THE ASCERTAINMENT OF FACTS IN AUSTRALIAN CONSTITUTIONAL CASES

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> The suggestion that the Court should hear evidence touching the question of the constitutionality of a statute is somewhat startling when the possible far-reaching effect of such a course is, upon reflection, rendered apparent. (*Barker v. State Fish Commission.*)[1]
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> Highly inconvenient as it may be, it is true of some legislative powers limited by definition . . . that the validity of the exercise of the power must sometimes depend on facts, facts which somehow must be ascertained by the court responsible for deciding the validity of the law. (*per* Dixon C.J. in *Commonwealth Freighters Pty Ltd v. Sneddon*).[2]

Judicial review of the validity of legislation in a federal system may be regarded as an exercise in the interpretation of legal texts—ascertaining whether the impugned law conflicts with the superior law of the constitution—and therefore as a matter of law in which evidence plays no part or at best a subsidiary one. In the seminal case of *Marbury v. Madison,* Marshall C.J. thus described judicial review: "If two laws conflict with each other", then in that event "the courts must decide on the operation of each".[3]

It has, however, been a common experience of federal supreme courts that it becomes necessary to recognise that, in some cases at least, facts may condition the validity of a law. The purpose of this article is to examine some aspects of the attitude of the High Court of Australia to this matter.[4] It should be added that the scope of the article does *not* extend to the related subject of the extent to which factual information may be used as an extrinsic aid in construing the Constitution itself. In this connection, the High Court has made rather greater use of factual materials of an historical character than is perhaps generally realised, but it is not proposed to pursue that matter here.[5]

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[1] (1915) 88 Wash. 73, 152 Pac. 537.

[2] (1959) 102 C.L.R. 280, 292.

[3] (1803) 1 Cranch. 137, 177, 2 L. Ed. 60, 73.

[4] The subject has also been examined by J. D. Holmes, "Evidence in Constitutional Cases" (1949) 23 A.L.J. 235 and by P. H. Lane, "Facts in Constitutional Law" (1963) 37 A.L.J. 108.

[5] Some of the cases were referred to by the writer in "Legislative History and the Sure and True Interpretation of Statutes" (1960) 4 Univ. Q.L.J. 1, 16-21.

Logically two questions may be distinguished:

(a) To what extent, under what conditions, do facts decide the validity of legislation?

(b) Where facts have this role, how does the Court ascertain the facts?

Constitutional Facts

At the outset a distinction needs to be observed between ordinary facts that, in a particular constitutional case, may have a bearing on the decision to be given, and what will be described in this article as "constitutional facts".[6] Instances of the former type of facts are readily given. The question may be whether the circumstances establish that a person has the status of an immigrant in the sense that he comes within the reach of the Commonwealth's legislative power with respect to immigration. A familiar issue before the High Court in recent years has been whether a particular transaction involving or connected with the crossing of a State border is, on the facts, an inter-State transaction or "inseverably connected" thereto, and therefore protected by section 92 of the Constitution. The characterization of the facts as found in such cases would involve questions of law, but the facts themselves would be dealt with as in ordinary litigation between parties. Sometimes the solution of this kind of fact problem will not be easy. The view taken on the facts will often be decisive of the case. It seems that the Chief Justice of the High Court (Sir Garfield Barwick) had ordinary facts mainly in mind in the following passage in a section 92 case:—

> It should be remembered that, having regard to the accepted interpretation of the constitutional guarantee, cases coming before this Court in which immunity from State laws by reason of s. 92 is claimed must be decided according to their own particular facts. However much the resolution of such a case is to be approached as a practical problem bearing in mind that it may be part of the nation's trade which is or may be affected by the Court's decision, in the end legal relationships deriving from the ascertained facts must be of singular importance and in many, if not in all, cases definitive of the outcome. Consequently, the facts ought at the outset to be carefully proved and fully explored by both parties. Equally, those who have to decide the facts in the first instance should be astute to realise which are significant for the application of the constitutional provisions and should find such facts precisely and state their findings as to them clearly.[7]

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[6] See Dixon C.J. in *Breen v. Sneddon* (1961) 106 C.L.R. 406, 411.

[7] *Tamar Timber Trading Co. Pty Ltd v. Pilkington* (1968) 117 C.L.R. 353, 358.

The "ordinary fact" problems that arise in constitutional cases can therefore be complex and their resolution decisive of the issue. From the evidential point of view, however, they present no peculiar problem. The ordinary laws of evidence apply; although the extent to which the principles on the burden of proof apply in, for example, section 92 cases is perhaps an open question.[8] The findings made by the Court may bind the parties in other litigation between them, by way of *res judicata* or issue estoppel, but would not be otherwise binding or authoritative.

Our main concern here is with constitutional facts, which may be described as facts that are not peculiar to the immediate parties and upon which the validity of legislation depends or may depend. In this connection, it is necessary to recall, briefly, the general approach adopted by the High Court to the question of the validity of impugned legislation. From the many judicial statements that could be referred to, the following passage from the judgment of Kitto J. in *Fairfax v. Commissioner of Taxation*[9] is quoted:

> The argument for invalidity not unnaturally began with the proposition that the question to be decided is a question of substance and not of mere form; but the danger quickly became evident that the proposition may be misunderstood as inviting a speculative enquiry as to which of the topics touched by the legislation seems most likely to have been the main preoccupation of those who enacted it. Such an enquiry has nothing to do with the question of constitutional validity under s. 51 of the Constitution. Under that section the question is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, "with respect to", one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character? See *per* Latham C.J. in *Bank of New South Wales v. The Commonwealth*[10] and *per* Higgins J. in *Huddart Parker & Co. Pty Ltd v. Moorehead*.[11]

Applying this kind of approach in the case in question, the High Court unanimously held that the challenged law, which subjected the investment income of superannuation funds to income tax unless a percen-

[8] *Allied Interstate (Qld) Pty Ltd v. Barnes* (1968) 42 A.L.J.R. 348.
[9] (1965) 114 C.L.R. 1, 6-7.
[10] (1948) 76 C.L.R. 1, 185-187.
[11] (1909) 8 C.L.R. 330, 409-411.

tage of the fund was invested in public securities, was in its true character a law with respect to taxation. It is the legal operation of the legislation that matters.

