, when the applicant could demonstrate ability to operate to the safety requirements of the Air Navigation Regulations. However, the company s operation is practically barred by the Director-General's refusal of import permission which is based on the government's economic policy of air transport within Australia, and the same case decided (by majority) that this refusal was a valid exercise of the Director-General's functions. Moreover, as we have already seen, tit was held unanimously that the connexion between the refusal of permission and the prevention from engaging in inter-State trade was too remote to make the refusal obnoxious to sec.92 (absolute freedom of the inter-State trade) of the Constitution. The questions raised in this case related closely to the extent of the Director-General's exercise of administrative discretion, which we have already mentioned in relation to the administration of civil aviation in general in Australia. The Customs (Prohibited Imports) Regulations were later amended by the Commonwealth Government to make the Minister

See Chapter II, ante.

for Civil Aviation responsible for granting aircraft import permission instead of the Director-General. 1

2. Licences

(1) Licensing of Operating Crew and other Personnels:
Part V of the Regulations prescribes various technical provisions concerning licensing of operating crew² and licensing (or grant of certificate of approval) of maintenance personnel in respect of design, manufacture, maintenance, etc. of aircraft (regs.38-42, 50-66). Flight crew licences are broadly classified into pilot licences (student, private, commercial, senior commercial, second class airline transport pilot, first class airline transport pilot), navigator licences, radio operator licences and engineer licences (reg.51). Privileges and limitations vary according to the category of licence held, and licences are endorsed for particular types and categories of aircraft: ³ cf. Annex 1 (Personal Licensing).

The change in the Regulations meant that IPEC (Interstate Parcel Express Co.) Air Co. Ltd. had to seek an adjournment of its application for an appeal to the Privy Council until October 1965. The company accused the Commonwealth of having attempted to block its appeal.

^{&#}x27;Operating crew' means any person having duties on board in connexion with the flying or safety of the flight of an aircraft (reg.5(1)).

Reg. 52 and reg. 60. See also reg. 203, providing for the exemption from necessity for obtaining an airline licence in certain circumstances.

- (2) <u>Licensing of Flying Schools, Training</u>

 Organizations and of their Activities: cf. Part VI

 (regs. 68-70).
- (3) Licensing of Air Service Operations: The subject is regulated both by federal law and by State law; the former in Part XIII (regs. 191-253) and the latter in State transport legislation. 'Air transport' is classified into (a) private operations, (b) aerial work operations, (c) charter operations, and (d) regular public transport operations (reg. 191). Aircraft is classified in accordance with the type of operations. An aircraft shall not be used in any class of operations unless the particular type of aircraft is authorized and approved for such use by the Director-General. Aircraft engaged in private operations shall comply with the provisions of the Regulations and such additional conditions as the Director-General from time to time directs in the interests of safety (reg. 195). As to other types of operations, the Regulations provide that an aircraft shall not be used by any person in each operation except under the authority of and in accordance with an aerial work licence (reg. 196), charter licence (reg. 197) or airline licence (reg. 198). Reg. 199 is the most important provision prescribing the conditions of issue for these licences:

- (1) An applicant for an aerial work, charter or airline licence, ... shall furnish such information in relation to the proposed service as the Director-General requires.
- (2) Where the proposed service is an interstate service, the Director-General shall issue an aerial work, charter or airline licence, as the case requires, unless the applicant has not complied with, or has not established that he is capable of complying during the currency of the licence with, the provisions of these Regulations, or of any direction or order given or made under these Regulations, relating to the safety of the operations.
- (2A) Where in the case of an application for an airline licence, the proposed service is an interstate service with a terminal or an intermediate stopping place in a Territory of the Commonwealth, the Director-General may -
 - (a) grant the licence;
 - (b) refuse the licence; or
 - (c) issue a licence for a service between the places, being places in different States, specified in the application subject to the condition that aircraft engaged in the service shall not land in the Territory unless such conditions as the Director-General considers necessary are complied with.
 - (3) Subject to the next succeeding sub-regulation, where the proposed service is other than an interstate service, the Director-General may issue an aerial work, charter or airline licence, as the case requires, upon such conditions, in addition to compliance with these Regulations, as the Director-General considers necessary or may refuse to issue a licence.

- (4) Where the proposed service does not involve air navigation of a kind specified in paragraph (a), (b), (c), (d) or (da) of subregulation (1) of regulation 6 of these Regulations, the Director-General shall, on and after the date fixed for the purposes of paragraph (f) of that sub-regulation in deciding whether or not to grant an aerial work, charter or airline licence, and in determining the conditions upon
- aerial work, charter or not to grant an aerial work, charter or airline licence, and in determining the conditions upon which the licence is to be granted, have regard to matters concerned with the safety, regularity and efficiency of air navigation and to no other matters.

With respect to inter-State service, the Director-General's discretion is limited to 'safety' considerations, perhaps pursuant to the High Court's decision in the Australian National Airways Case. In the IPEC-Air Case, the application of regs.197(1) and 199(2) in respect of charter licence were in question. The company applied to the Director-General for a charter licence to carry freight between State capitals by means of aircraft which it was in a position to obtain if the Director-General granted a licence for their importation into Australia. The company established to the Director-General's satisfaction that subject to obtaining the aircraft it was capable of complying during the currency of the licence with the provisions of the Regulations, or of any direction or order made under the Regulations, relating to the safety

The date fixed was 10 October 1964.

^{(1945) 71} C.L.R.; 71 C.L.R. 715.

of the aircraft. The Director-General, acting in accordance with government policy against allowing persons other than those already engaged in it to operate inter-State air freight services (two-airline policy), refused permission to import the aircraft and refused the charter licence on the basis that the company would not be in a position to provide the necessary aircraft to operate the service to which the application related. Court held (by majority) that a writ of mandamus should go commanding the Director-General to issue a charter licence, but two Judges in their dissenting opinion took the view that the application for a charter licence was not refused on the ground of the governmental policy of the air transport industry; according to their opinion, in view of the company's inability to obtain aircraft for its proposed service, charter licence would for all practical purposes be futile and in the exercise of the court's discretion it should refuse mandamus requiring the Director-General to issue the licence. However, this contention has to yield, it seems, to the majority interpretation of the provisions set out in reg.199(2) that is, a difficulty in obtaining a particular aircraft

See Appendix III, post.

³⁹ A.L.J.R. at p.74, per Taylor and Owen JJ.

or the absence of an import permit is not one of the grounds on which the Director-General can lawfully refuse a charter licence under the Regulations. Windeyer J. said:

The prosecutor desires to have a licence notwithstanding that it may prove of no use. That is a matter for it. It may be that it hopes that it will be able to obtain suitable aircraft in Australia. The Director-General could not lawfully impede its efforts to do That no suitable aircraft are at present available to be brought in Australia is not a decisive consideration. It may be that before the expiration of the period of a licence the prosecutor will be able to buy or by some other permissible arrangement gain the use of suitable aircraft in The prosecutor may well think Australia. a licence necessary to warrant its expenditure of money on obtaining aircraft. It may think, and apparently does think, that having a licence may aid it in efforts to persuade the authorities to relax in its favour the prohibition against importing them. hope that possession of a licence would give it an advantage over others if there should be a change in government policy. Whatever its motives for wishing to have a licence it seems to me that on the evidence it established its right to one, the only ground for refusal being unsound in law.

With respect to Territorial service, the Director-General's discretion is almost unlimited, and no constitutional restrictions apply to it. With respect

³⁹ A.L.J.R. at p.75.

See Chapter IV, ante.

to intra-State service, his discretion is limited to 'safety, regularity and efficiency of air navigation', and, as we have already seen, the High Court in the Airlines of N.S.W. Case (No.2)¹ assimilated these conditions (in respect of airline licence) in effect to 'safety' considerations as contained in sub-reg.(2); regs.198 and 199 were held valid as relating to the use of aircraft, as distinct from the authorization of air transport activity, in the interests of safe and orderly operations of every aircraft in Australia. Reg.200B provided:

An aerial work licence, a charter licence or an airline licence authorizes the conduct of operations in accordance with the provisions of the licence but subject to the Act and these Regulations and to the other laws of the Commonwealth.

This licensing provision was invalidated by the Court in the above case as giving a Commonwealth franchise or positive authority to conduct wholly intra-State services, notwithstanding any State prohibitions. The right to carry in the case of inter-State and foreign public air transport operations is not derived from the airline licence alone but now from reg.200B operating upon the

¹ 38 A.L.J.R. 388.

licence. In this very limited area of purely intraState air transport operations, the State legislation is
operative and, in order to operate on intra-State routes,
an air service operator is required to hold both a State
licence (to engage in that service) and a Commonwealth
licence (to use aircraft for that purpose). The main
provisions of the State legislation are as follows.

