CASE NOTES

THE QUEEN v. PUBLIC VEHICLES LICENSING APPEAL TRIBUNAL OF TASMANIA; EX PARTE AUSTRALIAN NATIONAL AIRWAYS PTY LTD[1]

Constitutional law—Matters referred by States—Reference revocable by Governor-in-Council—Valid—Constitution section 51 *(xxxvii)*[2]*—Commonwealth Powers (Air Transport) Act* 1952 *(Tas.).*

The Traffic Act 1925-1961 (Tas.) provided for the issue of aircraft licences by the Transport Commission and prohibited the use of aircraft without a licence. Section 30B provided that any person who, being the holder of any licence, was aggrieved by the grant of a licence to any other person, might appeal from the decision of the Commission granting the licence to the Public Vehicles Licensing Appeal Tribunal.

The Commonwealth Powers (Air Transport) Act 1952 (Tas.) referred the matter of air transport in Tasmania to the Parliament of the Commonwealth.[3] Trans-Australia Airlines, operating on intrastate air routes under section 19A[4] of the Australian National Airlines Act 1945-1961 (Cth), was granted aircraft licences by the Transport Commission to operate within the State of Tasmania.

Ansett-A.N.A. appealed under section 30B of the Traffic Act to the Public Vehicles Licensing Appeal Tribunal from this decision and argued, *inter alia*, that the Commonwealth Powers (Air Transport) Act did not effectively refer the matter of air transport to the Commonwealth Parliament. The Tribunal dismissed the appeal, holding that there was a valid reference within the meaning of section 51 (xxxvii) and that by virtue of section 19A of the Australian National Airlines Act, Trans-Australia Airlines did not need a licence under the State Act.

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[1] (1964) 37 A.L.J.R. 503, [1964] A.L.R. 918. High Court of Australia; Dixon C.J., Kitto, Taylor, Menzies, Windeyer and Owen JJ.

[2] S. 51 (xxxvii) provides—' The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:— . . . (xxxvii.) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law '.

[3] S. 2 of the Act 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.' S. 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 accordingly on the date so fixed.' The Act commenced on 2 April 1959 (S.R. 1959, No. 45).

[4] S. 19A (1) provides—' Where the Parliament of any State has . . . 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, 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 . . . '

Ansett-A.N.A. thereupon obtained orders nisi for certiorari and mandamus in the High Court against this decision of the Tribunal, and at the hearing argued, first, that section 19A of the Australian National Airlines Act only conferred a power on Trans-Australia Airlines to conduct its air services within Tasmania; and second, that section 19A required Trans-Australia Airlines to hold a State licence (and be subject to State regulation) in respect of its airline services in Tasmania; and third, that section 19A was ultra vires the Commonwealth Parliament as there had not been a reference of power within the meaning of section 51 (xxxvii) of the Constitution.

In a joint judgment, the Court decided, as a matter of interpretation, that section 19A of the Australian National Airlines Act did authorize Trans-Australia Airlines to operate airline services in a State without a State licence. The Court then turned its attention to the more important question of reference of power.

The reference was attacked on two grounds. In the first place, it was argued that under section 51 (xxxvii) a State could only refer a power to enact a statute described and defined by the State Parliament in the referring Act, that is to say, section 51 (xxxvii) did not authorize reference of a power in broad terms. The prosecutors sought support for this contention in the words at the end of placitum xxxvii—' which afterwards adopt the law '—inferring from this that the matter referred to the Commonwealth Parliament had to be a power to pass a particular law. But the Court dismissed this as ' an entirely erroneous inference without foundation '.[5] The law referred to by the last words of placitum xxxvii was the law made by the Parliament of the Commonwealth in pursuance of a reference of a matter.

The second and main argument was that placitum xxxvii contemplated the reference of a matter once and for all and that the power given by section 3 of the State Act to the Governor to fix by proclamation a date on which the State Act was to cease to be in force was incompatible with a reference under placitum xxxvii. The Court, however, held that a reference for a determinable period was valid. The words of the Constitution were to be read without imposing limitations or implications which were not found in the express words. In placitum xxxvii there were no implications concerning the period of reference. In the words of the Court—

> It is plain enough that the Parliament of the State must express its will and it must express its will by enactment. How long the enactment is to remain in force as a reference may be expressed in the enactment. It none the less refers the matter. Indeed the matter itself may involve some limitation of time or be defined in terms which involve a limitation of time.[6]

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[5] (1964) 37 A.L.J.R. 503, 507.

[6] *Ibid.* A similar view was expressed by Dr Evatt, Sir Robert Garran, Sir George Knowles, and Professor Bailey in a series of opinions on a model bill drafted in 1942 referring certain powers to the Commonwealth. See (1943) 16 *Australian Law Journal* 323.

The Court refrained from expressing any final opinion on the question of whether a general reference once made can be revoked by the State Parliament. But an indication of the course the Court might take was contained in the words—

> But it must be remembered that the paragraph is concerned with the reference 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 repeal.[7]

This statement supports the view that matters referred under placitum xxxvii may be revoked by the referring-parliament.

Against this it can be argued that once a matter is referred it becomes a fully-fledged power like the other powers in section 51, and as such cannot be repealed by a State parliament. Such a view was expressed by Windeyer J. (who was a member of the Court in the present case) in *Airlines of New South Wales v. New South Wales*[8] in a judgment delivered a month before that in the present case. His Honour said—

> But I entertain a serious doubt whether a reference could be for an indefinite period terminable by the State legislature . . . 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.[9]

An alternative interpretation of section 51 (xxxvii) which was not discussed by the Court, is that it merely operates to give the Commonwealth Parliament power to take advantage of the reference of a matter. When the Commonwealth Parliament legislates on a matter referred by a State, its power springs from two sources. One is section 51 (xxxvii) giving it power to legislate over matters referred to it, and the other is the State Act. The State Act provides a basis or field for the operation of the power contained in section 51 (xxxvii). The State parliament can take away the field in which the power operates, but it cannot affect the power itself. To say that a State Act referring a matter to the Commonwealth adds a power to those listed in section 51 —a power that becomes part of the Constitution that cannot be amended save under section 128—seems misleading. Power to act on a matter referred springs from section 51 (xxxvii): the State Act is the material

[7] (1964) 37 A.L.J.R. 503, 508.

[8] (1964) 37 A.L.J.R. 399.

[9] *Ibid.* 413. Professor Sawer, in an article in (1957) 4 *University of Western Australia Annual Law Review* 1 also argued that a State cannot amend or revoke a reference, on the ground of the uncertainty and inconvenience that would result from a power to revoke or amend.

on which the power operates. And it is doubtful whether an expedient that was intended to allow Commonwealth and States to adapt the constitutional balance of powers to changing circumstances ought to be allowed to become as inflexible as the rest of the Constitution.

Hitherto the States have made sparing use of section 51 (xxxvii), despite numerous proposals and even unanimous agreements by State governments.[10] In part this reluctance of the States has been due to doubt as to whether a reference can be made for a limited time and whether a reference once made can be revoked.[11] The present case has gone some distance towards clearing up the doubts surrounding section 51 (xxxvii) and may lead to greater use of the section in the future.

P. BUCHANAN

[10] For an account of these failures, see the article by R. Anderson in (1951) 2 *University of Western Australia Annual Law Review* 1.

[11] See, for example, the range of legal opinions on the proposal of the States to grant powers to the Commonwealth Parliament for five years from the end of World War II, in (1943) 16 *Australian Law Journal* 323.