The legalistic approach evident in cases where the allegation has been that the law exceeded power has also been generally followed where a law is alleged to conflict with a constitutional prohibition. Section 92 of the Constitution is, of course, the prohibition that has been most frequently before the Court. The Court's general approach has been to test validity by seeking out the direct legal effect of the impugned law, not its ulterior effect economically or socially. Examples are *Grannall v. Marrickville Margarine Pty Ltd,*[12] where the High Court upheld restrictions on the production of margarine although this might have had direct economic consequences for inter-State trade in margarine; and *Wragg v. New South Wales,*[13] where a State price-fixing law that clearly could not have applied to inter-State sales of Tasmanian potatoes was held validly to apply to a first sale of those potatoes within New South Wales. The law in each case imposed no legal obligation in relation to an inter-State transaction.

It has followed from the legalistic approach of the Court that the role played by constitutional facts in the process of constitutional adjudication has been obscured and, indeed, until about the last two decades the problem was largely, although not wholly, not acknowledged in Australia. A major influence in developing awareness of the problem was the "educative experience", if one may so describe it, of the many cases on the defence power decided during and immediately after the Second World War. The special feature of the defence power is that its content is to be ascertained by reference to purpose; a law will be valid under it if it is a law for the defence of the Commonwealth; cases arose in which demonstration of the relationship of the legislation to that purpose depended upon facts that had somehow to be ascertained.[14] The influence of other factors is more problematic, though one may surmise that one influence has been the Court's consistent view that, particularly in the field of constitutional prohibitions, it has the ultimate responsibility to see that the Constitution is not mocked; the maxim that what cannot be done directly cannot be done indirectly has been said to be particularly relevant in construing the Constitution. Thus, the Court has claimed the power to strike down laws embodying "circuitous means" or "concealed designs" to evade section 92 of the Constitution, though it is perhaps easier to point to judicial dicta to this

[12] (1955) 93 C.L.R. 55.
[13] (1953) 88 C.L.R. 353.
[14] See, in particular, *Stenhouse v. Coleman* (1944) 69 C.L.R. 457, 469-470.

effect than to cases where they have been applied. Reference should also be made to the observation by the Privy Council concerning section 92 in *The Commonwealth v. Bank of New South Wales*[15] that every case must be judged on its own facts and its own setting of time and circumstances; the Privy Council added that in regard to some economic activities and at some stage of social development, prohibition with a view to State monoply might be the only practicable and reasonable manner of regulation of inter-State trade. To this may be added the long-standing observation by Lord Maugham in *Attorney-General for Alberta v. Attorney-General for Canada*[16] in relation to "colourable" exercises of legislative power:

> The next step in a case of difficulty will be to examine the effect of the legislation . . . For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be.

The strictly legal operation of legislation is not necessarily the end of the matter.

The Role of Judicial Notice

Looking at the American cases, it is possible to discern a phase in which the major, if not the sole, role was given to facts of which judicial notice might be taken. The famous Brandeis brief, which sought to demonstrate, by reference to reports and opinions, that long hours of labour are dangerous for women primarily because of their "special physical organisation", was accepted by the Supreme Court on the basis of judicial notice: "We take judicial cognizance of all matters of general knowledge".[17] In some American State jurisdictions, a particular reason had been noted for confining factual enquiries to judicial notice. It was said by a majority of the Wisconsin Supreme Court in 1922:

> It is a well-established principle of law that the constitutionality of an act cannot be tested by the evidence in the particular case . . . This in the nature of things must be so, else a law would be constitutional under the facts found in one case and unconstitutional under the facts found in another. Or it would be valid today, but void to-morrow, because of the happening of an extraneous event. If such a view should obtain, the statute in question has been constitutional since its enactment in 1909, and until the Democrats in

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[15] (1949) 79 C.L.R. 497, 640-641.

[16] [1939] A.C. 117, 130. See also *Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty Ltd* (1939) 61 C.L.R. 735, 793 *et seq.*

[17] *Muller v. Oregon* (1907) 208 U.S. 412, 421, 52 L. Ed. 551, 555.

> 1922 failed to poll a 10 per cent. vote at the primary, when it became unconstitutional. Such a test of constitutionality is unthinkable.[18]

The difficulty referred to in this passage will be returned to below.

The High Court was perhaps tempted at one stage to settle upon a similar approach, under which the Court would be normally limited to facts of which it takes judicial notice. Speaking in the *Australian Communist Party* case[19] of the secondary aspects of the defence power, Fullagar J., associating himself with some earlier remarks by Dixon J., said:

> The question which arises at this second stage may itself turn on particular facts as distinct from the overriding general fact of war or national emergency. Such facts may relate to the operation of the law in question or to a state of affairs which calls for its enactment. Whether any and what evidence of such facts is admissible must depend on the circumstances of each particular case. In *Jenkins v. The Commonwealth*[20] and in *Sloan v. Pollard*,[21] evidence was admitted. On the other hand, affidavits were rejected in the *Uniform Tax Case*[22] and in *R. v. Foster; Ex parte Rural Bank of New South Wales*,[23] the Court in each case confining itself to matters of which judicial notice could be taken. The Court will normally, I think, so confine itself. In *Stenhouse v. Coleman*[24] Dixon J. said:— "Ordinarily the Court does not go beyond matters of which it may take judicial notice. This means that for its facts the court must depend upon matters of general public knowledge." The reasons why this must generally be so are stated in his Honour's judgment. The taking of evidence might often involve disclosures which would be prejudicial to the steps being taken by the Executive to deal with the emergency. The Court, in any case, is bound by the legal rules of evidence, and there are thus limitations upon the material which it can receive or take into account. It may perhaps be added that the "facts" will in many cases be of such a general character as to be difficult or impossible to prove or disprove by legally admissible evidence, while quite capable of being judicially noticed. It is indeed a characteristic of a large class of matters which are judicially noticed that they are of this general character.