In New South Wales, the <u>Air Transport Act</u> 1964² amended the <u>State Transport (Co-ordination) Act</u> 1931-56³ by making the latter Act no longer applicable to carriage by air of passengers and goods. The <u>Air Transport Act</u> 1964, which also affected the <u>Air Navigation Act</u> (N.S.W.) 1938-47 and the <u>Transport Act</u> 1930-64, provides:

- 3(1) A person shall not, on or after the appointed day, carry by an aircraft from a place in New South Wales to another place in New South Wales any passengers or goods unless -
 - (a) the aircraft is licensed under this Act;
 - (b) that person is the holder of the licence; and
 - (c) where the licence was granted in respect of a route or routes, the route over which the passengers or goods are so carried is such a route.

<sup>1
&</sup>lt;u>Airlines of N.S.W. Case (No.2)</u>, 1964-65, 38 A.L.J.R. at p.396, per <u>Barwick</u>, C.J.

No.36 of 1964.

³ No.32 of 1931 - No.16 of 1956.

- 6(1) The Commissioner may grant or refuse any application for a license.
 - (2) A license may be granted subject to or not subject to conditions, including conditions as to whether the carriage of passengers or goods or of both passengers and goods is authorised by the license.
 - (3) In deciding whether to grant or refuse a license and the conditions, if any, subject to which it should be granted, the Commissioner shall have regard to such of the following matters as to him seem appropriate and to no other matters:-
 - (a) the needs, in relation to air transport services, of the public of New South Wales as a whole and of the public of any area or district to be served by the route or routes, or by any of the routes, specified in the application for the license;
 - (b) the extent, if any, to which the needs of the public of New South Wales as a whole or of the public of any area or district to be served by the route or routes, or by any of the routes, specified in the application for the license are already, or are likely to be, served by public air transport services;
 - (c) the allocation of routes for public air transport services between persons holding or applying for licenses under this Act so as to foster as far as possible the existence of more than one airline operating in New South Wales capable of

The Commissioner for Motor Transport constituted under the Transport (Division of Functions) Further Amendment Act, 1952, as amended by the State Transport (Co-ordination) Amendment Act 1954.

providing adequate and reasonable public air transport services within New South Wales and so as to discourage the development of any monopoly of public air transport services within New South Wales;

- (d) where the applicant is an individual, his character and suitability and fitness to hold the license applied for and, where the applicant is a corporation, the character of the persons responsible for the management or conduct of the corporation and the suitability and fitness of the corporation to hold the license applied for;
- (e) the extent to which the area or district to be served by the route or routes, or any of the routes, specified in the application for the license are already, or likely to be, served by forms of public transport other than public air transport and the effect that the public air transport services proposed to be conducted by the applicant for the license over that route or those routes may have upon those other forms of transport.

Other important provisions of the Act are sec.3(3) (the persons who committed the offence or who are deemed to have committed the like offence), sec.5 (applications for licenses), sec.8 (revocation, suspension and variation of licenses) and sec.13 (regulation-making power of the Governor).

In Queensland, the <u>State Transport Act</u> 1960, which repealed the <u>State Transport Facilities Act</u> 1946-59²

¹ No.48 of 1960.

²

No.17 of 1946 - No.21 of 1959.

provides in Part VIII for 'air transport' and 'when transport by water or air unlawful' (Divisions II and III):

- The Commissioner may from time to time prohibit the carriage of passengers, or goods, or both passengers and goods by air from any place within this State to any other place within this State, except under and in accordance with the terms and conditions of a license under this Part...
- Subject to this Act the Commissioner may grant to any person a license to provide and carry on a service for the carriage by air of passengers or goods, or both passengers and goods between places specified in any notice of a prohibiton under this Division of this Part.
- or goods, or both passengers and goods by water or air at any time when such carriage is prohibited by the Commissioner....

In Western Australia, the <u>State Transport Co-ordination Act</u> 1933-61² provides for 'aircraft' in Division (4) of Part III (Licenses):

No aircraft shall operate intra-State unless such aircraft is licensed in accordance with this Part...

The Commissioner for Transport appointed or deemed to be appointed under the Act: the term includes the Deputy Commissioner while acting as the Commissioner and any person who may be appointed by the Governor in Council to act as Commissioner for Transport.

No.42 of 1933 - No.59 of 1961.

Subject to this Part the Board may, on the application of the owner of an aircraft, and provided that all laws or regulations of the Commonwealth relating to the aircraft and its operation have been and are at all time complied with, grant a license in respect of the aircraft, or may refuse to grant the same. The decision of the Board shall be final and without appeal. Every license granted shall, subject to the conditions of the license, authorize the operation of the aircraft between any points which are otherwise prohibited under the preceding section.

In Tasmania, the <u>Transport Act</u> 1938-61² deals with 'road, water and air transport' (Part V) which applies the <u>Traffic Act</u> 1925-61³ as part of the Act. Part III of the <u>Traffic Act</u> contains the following provisions:

- 14AB(3) Subject to sub-section (5) of this section, where an aircraft -
 - (a) is used or let for the carriage of passengers or goods for hire or for any other consideration; or
 - (b) is, except as otherwise may be prescribed, used for the carriage of goods either for sale or for offering for sale or in the course of a trade of business,

that aircraft shall for the purposes of this Act be deemed to be used as a public vehicle.

The Western Australian Transport Board appointed under the Act.

No.70 of 1938 - No.30 of 1961.

No.38 of 1925 - No.31 of 1961.

- 15(1) The Commission may issue public vehicle licences in accordance with this Act.
 - (2) Public vehicle licences may be (a) aircraft licences...
 - (3) Subject to this Act (a) an aircraft licence authorizes the use of an aircraft as a public vehicle;...
- 24(1) No person shall drive or use or cause or permit to be driven or used as a public vehicle any vehicle -
 - I. In respect of which a licence is in force, for any other purpose other than a purpose for which it is authorized to be used under that licence:
 - II. In or upon any area, route, or place in or upon which the licence in respect thereof does not authorise it to be so driven or used:
 - III. In respect of which a licence is not in force:...

Next, Victoria, Until repealed by the Ministry of

Transport Act 1958, the Transport Act 1951 had dealt
with air transport, providing for licences for commercial
aircraft, power to attach conditions to licence, variation
and cancellation of conditions, period of licence, fee
(sec.10). But now there is no provision relating to
'aircraft' or 'air transport' in the relevant legislation.

No.6322 of 1958.

[~] No.5559 of 1951.

Cf. Transport Regulations Act 1958 (No.6400) and Commercial Goods Vehicles Act (No.6222).

In South Australia, as in Victoria, the State transport legislation does not apply to aircraft, and no licensing system in respect of aircraft is established.

Semble, in Victoria and South Australia, only the licensing regulations of the Commonwealth apply to intra-State air service operations.

(4) Refusal to Grant, and Suspension and Cancellation of, Licences and Certificates: Among the regulations relating to this topic, 1 the subject of 'appeal to board of review or court' appears to warrant special mention.

A person aggrieved by the Director-General's decision, except suspension of licence or certificate pending investigation, may elect at his option either to have the matter submitted for review to a board of review, or to appeal to a specified court against that decision.

The Board of Review is an administrative machinery comparable to tax Boards of Review; 2 it consists of a chairman and two other members, all of whom are to be appointed by the Minister; the chairman is a person, nominated by the Attorney-General, who is qualified to

Cf. Part XV (regs.254-69). See also reg.200A as to cancellation or suspension of licence in respect of air service operations.

Cf. Symon v. Federal Commissioner of Taxation (1932) 47 C.L.R. 538.

practice as a barrister or solicitor of the High Court or the Supreme Court of a State or Territory of the Commonwealth, and the other two members are to be persons who possess aeronautical or engineering knowledge or experience or other special knowledge or experience of air navigation or aircraft. Proceedings before the Board are as follows: notice of time and place for consideration of the matter to be sent to the Director-General and the applicant within seven days after the appointment of a board of review; evidence including one not considered by the Director-General; finding without being bound by legal rules of evidence; determination of any question according to a majority opinion of the members; an applicant or the Director-General to be represented by counsel, solicitor or agent; the hearing to be in principle

Before 1960, the chairman was either an officer of the Attorney-General's Department, of the Crown Law Department of the Territory of Papua and New Guinea or a qualified barrister or solicitor of the High Court or the Supreme Court of a State or Territory.

The practice has been to nominate as members of the board persons qualified to hold the same licence as the appellant. For example, in the case of a commercial pilot, the Airline Pilots Association nominates a short list of pilots having similar qualification, at least one of whom is invariably appointed as a member of the board. Cf. Parliamentary Debates, H. of R. 27 (17 May 1960) p.1769.

open to the public. The Board may summon witnesses to give evidence or procedure documents, etc., and the decision of the Board is final. It is submitted that those provisions go a good deal further than other Commonwealth countries have yet done, giving more consideration to the interests of the licence-holder than any other Commonwealth country. 2

The Supreme Court of each State is invested with federal jurisdiction, and jurisdiction is conferred on the Commonwealth Industrial Court and on the Supreme Court of each Territory of the Commonwealth, respectively, to hear and determine appeals for this purpose. The Judiciary Act 1903-60³ applies to and in relation to the

A witness to a board of review or to a court is protected in that his statement or disclosure is not admissible in evidence against him in civil or criminal proceedings in a court except in a prosecution for giving false testimony in proceedings under the Regulations (reg. 265).