In the same case Kitto J. observed:

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[18] *State ex rel. Bentley v. Hall* (1922) 178 Wis. 172, 190 N.W. 457.
[19] (1951) 83 C.L.R. 1, 255-256.
[20] (1947) 74 C.L.R. 400.
[21] (1947) 75 C.L.R. 445.
[22] (1942) 65 C.L.R. 373, 384, 385, 409.
[23] (1949) 79 C.L.R. 43, 51, 52.
[24] (1944) 69 C.L.R. 457, 469.

> Although it is only in litigation between parties that the Court may decide whether Commonwealth legislation is valid, it is upon the validity of the legislation in relation to all persons that the Court has to pronounce. The question is whether the legislation forms part of the law of the Commonwealth. Since it is impossible to affirm the validity of a measure upon a particular basis of fact unless that basis of fact can be seen to be common to all persons, it cannot be material, for the purpose of considering validity, to decide an issue of fact which is of such a nature as to admit of different findings in different cases.[25]

To use the language of Fullagar J., it is characteristic of matters which are judicially noticed that they exhibit the requirements of generality postulated by this passage.

Any tendency there may have been to limit the enquiry to facts judicially noticeable seems, however, to have been effectively dissipated by the *cri de coeur* uttered in *Wilcox Mofflin Ltd v. New South Wales*[26] by the joint judgment of Dixon, McTiernan and Fullagar JJ.:

> Unfortunately the parties did not enter into formal or full proof of these and other matters which would have enabled us, at all events, to obtain an understanding which we felt more adequate of the real significance, effect and operation of the statutes, information of a kind that we have come to think almost indispensable to a satisfactory solution of many of the constitutional problems brought to this Court for decision; though we are bound to say that it is not an opinion commanding much respect among the parties to issues of constitutional validity, not even those interested to support legislation, who, strange as it seems to us, usually prefer to submit such an issue in the abstract without providing any background of information in aid of the presumption of validity and to confine their cases to dialectical arguments and considerations appearing on the face of the legislation.

It may be observed, with respect, that the Court's own approach had probably influenced parties to confine their cases to dialectical arguments and considerations appearing on the face of the legislation.

However, it is probably unrewarding to seek to allocate responsibility for the dialectical bent that has always marked proceedings in the Australian High Court. The significance of the dictum in *Wilcox Mofflin Ltd v. New South Wales* lies in the spirited acknowledgment that was made that enquiry into the factual situation, other than by way of judicial notice, was often indispensable for the proper exercise of judicial review. The American Supreme Court had reached a similar view at an earlier point of time. One may refer to the discussion in

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[25] *Id.*, 276.
[26] (1952) 85 C.L.R. 488, 507.

Borden's Farm Products Co. v. Baldwin, decided in 1934, where the Court said, among other things:

> But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic factors of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings.[27]

The Road Tax Cases

Doctrines on the admissibility of factual information crystallized further with the judgments in 1959 in the section 92 case of *Commonwealth Freighters Pty Ltd v. Sneddon.*[28] The main exposition appears in the judgment of Dixon C.J.:

> When, in *Armstrong's Case* [No. 2],[29] an attack was made upon the consistency of the charge imposed by Pt. II with s. 92, the State of Victoria took the course of going into evidence to establish the thesis that the charge formed no more than a proper tonnage rate per mile compensating for the wear and tear of the highways traversed. In courts administering English law according to the principles which developed in a unitary system it must seem anomalous that the question whether a given statute operates or not should depend upon facts proved in evidence. How facts are to be ascertained is of course a question distinct from their relevance. Highly inconvenient as it may be, it is true of some legislative powers limited by definition, whether according to subject matter, to purpose or otherwise, that the validity of the exercise of the power must sometimes depend on facts, facts which somehow must be ascertained by the court responsible for deciding the validity of the law. In *Griffin v. Constantine,*[30] in order to decide the validity of the law there impugned some knowledge was necessary of the nature and history of methylated spirits but it was considered proper to look at books to obtain it. In *Sloan v. Pollard*[31] facts were shown about arrangements between this country and the United Kingdom which gave constitutional validity to an order. In *Jenkins v. The Commonwealth*[32] the validity of the statutory instruments was upheld on evidence as to the place of the mineral mica in electronic devices used in naval and military defence. There is no need to multiply examples. All that is necessary is to make the point that if a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court

[27] 293 U.S. 194, 210, 79 L. Ed. 281, 289.
[28] (1959) 102 C.L.R. 280.
[29] (1957) 99 C.L.R. 28.
[30] (1954) 91 C.L.R. 136.
[31] (1947) 75 C.L.R. 445, cf. 468, 469.
[32] (1947) 74 C.L.R. 400.

> as best it can, when the court is called upon to pronounce upon validity. It is not necessary to consider now whether it was necessary for the State of Victoria to take the course of adducing evidence in response to the challenge to the validity of the statute on the ground that the tonnage-mileage rate did not fulfil the conditions which would justify it as consistent with s. 92. But it is necessary to note that the State did so and in doing so showed on the one hand that certain objections were not well founded and on the other hand other difficulties were inherent in the situation. Of these other difficulties the more serious are referred to in the judgment of Taylor J.: *Armstrong's Case* [No. 2].[33] But from the discussion both by the minority and by the majority of the Court certain features emerged which the road charge possessed, features on which the decision in favour of its validity may be taken to depend.[34]

In fact, in *Commonwealth Freighters Pty Ltd v. Sneddon,* New South Wales, whose statute was under challenge, did not adduce evidence, preferring to rely upon the earlier decision of *Armstrong's Case* [No. 2] referred to in the passage quoted immediately above, in which a similar Victorian statute had been upheld after evidence had been given. The Court held that the conclusion of validity reached in *Armstrong's Case* [No. 2] applied in New South Wales also. Presumptions played a part in this result, with Dixon C.J. presuming the New South Wales law to be valid since *ex facie* it conformed to the principles that had been outlined in the case of *Hughes and Vale* [No. 2] and in *Armstrong's Case* [No. 2] and no evidence had been led by the challenging party to overturn that presumption. Windeyer J. relied on the presumption that the position of roads north of the Murray in the south-eastern portion of Australia might, in the absence of evidence to the contrary, be taken to be the same as that of roads south of the River Murray. Menzies J. seems to have regarded the decision in *Armstrong's Case* [No. 2] as authoritative as to the facts as well as to the law: it was to be followed in the absence of evidence that might afford the basis for a conclusion that the New South Wales statute was not what it appeared to be. A similar approach was adopted in *Boardman v. Duddington,*[35] where the Court upheld the validity of a Queensland statute that was also patterned on the Victorian statute upheld in *Armstrong's Case* [No. 2].

Having begun the saga of the road tax cases since *Hughes and Vale* [No. 2], it is convenient to complete it at this stage. *Breen v. Sneddon*[36]

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[33] (1957) 99 C.L.R. 28, 89-92.
[34] (1959) 102 C.L.R. 280, 291-292.
[35] (1959) 104 C.L.R. 456.
[36] (1961) 106 C.L.R. 406.

concerned prosecution proceedings before a magistrate in which the defendant sought to lead evidence to rebut the presumption relied upon in *Commonwealth Freighters Pty Ltd v. Sneddon* in favour of the validity of the New South Wales statute; the evidence was proffered to show that the State charge bore no relation to the wear and tear involved upon the road. The magistrate rejected the evidence, and rightly so, in the opinion of the High Court, on the authority of *Commonwealth Freighters Pty Ltd v. Sneddon.* Dixon C.J. said that a distinction must be clearly maintained between, on the one hand, ordinary questions of fact which arise between the parties because one asserts and the other denies events bringing one of them within some criterion of liability or excuse set up by law and, on the other hand, matters of fact upon which under "our peculiar federal system" the constitutional validity of some general law may depend.[37] After referring to the tests for road taxes under section 92, he added:

> In the third place it is important to understand that a decision of this Court that a statute is constitutionally valid or has a constitutionally valid application to inter-State transportation is as much a binding precedent when the Court in reaching the decision did take factual information into account as if it had proceeded wholly by reasoning in the abstract. It is for the Court to say whether factual information is required before it can or will decide on the constitutional validity of a law or of its application to a given situation. But once it has decided that a law is valid or that a given application of the law may validly be made, that decision will bind other courts as a precedent governing the question until for good reason shown this Court reviews its decision or the decision is otherwise overruled.[38]

As to the indications in *Commonwealth Freighters Pty Ltd v. Sneddon* that the presumption of validity was rebuttable, Dixon C.J. said:

> But by these references it was not intended to throw it open to every tribunal of fact, be it judge be it jury or be it magistrate, to examine or try as an issue of fact the existence of any of the considerations which this Court had adopted as tests of the validity of the operation of the legislation upon inter-State carriage. It would be impossible to administer the law on such a footing.[39]

Taylor and Windeyer JJ. adopted a similar approach, Taylor J. observing:

> On this aspect of the matter it should be pointed out at once that the case is entirely different from those cases where the constitutional validity of a statute depends upon the existence of a

[37] *Id.*, 411.
[38] *Id.*, 412.
[39] *Id.*, 413.

> publicly and commonly recognised state of affairs. If the criterion of validity does, as I think, permit an issue of fact to be raised as to the reasonableness of the charge, it is one which can be resolved only by the consideration of evidence tendered and considered in the ordinary processes of litigation. But it would be most inappropriate if such an issue should be constantly open for decision in litigation between private individuals. Nor would it, in my view, be appropriate to entertain such an issue in summary proceedings before magistrates at the instance of a police officer or of a transport inspector.[40]

He thought that the State would be a necessary party to any decision on the validity of the statute; here the information had been brought by State officials but apparently this did not meet the requirement. Kitto and Menzies JJ. disposed of the evidence on the ground of its irrelevance; the judgments, particularly the important judgment of Kitto J., probably have as much bearing on the jurisprudence of section 92 as on the present subject. Kitto J. rejected the evidence on the basis that the evidence went to the *severity* of the charge; that was not, he thought, the question; the question was whether the legislation was of a *kind* that section 92 assumes may exist as part of the legal context within which the freedom postulated by section 92 is to exist.

In *Allwrights Transport Ltd v. Ashley*[41] evidence that the total amount of charges collected in respect of a particular highway exceeded the amount of its upkeep was rejected as irrelevant. The charges embodied a rate adopted for the whole of the State, and validity was said to depend on the question whether such a rate, considered as a whole, was consistent with section 92; not whether this or that carrier of goods or the users of this or that highway obtained a full return for what they paid.