In the United Kingdom, the relevant orders provide that the Minister may 'on sufficient ground being shown to his satisfaction after due investigation by him cancel or suspend any certificate, licence or other document issued under the order. There is no provision whatsoever for appeal. The relevant regulations in New Zealand (and Union of South Africa) are very similar to the United Kingdom orders and do not make provision for any sort of appeal. Under the Canadian Air Regulations, a pilot licence may be suspended at any time by the Minister for any reason that to him seems sufficient, and there is also no provision for appeal. Cf. Parliamentary Debates, supra.

No.6 of 1903 - No.109 of 1960.

exercise of such jurisdiction. An appeal in which the Director-General shall be the respondent, is by way of re-hearing, and the Court may make such order as to the costs of an appeal as it thinks fit. In deciding an appeal the Court may confirm, vary or reverse the decision of the Director-General and may by order give effect to the Court's decision.

3. Flight

- (1) Logs and Log Books: Log books and specified logs must be maintained in respect of aircraft and operating crew. The Regulations (Part VII regs. 71-78A) provide for detailed rules for maintenance and contents of logs and log books (i.e. aircraft log book, engine log book, journey log, signal log, radio maintenance log book, propeller log book, logs of members of operating crew, navigation logs): cf. Annex 1 (Personal Licensing) and Annex 6 (Operation of Aircraft International Commercial Air Transport).
- (2) Rules of Flight and Manoeuvre: Division 1 of
 Part X (Conditions of Flight) contains general provisions,
 most of which give effect to the limitations to the right
 to fly under the international agreements, and their
 adaptations to Australian aircraft (e.g. pilotless aircraft,
 flight manuel, documents to be carried in aircraft,

dangerous cargo, prohibited (restricted or dangerous) areas, 1 etc.). Division 2 of the Part provides for flight rules, viz. towing, dropping of articles, picking up articles, parachute descents, flight under simulated instrument flying conditions, flight instruction to a student for solo flying, acrobatic flying over public gatherings, low flying, reports at designated points of intervals, procedure on radio failure, etc. It is specifically provided that an aircraft shall not be operated in a negligent manner or in a reckless manner so as to be likely to endanger life or the property of others, and that an aircraft shall not be flown in such a manner or in such circumstances as is or are likely to cause avoidable danger to any person or property (including animals) on land or water or in the air. 2

Cf. also Defence (Special Undertakings) Act 1952 (No.19), providing for aircraft in prohibited or restricted areas.

Reg. 133 provides for low flying: an aircraft shall not fly over any city or town or other populous area except at such a height that the aircraft could landoutside the city, town or populous area, in the event of the means of propulsion failing through any cause, or, if it is an aeroplane with more than one engine, at such a height that it could land outside the city, town or populous area, in the event of one of its engines failing. With such conditions, an aircraft shall not fly over (a) any city, town or populous area, at a lower height than 1,500 feet; or (b) any other area at a lower height than 500 feet. height specified above is the height above the highest point of the terrain, or any obstacle thereon, within a radius of 2,000 feet of a line extending vertically below the aircraft. Sub-reg.(3) lays down various exception to the

Part XI (Rules of the Air) lays down general provisions of rules of the air, such as right of way, rules for prevention of collision, operation in proximity to other aircraft, and provides further for rules of the air concerning operation on and in the vicinity of aerodromes, visual flight rules and instrument flight rules.

Part XII (Signals for the Control of Air Traffic) contains the rules relating to signals for the control of air traffic of aerodrome traffic, special signals relating to danger areas, prohibited areas and restricted areas, visual signals between State aircraft and other aircraft in flight, emergency signals, lights to be displayed by aircraft, and lights and markings to be displayed on mooring cables: cf. Annex 2 (Rules of the Air).

4. Accident

Part XVI (regs.270-97) of the Regulations lays down provisions concerning accident inquiry. An accident or incident to aircraft must be reported or notified to the

^{2 (}cont.)
minimum height, including cases where, through stress of
weather or any other unavoidable cause, it is essential
that a lower height be maintained.
1

Note reg.147, in relation to prevention of collisions at sea, requiring every aircraft on the water to comply with the International Regulations for Preventing Collisions at Sea, contained in the Schedule to the Navigation (Collision) Regulations in force under the Navigation Act 1912-61.

Director-General. The Customs Act 1901-63 provides also for an obligation of pilot or owner of a wrecked aircraft to report certain matters to Collector of Customs. The procedures of accident investigation under the Regulations are as follows: The Director-General may authorize one or more investigators to conduct an investigation into any matter connected with any accident or incident occurring in Australian territory. The powers of investigator are to summon any person as a witness, to take evidence on oath or affirmation, and to require the production of documents, or any part or component of an aircraft, relevant to the investigation. Upon conclusion of an investigation, the investigator forwards a report in writing to the Director-General, who may cause the whole or any part of the report to be made public. The Regulations provide also for the investigations and inquiries into accidents to aircraft of contracting States, and for investigations of accidents and incidents to Australian aircraft outside Australian territory: cf. Annex 13 (Aircraft Accident Inquiry).

The Minister may appoint a Board of Accident Inquiry to inquire into the causes of an accident and such other

Sec.65(2).

z Reg.283(2).

matters relating to the accident as are referred to it by the Minister, if he is not satisfied that the report of the investigation adequately covers the matter. Board, which replaced the Air Courts of Inquiry in 1955, is constituted by a Chairman and such assessors as the Minister considers necessary; a Chairman is to be a person who is a Justice or Judge of a Federal Court, a State Court or a Court of a Territory or a person possessing legal, aeronautical or engineering knowledge or experience or other special knowledge or experience of air navigation, and the assessors are to be persons possessing legal, aeronautical or engineering knowledge or experience or other special knowledge or experience of air navigation. The Attorney-General may appoint a person to the Secretary of a Board of Accident Inquiry. Proceedings before the Board are as follows: the inquiry to be conducted in such manner as the Board thinks fit without being bound by legal rules of evidence; the time and place for conducting the inquiry to be fixed by the Chairman who may also grant leave to appear before the Board to certain persons; the sittings of the Board to be in principle open to the public. The Chairman may summon witnesses to give evidence or produce documents, etc. and, after conducting the

S.R. 1955, No.29.

inquiry, forward to the Minister a written report. He may state his findings, together with notes of the evidence taken, and adding any observations and recommendations which he thinks fit to make with a view to the prevention of life and the avoidance of future accidents. Assessors have no powers of adjudication, but each assessor shall sign the report with the Chairman, with his statement in writing of his reasons for the disagreement with a finding or recommendation of the Chairman. Inquiry may be extended or re-opened as the Minister thinks fit, and publication of the whole or a part of a report of the Board depends upon the Minister's discretion.

5. Aerodromes, Facilities and Services

The Regulations provide for establishment of aerodrome and air routes and airway facilities, designation of air routes and airways, licensing of aerodromes, authorization of places for use as aerodromes, accessability of official aircraft (i.e. aircraft belonging to or employed in the service of the Crown) to aerodromes, use of aerodromes by aircraft of contracting States, dangerous lights, removal or marking of objects which constitute obstructions or potential hazards to air navigation (Division 1 and 1A of Part IX). The sources of power to regulate these topics are laid down in sec.26(2)(e) and (g) of the Air

Navigation Act. Sec. 26(3) of the Act provides further that where the regulations make provision for the removal or marking of structures of obstacles referred to in para.(g) of sec.26(2) the regulations shall also include provision for the payment of compensation to any person who suffers loss or damage or incurs expense in or as a direct result of the removal or marking. Reg. 92(4) provides for the owner's right to compensation from the Department of Civil Aviation. State legislation concerning local government deals with power to acquire land or exercise control over land. Division 2 (Air Traffic Control) includes an important power of the Director-General to designate controlled airspace. Division 3 provides for meteorological services, Division 4 for search and rescue service, and Division 6 for fares, freights, time-tables and statistical returns. The Regulations do not provide for quarantine, customs, and immigration, but the relevant Commonwealth enactments deal with these topics: cf. Annexes 3 (Meteorology),

Quarantine Act 1908-61 (No.3-No.61); Quarantine (Air Navigation) Regulations, Quarantine (Animals) Regulations, Quarantine (Plant) Regulations, Local Quarantine Ordinance (applying to Papua-New Guinea, Norfolk Island, and Nauru), Migration Act 1958 (No.62) (see Immigration Act 1901 - Immigration Restriction Act - 1949), Aliens Act 1947-59 (No.22-No.32), Aliens Regulations, Customs Act 1901-63, and various Regulations made thereunder.

4 (Aeronautical Charts), 5 (Units of Measurement to be used in Air-Ground Communication), 9 (Facilitation),
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10 (Aeronautical Telecommunications), 11 (Air Traffic Services - Air Traffic Control Services, Flight Information Service and Alerting Service), 12 (Search and Rescue),
14 (Aerodromes) and 15 (Aeronautical Information Services).