In *Freightlines and Construction Holding Ltd v. New South Wales,*[42] the Privy Council declined, "as at present advised" to intervene in the developments since *Hughes and Vale* [No. 2]. Clearly the factual complications were very much in mind. Their Lordships referred to the area being one where "sharply defined questions of fact in the foreground blend imperceptibly in the middle distance with the broader and more distant matters of which a tribunal may take judicial notice";[43] these were matters peculiarly within the province of the High Court.[44]

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[40] *Id.*, 420.
[41] (1962) 107 C.L.R. 662.
[42] (1967) 116 C.L.R. 1, 18, 21-22.
[43] *Id.*, 18.
[44] With the passage of the Privy Council (Limitation of Appeals) Act 1968 (Cth), the unique and ultimate responsibility of the High Court in cases on s. 92 and on other sections has become further entrenched.

The Privy Council recognised, at least impliedly, that the High Court's approach involved negativing the proposition that, when an Act depends for its validity on circumstances that may change, it can be valid only if its operation is expressed to depend on them. The High Court has upheld Acts expressed in general terms, whose operation is not as a matter of language conditioned by reference to the factual basis upon which validity depends. It would be unsafe, however, to generalise from the cases in question and to assume that this would be so in every case.

The Airlines Case [No. 2]

It is paradoxical that the road tax cases, in which the ascertainment of constitutional facts has received its most extensive judicial examination, should be cases in which factual materials played no practical role except in the foundation decision in *Armstrong's Case* [No. 2]. Reassurance that facts may play a decisive role in constitutional adjudication was given, however, in *Airlines of N.S.W. Pty Ltd v. New South Wales* [No. 2],[45] in which the Court held, among other things, that the safety, regularity and efficiency of all air navigation in Australia was a proper subject of Commonwealth legislation under the overseas and inter-State trade and commerce power conferred by section 51(i) of the Constitution. The plaintiff had placed before the Court a great deal of evidence descriptive of the use and control of aerodromes, flight paths, controlled air space, navigational aids, systems of communications and other matters. Much of the material was probably only confirmatory of what were matters of general knowledge, and therefore judicially noticeable, but it undoubtedly helped to produce the Court's conclusion that intra-State air navigation—held by the Court in *The King v. Burgess; Ex parte Henry*[46] to be outside section 51(i) —now came within the regulatory scope of the Commonwealth's legislative power. It may be surmised that, as Australian trade and industry develop, other factual situations will emerge, if they have not already done so, that have the effect of broadening the reach of the "commerce power" in a similar way. Speaking some ten years before the *Airlines Case* [No. 2], Fullagar J. in *O'Sullivan v. Noarlunga Meat Ltd*[47] had observed the following in relation to the "commerce power":

> It is true that the Commonwealth possesses no specific power with respect to slaughter-houses. But it is undeniable that the power with respect to trade and commerce with other countries includes

[45] (1965) 113 C.L.R. 54.
[46] (1936) 55 C.L.R. 608.
[47] (1954) 92 C.L.R. 565, 598. Dixon C.J. and Kitto J. concurred with Fullagar J.

> a power to make provision for the condition and quality of meat or of any other commodity to be exported. Nor can the power, in my opinion, be held to stop there. By virtue of that power all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia must be the legitimate concern of the Commonwealth. Such matters include not only grade and quality of goods but packing, get-up, description, labelling, handling, and anything at all that may reasonably be considered likely to affect an export market by developing it or impairing it. It seems clear enough that the objectives for which the power is conferred may be impossible of achievement by means of mere prescription of standards for export and the institution of a system of inspection at the point of export. It may very reasonably be thought necessary to go further back, and even to enter the factory or the field or the mine. How far back the Commonwealth may constitutionally go is a question which need not now be considered, and which must in any case depend on the particular circumstances attending the production or manufacture of particular commodities. But I would think it safe to say that the power of the Commonwealth extended to the supervision and control of all acts or processes which can be identified as being done or carried out for export.

In an earlier passage Fullagar J. had stated that it would perhaps have been better if the Court had had some evidence in the case before it as to Australia's export trade in meat; nevertheless, he was able to uphold the validity of the impugned Commonwealth regulations, but he clearly regarded the matter as a situation where evidence would have been appropriate.[48] The main future significance of constitutional facts may well be in the area of the "commerce power".

Some Guidelines

In looking to the future, an attempt has now to be made to sum up what has been decided to date. This is a task to be approached with some diffidence but the following guidelines are suggested:—

(a) It has been amply acknowledged that the constitutional validity of legislation may depend upon facts. The factual material may show that a law is *ex facie* outside power or in collision with a constitutional prohibition nevertheless satisfies constitutional requirements. Contrariwise it may show that laws apparently valid are, in substance, beyond power or are circuitous means of defeating a constitutional prohibition.

(b) Such facts—described herein as constitutional facts— are to be distinguished from ordinary facts in issue between the

[48] *Id.*, 596.

parties, and simply involve information that the Court, which bears the ultimate responsibility for applying the Constitution, or at least its justiciable parts, should have for the proper discharge of judicial review.

(c) It is for the Court to say whether factual information is required, though no doubt it will hear argument on the question.

(d) Constitutional facts are characteristically of a general nature. Validity is not likely to be held to depend on matters that admit of different findings in different cases. They need not, however, be immutable: laws have been justified under the defence power by reference to a national emergency that was thankfully transient.

(e) Because constitutional facts are typically general in character, judicial notice will frequently be the appropriate means by which they are ascertained, but it is certainly not the sole means. Judicial notice, it is true, was once considered to be the normal means but this can no longer be regarded as so.

(f) Where the Court in reaching a decision takes factual information into account, the decision is as authoritative as if it had proceeded wholly by reasoning in the abstract, at least as far as the legislation directly in question is concerned. Its authority extends, however, to cover as well similar legislation which the Court is prepared to regard as sharing a presumptively similar factual context.

(g) When a decision concerning validity has been reached upon findings of fact, it is of course open to the Court to consider the matter again upon the representation that the significant facts are no longer as they were.[49] Where the facts are established as having ceased to exist the conclusion will be that the legislation has lapsed.[50]

(h) The practical effect of the peculiar characteristics of constitutional facts, as described above, is that the worst possibilities, envisaged by the Wisconsin Supreme Court in the passage quoted above,[51] of laws oscillating between validity and invalidity are not likely to occur. The admissibility

[49] *Per* Menzies J. in *Commonwealth Freighters Pty Ltd v. Sneddon* (1959) 102 C.L.R. 280, 302; see also *Freightlines & Construction Holding Ltd. v. New South Wales* (1967) 116 C.L.R. 1, 18.

[50] See *Hume v. Higgins* (1949) 78 C.L.R. 116, 134; *Australian Textiles Pty Ltd v. The Commonwealth* (1945) 71 C.L.R. 161, 180-181; *Armstrong's Case* [No. 2] (1957) 99 C.L.R. 28, 48-49.

[51] *Supra* n. 18.

> of constitutional facts has been accepted in a way that does not endanger due stability; some might say, indeed, that there is too much stability at the expense of a closer correspondence with factual reality.

The purely formal character of these guidelines will not have escaped notice. They do not tell the prospective litigant whether in his particular case factual materials will be admissible. Nor do they tell him when such materials, either to support validity or to establish invalidity, will be required of him; when, that is to say, he carries the burden of proof, as it were, on the issue of validity or invalidity. In this latter connection, however, it will have been noted above that presumptions have played some role in courts' decisions. There seems to be acknowledgment of a presumption in favour of validity, although the warning has been added that a presumption seldom provides a solution; at best it supplies a step in legal reasoning.[52] It seems, also, that a distinction may be drawn between Commonwealth legislation and State legislation. There is a high authority for the proposition that, since the Commonwealth Parliament is a body of limited powers, those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority; but where the affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some limitation or restriction of power to indicate it in the Constitution.[53] In the case of State legislation, the presumption of validity seems to be general in operation, but there may be counter-presumptions arising if the law appears *ex facie* to be in collision with a constitutional prohibition.[54] It is not possible to be more specific on the role of presumptions, and their consequential effect in creating, as it were, a burden of proof on one of the parties. For the time being at least, it seems likely that each particular case will be considered as it arises; initial presumptions of validity or invalidity are unlikely to play a decisive role in many cases.

On the question of the situations in which evidence will be admissible, it is possible of course to seek enlightenment by examining past cases where factual materials have been used. Thus, it seems clear that in defence power cases and also, it has been suggested above, in cases under the commerce power, there is considerable scope for presenting

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[52] *Per* Dixon C.J. in *Stenhouse v. Coleman* (1944) 69 C.L.R. 457, 470.

[53] *Attorney-General for the Commonwealth v. The Colonial Sugar Refining Co. Ltd* (1913) 17 C.L.R. 644, 653; *The Engineers Case* (1920) 28 C.L.R. 129, 154.

[54] See e.g. *Commonwealth Freighters Pty Ltd v. Sneddon* (1959) 102 C.L.R. 280, 295.

information in aid of the process of constitutional adjudication. Cases dealing with section 92 of the Constitution are another general category where facts may indeed be indispensable for a satisfactory solution of many of the constitutional problems that arise. Alongside such positive guidance, there is at all times the negative guidance implicit in the Court's general insistence that its concern is with the legal operation of legislation and with that alone. This brings us to what is perhaps the cardinal point.

Under the ordinary law of evidence, it has been said that the main general rule governing the entire subject is that all evidence that is sufficiently relevant to an issue before the Court is admissible and all that is irrelevant, or insufficiently relevant, should be excluded.[55] It is suggested that a similar principle is applicable to the role of constitutional facts. Thus, evidence directed to the social or economic desirability of a law will be set aside, because such desirability is not an issue before the Court. This means that, in the particular case, it is of the first importance to examine closely the legal issues likely to be considered to bear on validity, as a first step in ascertaining whether they open up the possibility of factual materials being presented. Often this will be no easy task; the toughness of Australian constitutional law—its dialectical muscularity—has been remarked upon by observers from outside the Australian constitutional system.[56]

In this connection, there is no more instructive case than *Greutner v. Everard*.[57] The defendant in the case was charged with driving on a Victorian highway an articulated motor vehicle the overall length of which exceeded forty-five feet, contrary to the Motor Car Act of that State. The vehicle was being driven in the course of inter-State trade. Evidence was given for the defendant by a civil engineer who stated that he had followed a vehicle and load of similar length over a similar route and that he had formed the opinion that the vehicle was perfectly safe and that the Victorian length limit was unreasonably short in the circumstances of the route. Counsel for the defendant relied on section 92 of the Constitution and submitted, amongst other things, that the length limit contained in the State law was unreasonable in view of the evidence and therefore invalid. A unanimous High Court upheld the valid application of the State law to the defendant's vehicle on the occasion in question. It was said that no real detraction from the freedom of inter-State trade is suffered by submitting to directions for the orderly and proper conduct of commercial dealings or other

[55] *Hollington v. Hewthorn & Co. Ltd* [1943] K.B. 587, 594.
[56] See e.g. Professor S. A. de Smith in (1961) 24 Mod. L.R. 407, 408.
[57] (1960) 103 C.L.R. 177.