The Commonwealth regulations to prohibit or authorize the use of the Commonwealth-aerodromes and controlled airspace have been already discussed in Chapter IV. The relevant regulations are as follows:

- 320A-(1) On and after such date as is fixed by the Minister for the purposes of this regulation by notice in the Gazette, an aircraft shall not land at or take-off from any place, being a place acquired by the Commonwealth for public purposes, except under the authority of, and in accordance with, a permit issued under this regulation by the Director-General.
 - (2) The application of the last preceding sub-regulation is not limited by the operation of sub-regulation (1) of regulation 6 of these Regulations.
 - 320B On and after such date as is fixed by the Minister for the purposes of this regulation by notice in the Gazette, an aircraft shall not be flown in controlled airspace in the course of air navigation of a kind specified in paragraph (e) of

The date fixed was 10 October 1964.

sub-regulation (1) of regulation 6 of these Regulations except under the authority of, and in accordance with, a permit issued under this regulation by the Director-General.

In respect of Commonwealth aerodromes and facilities the Commonwealth has enacted the following special legislation:

Airports (Surface Traffic) Act 1960 provides for the control of surface traffice within Commonwealth airports. Owing to the difficulties in enforcing the previous provisions of reg. 315C, this Act puts into statutory form what, until then, had been only in the form of regulations. The Director-General is authorized to determine, indicate or notify areas and positions, days and hours, periods, conditions, and fee (if any) (sec.6). Other main provisions of the Act are as follows.

No.40 of 1960.

For the purpose of the Act, 'airport' is defined as (a) an aerodrome owned or held under lease by the Commonwealth, or owned by the Crown in right of a Territory of the Commonwealth or by the Administration of a Territory of the Commonwealth, and operated in pursuance of the Air Navigation Act 1920-60 or of the regulations under that Act, or (b) such part of an aerodrome owned or held under lease by the Commonwealth and under the control of a part of the Defence Force as is made available for civil aviation purposes in pursuance of arrangements made under sec.18 of that Act (sec.3(1)).

The matter was controlled by reg.315C, originally promulgated in 1954 and amended in 1957, which contained detailed rules relating to the parking of vehicles, and provided for the imposition of parking fees; it was repealed by 1960 Regulations (No.99).

The Act adopts the system of owner-onus liability (sec.11). The Act is not to be construed as intended to exclude the operation of any law of a State or Territory of the Commonwealth in which an airport is situated that can operate without prejudice to the express provisions of the Act or the regulations and, in particular, of any law of a State or Territory of the Commonwealth relating to the registration and equipment of vehicles, the licensing of drivers of motor vehicles and the rules to be observed by persons driving or in charge of vehicles or animals, or by pedestrians, on roads (sec.18). The annual report to Parliament on the administration of the Air Navigation Act and Regulations must also include a statement setting out details of prosecutions and parking infringements under this Act (sec.21).

Airports (Business Concessions) Act 1959 aims at facilitation of development of the business potential of airports² of the Commonwealth so as to obtain the maximum economic return from land, terminal buildings and other

Arrangements are made with the States for the performance of the duties and the discharge of the functions of authorized persons by members of the police force of the State and for the payment to be made by the Commonwealth for any such service (sec.19).

The definition of the term 'airport' is same as in the Airports (Surface Traffic) Act.

facilities not required for operational purposes and to meet the requirements of the travelling public for goods and services. The Minister may, on behalf of the Commonwealth, grant leases and licences in respect of land within an airport on such terms and conditions, and subject to payment of such rent or other considerations, as he thinks fit, and he may exercise any power or remedy of the Commonwealth in respect of any such lease or licence; this has effect notwithstanding anything contained in the Lands Acquisition Act 1955-57 (sec.6). The sale or supply of goods or services within an airport or the carrying on or soliciting for any business is prohibited except in accordance with the terms and conditions of an authority issued under the Act (sec.7). The Act provides for various aspects of business activities at airports,

Before this Act was enacted, there was provision for the establishment, maintenance and operation of aerodromes including conditions for their use under the Air Navigation Act 1920-50, by which the Director-General was responsible for the control and management of Commonwealth-owned However, insofar as business concessions aerodromes. require the granting of leases or licences, the Department of the Interior had the primary statutory responsibility by virtue of the Lands Acquisition Act and the Administrative Arrangements Order. Under this Act, the administrative responsibility was shifted to the Department of Civil Aviation, while other land acquired for civil aviation purposes and the acquisition and disposal of land, including aerodrome land, continue to be governed by the Lands Acquisition Act and remain within the administrative responsibility of the Minister of the Interior.

leases, etc., but special mention must be made as to an issue of an authority to sell or supply intoxicating liquor. As we have already seen, sec.52(i) of the Constitution gives to the Commonwealth Parliament exclusive power to make laws relating to places acquired by the Commonwealth for public purposes, and therefore the Commonwealth can prescribe anything which it thinks fit for the operation of its aerodromes. However, as regards intoxicating liquor, there is a compromise between the Commonwealth's and States' laws; in any case where a Commonwealth authority is issued, it must contain conditions and restrictions, especially those relating to the days on which and the times during which liquor may be sold, corresponding with the provisions of State law which are applicable in the State in which the airport is situated (sec.9). The intention of this clause is to permit the conduct of all businesses, other than the sale of intoxicating liquor, outside normal trading hours, but only in circumstances where the extension of trading hours is necessary to meet the needs of the travelling public.

Air Navigation (Charges) Act 1952-57 prescribes the charges payable, in accordance with the Schedules to the Act, in respect of the use by aircraft of aerodromes,

No.101 of 1952 - No.87 of 1957.

air route and airway facilities, meteorological services and search and rescue services maintained, operated or provided by the Commonwealth. The mode of calculating charges are specified in the First Schedule (i.e. charges payable by the holders of airline licences and of charter licences engaged in the course of regular public transport operations), Second Schedule (i.e. charges payable by the registered owners of aircraft not being persons who are the holders of airline licences, viz. private aircraft, aerial work aircraft or charter aircraft), and Third Schedule (i.e. charges payable by the owners of foreign aircraft being aircraft which are not operated by the holders of airline licences). For example, charges for airline operations are calculated by multiplying the unit rating of an aircraft which is based on its all-up weight² by the factor specified in the Act for the flight in Flights for which a factor is specified amount to more than 300 to cover all flights being operated by regular public transport services. One of the main purposes of the amendment in 1957 was to increase by 10

This includes 'international airline licence'; see reg.198.

^{&#}x27;Weight' means the maximum all up weight of the aircraft as specified in the Certificate of Airworthiness for the aircraft (cl. 7(2) of the First Schedule).

per cent the charges payable for the Commonwealth facilities. A regulation-making power is conferred on the Governor-General (sec.6). The Act of 1952 authorized regulations amending the Schedules to the Act, but such a wide power in the executive was repealed in 1957, although if a new route is developed regulations may specify the factor applicable to a flight over that route. 1

6. Enforcement of Air Navigation Act and Regulations

The rules concerning offences and penalties had been governed by the Air Navigation Regulations, but by the 1960 amendment some important provisions were added or shifted to the Air Navigation Act. Sec.26(2)(k) of the Act authorizes the regulations to be made with respect to the imposition of penalties not exceeding a fine of £A500 or imprisonment for a term of two years, or both, for a contravention of, or failure to comply with, a provision of the regulations or a direction, instruction or condition issued, given, made or imposed under, or in force by virtue of, the regulations.

Cf. Parliamentary Debates, H. of R. (27 November 1957), p.2608.

A person who contravenes or fails to comply with a provision of the Act or the Regulations is guilty of an offence; the owner, the operator and the hirer (not being the Crown), and the pilot in command and any other pilot, of an aircraft that flies in contravention of, or fails to comply with, a provision of the Act or the Regulations is guilty of an offence. In any proceedings with respect to an offence against the Act or the regulations, it is a defence if the act or omission charged is proved to have been due to stress of weather or other unreasonable cause, and in any proceedings against the owner, operator, hirer, pilot in command or other pilot of aircraft, it is a defence if the act or omission charged is proved to have taken place without his fault or privity. 2 An offence against the Act or the Regulations may be prosecuted either summarily or upon indictment, but, both in the Act and in the Regulations, provisions are respectively laid down for the prohibition of double punishment of the same offence. The rules for penalty for an offence against the Act or the Regulations are same; if the offence is prosecuted summarily - a fine not

Sec.22(1) and (2); reg.312(1) and (2).

[~] Sec.23.

³ Sec.22(3); reg.312(4).

exceeding £A200 or imprisonment for a term not exceeding six months, or both, or if the offence is prosecuted upon indictment - a fine not exceeding £A500 or imprisonment for a term not exceeding two years, or both. The Act specifically provides that the Crown in right of the Commonwealth or of a State is not liable to prosecution for an offence, but this does not affect any liability of a member of the crew of an aircraft of which the Crown is the owner or of any other person in the employment of the Crown to be so prosecuted. The Regulations enumerate offences in various items, e.g., offences in relation to licences and certificates (reg.312A), false statements (reg.312B), interference with crew or aircraft (reg. 312C), stowaways (reg. 313), creation of fire hazard (reg.315A), etc. Proceedings for the commitment of a person for trial on indictment for, or proceedings for the summary prosecution of, an offence shall not be instituted except with the consent of the Director-General or (in the latter case) a person authorized by the Director-General. 3 Time limit for commencing

Sec.22(4); reg.312(5).