transactions or activities, at all events if the directions are both relevant and reasonable and place inter-State transactions under no greater disadvantage than that borne by transactions confined to the State. Taylor J. referred to the evidence as follows:—

> . . . the validity of the provision cannot be made to turn upon the objective fact that the vehicle which he [the witness] followed was "safe" in the sense in which he used the word, or, whether, in any wider sense in which that expression may be used it travelled safely over those roads in Victoria which form part of the journey from Adelaide to Sydney. Nor, in my view, is it of any consequence whether his opinion that the limit prescribed by the provision in question was or was not necessary. In the circumstances of the case the only inquiry which seems to me to be relevant is one which is concerned with the essential character of the provision, for if it clearly appears as one reasonably designed to ensure safety on the roads it matters nothing that a professed expert witness should form the opinion that, consonant with safety on the roads, more liberal limits might have been prescribed. That some limits may be prescribed in the interests of safety is beyond question, and the legality of limits when prescribed cannot be made to turn merely upon the fact a witness may be found whose view as to what is necessary or appropriate is at variance with that entertained by the legislature.[58]

The passage brings out two important points. First, the legislature may lay down a general rule, notwithstanding that its application in a particular case may seem remote from the constitutional basis for the rule. Secondly, the legislature has a discretion as to the precise measures that it may adopt to serve constitutional ends: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited . . . are constitutional".[59] In the recent decision of *The Herald and Weekly Times Ltd v. The Commonwealth*,[60] in which very extensive Commonwealth controls over shareholdings relating to television companies were upheld, the leading judgment of Kitto J. conceded that the provisions cast a net so wide as to cover situations where it was most unlikely that the person concerned would find himself in a position to exercise any control over any television licence.

> But it does not follow that for this reason they are beyond power, unless the assumption be accepted which the plaintiffs' argument in truth made, that a law cannot be with respect to television

[58] *Id.*, 189-190.
[59] *M'Culloch v. Maryland* (1819) 4 Wheat. 316, 421, 4 L. Ed. 579, 605.
[60] (1966) 115 C.L.R. 418.

553 and *Poulton v. The Commonwealth* (1953) 89 C.L.R. 540, 551, 593.

> services unless there can be seen, in every kind of case that it covers, some likelihood of there being an opportunity of influence or control in respect of a television service. The assumption, in my opinion, unduly limits the notion of substantial connection upon which the Constitution insists when it uses the expression "with respect to".[61]

The Court, therefore, shows a proper respect for the competence of the legislature to judge the necessity or desirability of legislative measures and it recognises that, as a practical matter, the legislature may have to lay down general rules rather than try to accommodate a wilderness of single instances. It seems also that a proper regard for the limits of its own abilities satisfactorily to examine "a variety of circumstances, commercial, industrial, social and political"[62] will sometimes prompt the Court to draw back from what could be time-consuming investigations, of a merely factual or opinion character, into highly disputable subject matters. That is to say, the Court presumably does not regard itself as being necessarily required to turn itself into a kind of Royal Commission of Enquiry into, say, the nature and role in Australia of the Australian Communist Party. This consideration is probably at the basis of the decision of the Court (Webb J. dissenting) in the *Australian Communist Party* case[63] that the question of the validity of the Communist Party Dissolution Act 1950 (Cth) did not depend upon a judicial determination or ascertainment of the facts concerning the Australian Communist Party set forth in the preamble to the Act. In such cases, the Court is likely to remain on the more familiar ground of dialectical argument supplemented by matters of which judicial notice is taken. This is what was done, of course, in the *Australian Communist Party* case. The case has been criticised in this respect,[64] but it is suggested that there was practical wisdom in the course the Court took. That course, it might be noted, did not in its ultimate results prejudice the party seeking to lead evidence.

The point of view has been put above that relevancy is or should be the basic principle that informs the Court's approach to constitutional facts, and certain elaborations and qualifications of that statement have been noted. Under the ordinary law of evidence the principle of relevancy can involve consideration of degrees of relevancy; for example, if evidence is too remotely relevant from any isue—that is,

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[61] *Id.*, 436.

[62] *Jumbunna Coal Mine, No Liability v. The Victorian Coal Miners' Association* (1908) 6 C.L.R. 309, 376.

[63] (1951) 83 C.L.R. 1.

[64] See E. McWhinney, *Judicial Review in the English-Speaking World* (3 ed. 1965) 81 *et seq.*

if it is insufficiently relevant—it is inadmissible. This consideration undoubtedly applies in the area of constitutional facts, but some special considerations may apply also. If the cogency of the information is very high, there would of course be an expectancy that the Court would act upon it: the evidence in the *Airlines' Case* [No. 2],[65] for example, was undisputed and indeed indisputable, and was acted upon. But there may be situations in which a broad judgment or characterisation of a fact situation is all that is required. Windeyer J. observed in *Commonwealth Freighters Pty Ltd v. Sneddon*:

> We do not have to assess damages to the roadway. We must, however, be satisfied that the charge imposed by the legislature can reasonably be said to be within the range of what is proper, for "It is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation"—a statement of Williams J.[66] quoted in the majority judgment in *Hughes and Vale's Case* [No. 2].[67] Nice mathematical computation is impossible . . .[68]

The Ascertainment of Constitutional Facts

Fullagar J. in the passage quoted above from the *Australian Communist Party* case[69] stated that the Court, in considering constitutional facts, is bound by the legal rules of evidence, and that there are thus limitations upon the material which it can receive or take into account. It is suggested, however, that this does not necessarily mean that the Court is bound by each and every technical restriction to be found in the ordinary law of evidence, particularly the hearsay rule, although it is recognised that the extent to which the Court may mould procedures in this regard may depend upon the co-operation of the parties and also upon the nature of the proceedings. For example, in a series of cases in the years following the Second World War, the High Court found it necessary to acquaint itself with what it described as the "epic story" of the arrangements made for the disposal of the wool clip during the War and for the subsequent distribution of the resulting profits.[70] It is difficult to believe that the complex information involved was able to be dealt with in full accordance with the technical requirements of the ordinary rules of evidence as to modes of proof.