Sec.24.

³Sec.22(5) and (6); reg.317(1) and (2).

prosecutions in respect of any offence against the regulations is one year after the commission of the offence. 1

The provisions relating to jurisdiction of Courts are laid down in the Act. 2 The several courts of the States are invested with federal jurisdiction, and jurisdiction is conferred on the several courts of the Territories of the Commonwealth, with respect to offences against the Act or the Regulations. The jurisdiction so invested in or conferred on courts is invested or conferred within the limits (other than limits having effect by reference to the places at which offences are committed) of their several jurisdictions, whether those limits are as to subject-matter or otherwise. on indictment of an offence against the Act or the regulations, not being an offence committed within a State, may be held in any State or Territory of the Commonwealth. Where an appeal lies from a court to the Supreme Court of a State or Territory of the Commonwealth, an appeal from a decision of the court exercising jurisdiction by virtue of the Act may be brought to the High Court. The High Court may grant special leave to

¹ Reg.319(1).

Sec.25.

appeal to the High Court from a decision of such a court, notwithstanding that the law of that State or Territory prohibits the appeal. Subject to the Act, the laws of a State or Territory of the Commonwealth with respect to arrest and custody of offenders or persons charged with offences and the procedure for certain matters (i.e., their summary conviction, their examination and commitment for trial on indictment, and the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith), and for holding accused persons to bail apply, so far as they are applicable, to a person who is charged in that State or Territory with an offence against the Act or the regulations. Except as provided by the Act, the <u>Judiciary Act</u> 1903-60 applies in relation to these offences.

APPENDIX III

Legislation relating to Air Corporations

Legal aspects of the governmental control over air corporations and their transport operations in Australia cannot be satisfactorily discussed without examining carefully economic and political considerations relevant to the industry as a whole. A detailed survey of these problems is, however, beyond the scope of the present study, and it is intended here to give only an outline of the Commonwealth legislation in this field. The Commonwealth and State licensing regulations of air transport service operations have already been mentioned in Chapter VII and Appendix II.

1. International aviation

(1) Qantas Empire Airways Ltd. (Q.E.A.) is a public company incorporated under the Queensland <u>Companies Act</u>
1931, as amended, in which the Commonwealth and its nominees hold all shares. Historically, the Queensland and Northern Aerial Services Ltd. (Q.A.N.T.A.S.), the first airline in eastern Australia, was formed in 1920, and

No.53 of 1931, as amended. See now the uniform <u>Companies</u> Act (Queensland, 1961 - date of commencement, 1 July 1962).

Q.E.A. was registered in Queensland in 1934, combining the interests of Imperial Airways Ltd. and Q.A.N.T.A.S. Ltd. The Qantas Empire Airways Agreement Act, 1946, authorized the execution of an agreement for the purchase by the Commonwealth of the shares held by British Overseas Airways Corporation (B.O.A.C. - successor to Imperial Airways Ltd.) in Q.E.A., so that the Commonwealth became the owner of these shares on 31 March 1947. By the Qantas Empire Airways Act, 1948, 2 approval was given to the purchase by the Commonwealth of all the remaining 261,500 shares which had been owned by Q.A.N.T.A.S.; Q.E.A. became thus entirely Commonwealth-owned. It is managed by a board of directors who are appointed by the Federal Government, and its powers and capacity are formally governed by its Memorandum and Articles of Association. By the abovementioned Act of 1948, approval was given to subscription by the Commonwealth to issues of capital by Qantas. Several Loan (Qantas Empire Airways Ltd.) Acts 4 have been enacted from time to time to approve the raising by way of loan of moneys to be lent to Qantas.

No.75 of 1946.

No.30 of 1948.

The shareholding of Q.A.N.T.A.S. passed to the Commonwealth on 30 June 1947.

Loan (Qantas Empire Airways Limited) Act 1957; 1958; 1960; 1962; 1963 and 1964.

- (2) The agreement between the United Kingdom and Australia in respect of the participation by Australia in the Empire Air Mail Scheme was ratified by the Empire Air Service (England and Australia) Act, 1938, and the execution of an agreement between the Commonwealth and Qantas, as the contractor, was also authorized. This agreement was amended as a result of certain changes in the form of administration of the governmental control of civil aviation in the Commonwealth, and the Empire Air Service (England and Australia) Act, 1941, agave effect to the amendment. However, the Act was repealed by the Statute Law Revision Act, 1950, and is not now in force.
- (3) The <u>British Commonwealth Pacific Airlines Act</u>,

 1947, authorized the execution of an agreement between

 United Kingdom, Australia and New Zealand for the

No.13 of 1938.

The agreement between the U.K. and Australia was contained in the despatch and cablegram, the copies of which were set out in the First Schedule to the Act. The agreement between the Commonwealth and Qantas was set out in the Second Schedule to the Act.

This had connection with the re-organization of the civil aviation administration in 1938.

No.11 of 1941.

No.80 of 1950, sec.5 (Third Schedule, Part VII).

No.32 of 1947.

establishment of British Commonwealth Pacific Airlines Ltd. (B.C.P.A.), a tripartite organization for establishing, operating and developing trans-Pacific air services between Australia and North America and between New Zealand and North America, under arrangements to be agreed between the three governments. The Act also provided for the appropriation of such amounts as were required to be paid by the Commonwealth under this inter-governmental agreement. The air services agreement between the United States and Australia was signed on 3 December 1946, in which the U.S.A. designated Pan American Airways and Australia designated B.C.P.A. to operate a service between the both B.C.P.A. was incorporated under the New South countries. Wales Companies Act 1936-40, in which the partner governments were the sole shareholders. Control was exercised by financial directives issued by the shareholders. The contributions by the Government was in the following ratio which was fixed in accordance with the degree of general interest which each country had in the services to be operated by the company: Australia 50 per cent, New Zealand 30 per cent and United Kingdom 20 per cent. tripartite organization was in accord with the policy of international ownership and control of international air

No.33 of 1936, as amended. See now the uniform <u>Companies</u> <u>Act</u> (New South Wales, 1961 - date of commencement, 1 July 1962).

transport which was unsuccessfully advanced by the Australian and New Zealand Governments at the Chicago Conference of 1944. As a result of a conference which took place in Christchurch, New Zealand, in October 1953, between the three Governments' delegates, B.C.P.A. was merged with Qantas Empire Airways Ltd. in 1954, and was placed in liquidation. Until the litigation in Executors of William Kapell v. B.C.P.A. now pending before a U.S. court is finally disposed of, the liquidation of the company will not be completed.

2. <u>Domestic Aviation</u>

(1) The Australian National Airlines Act 1945-61³ establishes a Commonwealth instrumentality, viz., the Australian National Airlines Commission (hereinafter 'the Commission'), to operate national airline services. The Commission is a body corporate with perpetual succession and a common seal, and may acquire, hold and dispose of real and personal property, and is capable of suing and being sued in its corporate name. It shall have and may

The policy has now been abandoned. See Chapter VI, ante.

As to this case, see Chapter VIII, ante.

No.31 of 1945, as amended by No.90, 1947; No.102, 1952; No.105, 1956; No.70, 1958 (<u>Airlines Equipment Act</u>); No.3, 1959; and No.71, 1961.

exercise the rights, powers, authorities and functions conferred, and shall be charged with and perform the duties and obligations imposed, upon it by the Act. office is to be established at such place as the Minister appoints, and the Minister has appointed Melbourne as the head office. The Commission carries on its operational activities under the name of Trans-Australia Airlines (T.A.A.). The Commission consists of 6 Commissioners (including a Chairman and a Vice-Chairman), who are appointed by the Governor-General. A Commissioner is appointed to hold office for a period not exceeding 5 years and is eligible for re-appointment. However, the Governor-General may terminate the appointment for inability, inefficiency or misbehaviour; a Commissioner or an Acting Commissioner may resign his office on his own accord, but the resignation is not effective unless it has been accepted by the Governor-General or the Minister, as the case may be. The Act provides further for vacation of office of the Commissioner, meetings of Commission,

Sec.14. A Commissioner who is directly or indirectly interested in a contract made or proposed to be made by the Commission otherwise than as a member, and in common with the other members, of an incorporated company consisting of not less than 25 persons must, as soon as possible after the relevant facts have come to his knowledge, (cont. next page)

delegation of powers by Commission, appointment of officers and of temporary and casual employees. The Public Service Arbitration Act 1920, as amended, does not apply in relation to the employment of officers or employees of the Commission. For industrial disputes relating to conditions of employment, the Conciliation and Arbitration Act, 1904, as amended, applies, and there have been several applicable judgments of the Commonwealth Court of Conciliation and Arbitration.

^{1 (}cont.)

disclose the nature of his interest at the meeting of the Commission. Such a Commissioner cannot take part after the disclosure in any deliberation or decision of the Commission with respect to that contract and is disregarded for the purposes of constituting a quorum of the Commission.

Secs. 14-18.

² No. 28 of 1920 - No. 1

No.28 of 1920 - No.41 of 1959. Earlier Acts were cited as Arbitration (Public Service) Acts.

This section was inserted by sec.3 of the Australian National Airlines Act 1956. See also sec.4. Previously, employees of the Commission also had access to the Public Service Arbitrator under the Public Service Arbitration Act 1920-52 (secs. 3 and 122); see Australian Pilot, vols. 1-5, civil aviation, p.442.

No.13 of 1904 - No.40 of 1961. Earlier Acts were cited as Commonwealth Conciliation and Arbitration Acts.

See, Qantas Empire Airways Limited v. The Australian Air Pilots' Association and Others (No.496 of 1952); Australian Air Pilots' Association v. Airlines (Western Australia) Limited and Others (No.139 of 1954); Australian Air Pilots' Association v. Australian National Airlines Commission (Nos.11 and 202 of 1954); Australian National Airlines Commission v. Australian Air Pilots' Association (No.230 of 1953); see also R. v. Portus: Ex parte Australian Air Pilots' Association (1953) 27 A.L.J. 627.

of officers of Public Service of Commonwealth who transferred to the Commission are to be preserved, and the Officers' Rights Declaration Act 1 applies. The Commonwealth Employees' Compensation Act 1930, as amended, 2 applies to employees of the Commission.

The powers, functions and duties of the Commission are prescribed in secs.19-29 of the Act. Sec.19 provides for general functions and duties of Commission:

- (1) For the purposes of this Act and subject to the provisions of this Act and of the Air Navigation Regulations and with full regard to safety, efficiency and economy of operation the Commission may do all that is necessary or convenient to be done for, or as incidental to, in relation to, or in connexion with the establishment maintenance or operation by the Commission of airline services for the transport, for reward, of passengers and goods by air -
 - (a) between any place in a State and any place in another State;
 - (b) between any place in any Territory of the Commonwealth and any place in Australia outside that Territory; and
 - (c) between any place in any Territory of the Commonwealth and any other place in that Territory.

¹ No.16 of 1928 - No.15 of 1959.

No.24 of 1930 - No.94 of 1962.

Cf. Australian National Airlines Commission and Another v. Cassidy, 1964, 38 A.L.J.R. 47.

or for the transport of mails by air between any places in Australia in pursuance of an agreement entered into under section twenty-two of this Act.

- (2) It shall be the duty of the Commission to exercise the powers conferred by the last preceding sub-section, as fully and adequately as may be necessary to satisfy the need for the service specified in that sub-section, and to carry out the purposes of this Act.
- (3) The Commission, with the approval of the Minister, shall have, and may exercise in relation to airline services between any place in Australia and any place outside Australia, the like powers as it has in relation to airline services specified in sub-section (1.) of this section.

The <u>Australian National Airways Case</u>¹ has already been discussed in relation to the Commonwealth's unsuccessful attempt to confer on the Commission on a monopoly in respect of services between States. Sec.19A provides for the Commission's intra-State services in pursuance of powers referred by State Parliaments:

(1) Where the Parliament of any State has, prior to the commencement of section ten of the Australian National Airlines Act 1959, by any State Act, referred to the Parliament of the Commonwealth the matter of air transport, or the matter of the regulation of air transport, or the matter of the regulation of air transport, the Commission may, subject to this section, during the period of operation of that State Act, or during any extension of that period -

¹ (1945), 71, C.L.R. 29.

- (a) establish airline services for the transport for reward of passengers and goods within that State; and
- (b) maintain and operate airline services for any such transport,

and shall have, in relation to any such service, the like powers as it has in relation to airline services specified in sub-section (1.) of the last preceding section.

- (2) The Commission shall not -
 - (a) establish any service which it could not lawfully establish but for this section unless the Premier of the State in which the service is to be established has notified the Prime Minister in writing that he consents to the establishment and operation of the service; or
 - (b) continue the operation of any service in respect of which consent has been given under the last preceding paragraph after the Premier has notified the Prime Minister in writing that he withdraws his consent to the operation of that service.
 - (3) The Commission shall, in respect of any service operated by it in pursuance of consent under the last preceding sub-section by the Premier of a State, pay to the State from time to time amounts equivalent to the licence fees (if any) which would be payable under the law of the State if the service were operated by a person other than the Commission.

Only the Queensland's and Tasmanian Parliaments have so far passed legislation of this kind, and the <u>Public Vehicles</u>

<u>Licensing Appeal Tribunal (Tasmania) Case</u> has already been

^{(1964),} A.L.R. 918; 37 A.L.J.R. 503.

discussed in relation to the Commission's authority under this section to establish and operate within Tasmania intra-State airline services without a licence under the Tasmanian traffic legislation. Fares and charges may be imposed by the Commission in respect of its transport activity, but its power to purchase and dispose of assets is restricted by the provisions of the Act. According to sec.21, the Commission may (a) acquire by lease or purchase any land, buildings, easements or other properties (whether real or personal), rights or priviledges which it thinks necessary for the purposes of the Act; and (b) exchange, lease, dispose of, turn to account or otherwise deal with, any property, rights or priviledges of the Commission. But the Commission cannot, without the approval of the Minister, purchase any land for a consideration exceeding £A20,000, enter into a lease of land for a period exceeding 10 years, or dispose of any property, right or priviledge where the consideration for the disposal, or the value of the property, right or priviledge, exceeds £A50,000; the Commission cannot, without the approval of the Minister, enter into a contract for the supply of aircraft, equipment or materials to the Commission for a consideration exceeding £A50,000. General contractual powers of the Commission are conferred by sec.23 for the execution of

any work or service authorized by the Act or any other Act to be executed by the Commission, in such manner, upon such terms, for such sums, and under such stipulations, conditions, and restrictions as the Commission thinks The Commission may enter into any agreement or contract with the Commonwealth for the transport of mails by air. In Helicopter Utilities Case, the Commission successfully tendered for the hire to the Commonwealth of helicopters and crews to accompany the Australian National Antartic Research Expedition on a voyage to the Antartic; H., who had supplied helicopters for use by the Commonwealth in respect of a previous Antartic expedition and on this occasion had placed the only other tender, sought an interlocutory injunction to restrain the Commission from carrying out the contract for the hire of the helicopters, on the ground that the Commission had no power to make such a contract. The Court considered that if the power to conduct this operation was not conferred by the Act whereby the defendant Commission was incorporated, then, the act would be ultra vires and void. According to the Court's opinion, the only power conferred upon the Commission by the Act was a power to conduct

¹ (1962), N.S.W.R. 747; 1963 (vol.80), W.N. 48.

airline services, and the charter of two helicopters for an expedition of that kind was not any part of the conducting of an airline service. Having referred to the definitions of 'interstate airline service' and 'territorial airline service' which were set out in the Act, the Court defined what was envisaged in sec.19 in its references to airline services as 'the services of a regular succession of aircraft plying between certain places'. However, the defendant relied on the incidental power under sec.19 and on a wider power under sec.21.

^{&#}x27;Airline services' is not defined in the Act, but in sec.4, 'air service' is defined as a 'service established or conducted by the Commission for the transport by air of passengers or goods!. !Interstate airline service! is defined to mean 'a service providing for the transport by air, for reward, of passengers or goods and operating from one place in Australia to another and having scheduled stopping places in two or more States. 'Territorial airline service' is defined to mean 'a service providing for the transport by air, for reward, of passengers or goods and having a scheduled stopping place in a Territory of the Commonwealth. 'Scheduled stopping places, in relation to any airline service, means the terminal and scheduled intermediate stops specified in the conditions of any airline licence issued in respect of the service and includes such other stopping places as are prescribed!.

⁸⁰ W.N. at p.52; the court referred to the definition of 'airline' in the Shorter Oxford Dictionary - 'a line of air craft', and in the definition of 'line' in the same dictionary - (in such a context) 'a regular succession of public conveyances plying between certain places'.

⁸⁰ W.N. at p.52.

I do not consider that s.21 can be read so as to widen the power to conduct air services which is contained in s.19; and I do not think that any of the other sections in Division 2 of the Act widen this primary power so as to permit the operation of a charter helicopter service as an operation in itself. It seems to me that the only right which the defendant Commission can assert to conduct such a service is under an incidental power. It is argued that there is an incidental power to engage in the performance of the present contract because the airline service may have helicopters for use in the course of its regular flights. Reliance is placed on the fact that helicopters are used for the transport of airline passengers from airport to city terminal. 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 waste1....It is clear that a question of fact arises, namely, whether this is an incidental use of the helicopters or not. However it appears to me on such evidence as is before me that there is nothing to suggest that the proposed use of helicopters is an incidental use; rather, it is the assertion of a right to conduct charter services of extended duration in a manner which, in my view, goes beyond power.

It will be seen that the only question was as to the scope of the Act, not of the constitutional power which we have already discussed elsewhere.² Nothing in the Act is to

The court cited as authorities, Foster v. London Chatham and Dover Railway Co. (1895) 1 Q.B. 711; Forrest v. Manchester, Sheffield and Lincolnshire Railway Co. Ltd. (1861) 30 Beav. 40; 54 E.R. 803; Lyde v. The Eastern Bengal Railway Co. (1866) 36 Beav. 10; 55 E.R. 1059.

See Chapter IV, ante.

be construed to confer on the Commission any power which, for the time being, are exercisable under the <u>Air Navigation</u>

Regulations by the Minister or any other authority, and the provisions of the Regulations, so far as applicable, apply to and in relation to the Commission.

The Act provides for finances of the Commission, including such matters as capital of the Commission, borrowing by the Commission, Commission's duty to prepare annual estimates, bank accounts, application of moneys, proper accounts to be kept, audit, profits of the Commission. Above all, the Commission must pay all rates, taxes and charges imposed by or under any law of the Commonwealth and such other rates, taxes or charges as the Minister specifies; the Commission is not a public authority for certain purposes either of the Income Tax and Social Services Contribution Assessment Act or of the Sales Tax (Exemptions and Classifications) Act.

Secs. 28 and 29.

Secs. 30-38.

No.27 of 1936 - No.69 of 1963.

No.60 of 1935 - No.44 of 1963.

An annual report of Commission is to be submitted to the Minister, who subsequently lays it and financial statements, together with the report of the Auditor-General, before each House of the Parliament. 1

Part VI of the Act provides for penalties and procedure. ² If on demand any person fails to pay the fares or charges due to the Commission in respect of any service rendered by the Commission the Commission -

- (a) may detain and sell all or any of the goods of the person which are in its possession, and out of the moneys arising from the sale retain the fares or charges so payable, and all charges and expenses of the detention, and shall render the surplus, if any, of the moneys arising by the sale and such of the goods as remain unsold, to the person entitled to that surplus; or
- (b) may recover the fares and charges in any court of competent jurisdiction.

If any person inflicts, through any act, neglect, or default whereby he has, on conviction, incurred any penalty imposed by the Act or any other Act, any damage upon any aircraft or other property vested in the Commission, damage must be made good in addition to penalty, the amount of that damage being to be determined by the court

Sec.40. See also sec.41 for further reports to the Minister.

Secs. 60-63.

by which he was convicted. Any office; employee or agent of the Commission and any person called by him to his assistance may seize and detain any person who has committed any offence against the provisions of the Act and whose name and residence are unknown to the officer, employee or agent, and may, without any warrant or other authority than the Act, convey him with all convenient despatch before a court of summary jurisdiction; the court may proceed with all convenient despatch to the hearing and determination of the complaint against the offender. Notwithstanding anything contained in any other Act, any justice or justices of the peace of a State sitting at any place as a court for the summary punishment of offences under the law of the State shall, at that place, have jurisdiction to hear and determine the complaint against an offender who is so arrested and who cannot be brought before a Police, Stipendiary or Special Magistrate within seventy-two hours after he has been brought to that place for the purpose of the hearing and determination of the complaint, or, if he was seized at that place, within seventy-two hours after he was so seized. be noted, however, that secs.69(1)(g) and 70 of the Act authorize the Commission to make by-laws and regulations respectively providing for penalties, but, it seems, no by-laws or regulations creating offences have been made

of the Act, the <u>Air Navigation Regulations including the</u>

<u>penal provisions</u> apply to and in relation to the Commission
in like manner as they apply to and in relation to other

persons. The period of limitation for actions <u>against</u>
the Commission is two years after the act complained of
was committed, but this does not apply to an action to
which a period of limitation is applicable by virtue of
the <u>Civil Aviation (Damage by Aircraft) Act</u> 1958¹ or the
Civil Aviation (Carriers' Liability) Act 1959.²

In an action brought against the Commission to recover damages or compensation in respect of personal injury or death (including proceedings for the recovery of contribution from the Commission brought by a tort-feasor who is liable in respect of the same injury or death) the plaintiff is not entitled to recover an amount exceeding £A7,500, but again this does not apply in relation to the liability of the Commission by virtue of the said Commonwealth Acts. The power to enter into insurance contracts, agreements is conferred to the Commission. One

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No.81 of 1958.

No.2 of 1959, as amended by No.38 of 1962.

Sec.63.

Sec.68.

of the main features of the amendment to the Act in 1961 . relates to insurance against (a) risk of loss of, or damage to, aircraft of the Commission and parts of, and equipment for, such aircraft, (b) risk of liability in respect of the death of, or injury to, passengers in aircraft of the Commission, and (c) risk of liability in respect of the death of, or injury to, persons on the surface, or damage to property on the surface, caused by an aircraft of the Commission in flight or by any person or thing falling from such an aircraft. So long as the Commission is not fully insured by policies of insurance against all such risks, the Commission must maintain an account (referred to as 'the prescribed account') for the purpose of making provision against such risks, so far as they are not covered by insurance. Provisions are laid down respectively for the prescribed account to which the Commission shall credit and debit.

The Loan (Australian National Airlines Commission) Acts² have been enacted to approve the raising by way of loan of moneys to be lent to the Commission.

(2) Prior to 1946, the only trunkline operator of significance in the domestic civil aviation was Australian

Sec.5 of No.71 of 1961.

 $^{^{2}}$ No.71 of 1958 and No.31 of 1963.

National Airways Pty. Ltd. (A.N.A.), which was incorporated under the laws of the State of Victoria relating to companies and whose registered office was situated in Melbourne in Victoria. It was controlled by the larger shipping companies operating on the Australian coast and had grown rapidly by absorbing small operators and linking their services into a single network. However, following the establishment of T.A.A. by the Commission in 1946, competition within the industry impinged with great severity on A.N.A. By 1949, A.N.A. faced the dilemma of incurring losses at a time when substantial investment in new heavy aircraft was necessary for its continued existence. In that year A.N.A. approached the Government to merge the two major trunkline enterprises. However, with the Government's early objective of a public monopoly almost achieved, the negotiations for the merger foundered on the obstacle of personalities. Shortly after, the Labour Party was defeated in the elections and the Liberal Party gained control of the Federal Parliament. The new Government's solution to the industry's problems was to establish 'fair and active competition' between the major

This company had no connection with the earlier company of the same name (Australian National Airways Pty. Ltd.), which was formed in 1929 by C.E. Kingsford Smith and C.T.P. Ulm but ceased operations in 1941 because of financial difficulties after the loss of the 'Southern Cloud'.

airlines. This policy required the resuscitation of A.N.A. The measures necessary to secure equitable competition between the two major airlines were given legislative form in the <u>Civil Aviation Agreement Act</u> 1952-57². The Act was later amended by the <u>Airlines Agreement Act</u> 1961.³

The Civil Aviation Agreement Act 1952 approves an agreement made between the Commonwealth and A.N.A. on 24 October 1952 (a copy of which is set forth in the Schedule to the Act), and requires the Commission to do all such things as the agreement provides that the Commission will do. The Preamble to the agreement declares, inter alia, that in order to facilitate trade and commerce among the States, provide for the efficient carriage of mail by air within Australia and assist for defence of the Commonwealth, it is expedient to make provision for the purpose of ensuring - (a) the continued existence of the Company, as well as of the Commission, as an operator of airline services within Australia, (b) the maintenance of competition between the Commission and the Company, and

Cf. P.H. Karmel and M. Brunt, The Structure of the Australian Economy, first published 1962, reprinted in 1963, pp.111-12.

No.100 of 1952, as amended by No.86 of 1957.

No.70 of 1961.

(c) the efficient and economical operation of air services within Australia. The agreement, an operative period of which was fixed as for 15 years, covered such matters as financial assistance to A.N.A. in the form of guaranteed loans for purchasing new equipment, reduced air route charges to be paid by the Company, air mail to be shared equally, government business to be accessed by A.N.A., rationalization of services (i.e., air routes, timetables, fares and freights and other related matters), exercise of Commonwealth powers, and associated matters. Among them, the rationalization of airline services (c1.7) appears to warrant special mention. The Commission and the Company will rationalize such services in respect of routes on which both parties are operating services so as to avoid unnecessary overlapping of services and wasteful competition, to provide the most effective and economical services with due regard to the interests of the public and to bring earnings into a proper relation to overall costs. If the Commission and the Company are unable to agree on any matter arising under such

^{&#}x27;Air route charges' means the amounts charged by the Commonwealth to owners of Australian aircraft engaged in regular public transport operations in respect of their use of aerodromes, and air route and airway facilities, meteorological services and the search and rescue service maintained and operated by the Commonwealth (cl.18).

rationalization review, a representative of the Commission and a representative of the Company will confer together upon that matter under the Chairman and, if still not agreed, the Chairman himself decides the matter in dispute. The Chairman may require the Commission and the Company to furnish or produce to him all information &c., necessary for his making decision. The Commission and the Company assume an obligation to obey any such decision.

Early in 1957 A.N.A., whose finances were deteriorating again, proposed the formation of a holding company to operate T.A.A. and A.N.A. This suggestion was rejected by the Government, on the ground that it was inconsistent with its philosophy of competing airlines. A.N.A. then proceeded to sell the enterprise to Ansett Transport Industries Ltd. on 3 October 1957, the new firm taking the name of Ansett-A.N.A. The Civil Aviation Agreement Act 1957 approved the execution on behalf of the Commonwealth of the proposed agreement made on 16 December 1957 between the Commonwealth, the Commission, A.N.A., Ansett Airways Pty. Ltd. and Ansett Transport Industries

^{&#}x27;Chairman' is an independent person appointed by agreement between the Commission and the Company or in default of agreement is a retired Justice of the High Court of Australia or of the Supreme Court of a State appointed by the Minister (cl.14).

Cf. Karmel and Brunt, op.cit., p.112.

Ltd. (A.T.I.), in accordance with the form in the Schedule to the Act, and empowered the Commission to enter into the agreement and to carry out its obligations and avail itself of its rights under the agreement. The period of the agreement was fixed as until the termination of the 1952 agreement, namely, until October 1967, and the agreement covered the following two main topics. rationalization was extended in respect of routes (in addition to the routes on which both T.A.A. and A.N.A. were competing in 1952) on which both the Commission and any one airline in which A.T.I. had a controlling interest (including A.N.A.) operate, or propose to operate. Secondly, the Rationalization Committee was established. It is constituted from time to time by the Co-ordinator nominated by the Minister and two members nominated by the Commission and the Company respectively. Functions of the Co-ordinator are similar to those of the Chairman as provided for in c1.7 of the 1952 Act. His decision is binding, but either airline, if still dissatisfied,

By purchasing all the shares in A.N.A., A.T.I. automatically assumed the obligations, as well as the benefits, of A.N.A. under the <u>Civil Aviation Agreement</u>. Before concluding its purchase, A.T.I. therefore entered into detailed negotiations with the Government to obtain a rearrangement of the loans in default, and to allow a reasonable period in which to discharge the outstanding obligations it hereby assumed. Cf. Parliamentary Debates, H. of R. 27 Nov. 1957, p.2606. See also cl.5 providing for the ceasing of Ansett Airways Pty. Ltd.'s operation of airline services and for prohibition of resumption of the operation during the continuance of the agreement.

may appeal to the Chairman, in which event the Co-ordinator will furnish the reasons for his decisions to the Chairman (cls. 3 and 4).

The Airlines Agreement Act 1961, by which the Civil Aviation Agreement Act 1952-57 was amended and its citation became the Airlines Agreement Act 1952-61, approves the agreement made on 26 September 1961 between the Commonwealth, Commission, A.T.I. and A.N.A., a copy of which is set out in the Second Schedule to the Act. Among other things, the agreement provides for acquisition and use of turbojet aircraft on the equal basis by the Commission and the Company, guarantees of loans for turbo-jet aircraft to A.T.I. or A.N.A., rationalization of services, establishment and procedure of Rationalization Committee and related matters. As provided for in the Preamble, the parties desire to consolidate the procedures relating to the rationalization of domestic air services in the light of experience of the operation of the Civil Aviation Agreements of 1952 and 1957. The matters relating to rationalization of services which the Commission and the Company agree to keep under review are:-

- (a) time-tables, frequencies and stopping places,
- (b) the aircraft types and aircraft capacity used on those air services,
- (c) proposed variations in the levels of fare and freight rates,

- (d) the industry passenger load factor and freighter load factor necessary to permit profitable airline operations by the Commission and the Company in relation to particular periods on specified groups of competitive routes, and
- (e) any other matters affecting the efficient and economical operation of those air services.

If the airlines are unable to agree in relation to any matter which is the subject of review, either airline may refer it to the Rationalization Committee - a successor of the Committee established under the 1957 agreement. If, after consideration by the Committee, the airlines are still unable to agree, the matter is decided by the Co-ordinator. Under the new Airlines Agreement, an airline which is dissatisfied with a decision of the Co-ordinator may refer the matter to an Arbitrator, who exercises similar functions as the Chairman exercised under the 1952 agreement. The Civil Aviation Agreement 1952 as affected by 1961 agreement continues in force until 1977, and the 1961 agreement is to be read and construed as forming part of that agreement as so extended and affected.

^{&#}x27;Arbitrator' is a person appointed by agreement between the Commission and Ansett-Transport Industries Ltd. or in default of agreement a Justice of a federal court other than the High Court made available under arrangements made by the Attorney-General (c1.13(1)).

(3) The <u>Airlines Equipment Act</u> 1958 authorizes the Commonwealth to give assistance to the major domestic airlines in respect of their aircraft re-equipment under terms and conditions which will ensure the stability of the domestic air transport industry and promote the objectives of the Civil Aviation Agreement Acts of 1952 and 1957. Part II and Part III of the Act, setting out provisions relating to financial arrangements, enable the Commission and the Ansett-A.N.A. to re-equip aircraft (including the purchase of two Lockheed Electra aircraft) respectively. 2 Part IV (rationalization of aircraft fleets) sets up machinery to ensure that the two airlines do not provide excess capacity. An estimate is to be made by the Minister of the traffic on competitive and non-competitive routes during a specified period. A determination is then to be made by him mainly on the

No.70 of 1958.

²

Sec.31 (borrowing of moneys by the Commission) of the <u>Australian National Airlines Act</u> 1945, as amended, was amended by this Act (sec.5(1)) so as to expand the limits of borrowing.

^{&#}x27;Competitive route' means a route over which air services are operated both by the Commission and by the Company, and 'non-competitive route' means any other route (sec.11).

basis of an optimum revenue load factor of the aircraft capacity necessary for the Commission and the Company respectively to carry one-half of the total traffic on competitive routes and to operate its non-competitive services during that period. In the light of this determination the two operators will then be mutually bound during the period in which any guaranteed loans are not repaid in full by the following obligations: first, neither airline must provide on competitive routes, during the specified period, more aircraft capacity than is necessary to carry half the estimated traffic at the predetermined revenue load factor, Secondly, the operators

^{&#}x27;Revenue load factor', in relation to an aircraft, means, in respect of a period, the percentage that the revenue value of the work performed on the flights made by the aircraft during that period is of the revenue value of the work that could have been performed on those flights, ascertained in accordance with the equation - $A = \frac{100(B + CD)}{E},$

where A is the revenue load factor; B is the number of passenger ton-miles performed by the aircraft in the period, based on a passenger weight (including free baggage) of £A200; C is the non-passenger revenue traffic ton-miles performed by the aircraft in the period; D is the ratio of the revenue yield per ton-mile of non-passenger traffic to the revenue yield per ton-mile of passenger traffic; and E is the total revenue traffic ton-miles for which the aircraft could have been used on the flights performed in the period (see sec.11).

^{&#}x27;Aircraft capacity', in relation to aircraft, means, in respect of a period, the number of revenue traffic ton-miles capable of being performed by the aircraft in the period (sec.11).

³ Sec.12.

must dispose of any aircraft capacity in excess of that required to operate their competitive and non-competitive services after making due allowances for the need for stand-by aircraft, maintenance and overhaul of aircraft and crew training and similar matters. Thirdly, the airlines are required not to acquire additional aircraft which would result in the capacity limitations being exceeded, and not to introduce aircraft of a type which, having regard to the types already in operation, would be detrimental to the stability of the domestic air transport industry. Finally, there is an obligation to furnish to the Minister, within such times as the Minister specified, such information in respect of traffic as the Minister requires. 1 The Director-General may convene conferences to be attended by representatives of the Department of Civil Aviation, the Commission and the Company, for the purpose of considering matters relevant to the making of such estimates and determinations by the Minister. The Minister is expressly required to accord Commission and Company equal treatment.

These Commonwealth Acts aim at the Government's 'two airlines' policy to rationalize two, and not more than two,

¹ Sec. 13.

operators of trunk route airline services, one being the Commission, each capable of effective competition with the other. However, as shown in the IPEC-Air Case, a successful application for a licence of inter-State air transport service operations on the strength of sec.92 of the Constitution has recently put the Commonwealth in a difficult position to maintain its two-airlines policy, save by relying upon its control over aircraft importation into Australia; there are indications that several other airline companies wish to enter into the inter-State air transport businesses.

The Ansett Transport Industries Ltd. carries on various transport undertakings including Ansett-A.N.A. and associated businesses (e.g., hotel, communication), whose internal regulations are generally outside the Commonwealth powers; hence, the Australian National Airlines Commission operating T.A.A. whose capacity, powers, etc, are defined in detail by the Commonwealth legislation may well feel discontented with being restricted in acting for itself in its economic competition with another competitor, Ansett-A.N.A.

The Queen v. Anderson; Ex parte IPEC-Air Pty. Ltd. (1965) 39 A.L.J.R. 66.

As to the Commonwealth powers generally in respect of corporations ($\sec.51(xx)$ of the Constitution), see Wynes, op.cit., p.211, et seq.

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