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[65] (1965) 113 C.L.R. 54.
[66] (1951) 83 C.L.R. 1, 222.
[67] (1955) 93 C.L.R. 127, 165.
[68] (1959) 102 C.L.R. 280, 307.
[69] (1951) 83 C.L.R. 1, 256.
[70] See *Ritchie v. Trustees Executors and Agency Co. Ltd* (1951) 84 C.L.R. 553 and *Poulton v. The Commonwealth* (1953) 89 C.L.R. 540, 551, 593.

The basic rule seems to be that when validity turns on facts, the Court must ascertain the facts as best it can. It seems then that there are no *a priori* limits on the ways in which a Court may acquaint itself with the necessary information.

The reported cases disclose a variety of methods that have been used, or have been sought to be used, for this purpose. Pride of place in any list must probably still be given to judicial notice. Isaacs J. described the scope of judicial notice as follows:—

> . . . wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the Court "notices" it, either *simpliciter* if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt.[71]

Dixon J. used rather different language in the *Australian Communist Party* case, where he said:

> . . . courts may use the general facts of history as ascertained or ascertainable from the accepted writings of serious historians . . . and employ the common knowledge of educated men upon many matters and for verification refer to standard works of literature and the like . . .[72]

It may be asked who is to be preferred—the ordinary man of Isaacs J. or the educated man of Dixon J. The practical answer to such a question seems to be that the broad scope of judicial notice covers both the notorious facts known to the ordinary man and the common body of information known to, or ascertainable by reference to generally accepted works by, his more educated brother. The doctrine, it may be noted, allows a certain scope for judicial initiative and this has prompted the expression of certain misgivings on the ground that there is always present an uncertainty for the litigant in not knowing of what facts the Court will take notice; the same facts may not be noticed by all the Justices. The suggestion has been that it may therefore be necessary to complete the record of the facts of which the Court is asked to take notice by supplying evidence of those facts.[73] Clearly, however, this is not the present practice of the Court.

It is usual to include under the heading of judicial notice those cases in which a certificate issued by the executive arm of the government is treated as being evidence, often conclusive in nature, on certain political matters, such as the existence of a state of war or the extent of

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[71] *Holland v. Jones* (1917) 23 C.L.R. 149, 153.
[72] (1951) 83 C.L.R. 1, 196.
[73] See J. D. Holmes, *op. cit. supra* n. 4, 236.

territorial waters. The approach to date of the Court to the use of certificates in constitutional cases has been a cautious one. In *Fishwick v. Cleland*[74] it was considered unnecessary to consider the admissibility of an executive certificate on the status of the Trust Territory of New Guinea. In *Bonsor v. La Macchia*[75] a certificate relating to the view taken on the extent of "Australian waters", as referred to in section 51(x) of the Constitution, was rejected. A similarly cautious approach has been adopted to the evidentiary significance to be attributed to statements in preambles to statutes. The better view under the ordinary law of evidence seems to be that statements of fact contained in the preamble constitute *prima facie* evidence of the facts referred to. The question of the position when the facts referred to in the preamble are constitutional facts was considered by some of the Justices in the *Australian Communist Party* case.[76] The view that emerged was that where the facts recited go to validity the preamble does not operate even as *prima facie* evidence; it is merely to be taken as representing the beliefs of the legislature as to what the facts are. Reference should also be made in this connection to the legislation considered in *Marcus Clark & Co. Ltd v. The Commonwealth*,[77] which provided that a statement made by the Treasurer under a provision in the legislation was to be treated as evidence of what it contained. Dixon C.J. commented:—

> The Treasurer's statement prepared for the purpose of an order under this provision was not unnaturally an argumentative document. However convenient it may have been found to refer to it for the facts and matters upon which the pleader placed reliance, had the more regular course been followed of stating them with exactness in the pleading itself, it is probable that considerations upon which the connection of the regulations with the defence power depend would have appeared with greater clearness and perhaps consequently with more force.[78]

These are perhaps special cases. The ordinary modes of proof are, of course, available, and it seems that the usual rules relating to the stage at which evidence may be introduced may not apply. In *The King v. Foster; Ex parte Rural Bank of N.S.W.*,[79] removed to the High Court under the Judiciary Act, evidence of constitutional facts was introduced which had not been led in the initial prosecution proceedings in

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[74] (1960) 106 C.L.R. 186, 197.
[75] See (1969) 43 A.L.J.R. 275, 282.
[76] (1951) 83 C.L.R. 1, 224, 243-244, 263-265.
[77] (1952) 87 C.L.R. 177.
[78] *Id.*, 211.
[79] (1949) 79 C.L.R. 43.

question. A convenient method of dealing with a complex factual situation that is sometimes possible is by an agreed statement of facts by the parties, though a question seems to arise how far the Court would be bound to accept the agreed facts on an issue of validity. The absence from the Australian scene of the Brandeis brief, as a basis for introducing social and economic documents and other materials, is no doubt due to a number of factors. One obvious practical reason has been the absence of a practice of submitting written briefs, providing a ready means of introducing such materials.[80]

However, it was not the purpose of this article to appraise the various techniques, existing and possible, for the ascertainment of constitutional facts. Such an examination could obviously be very valuable. The ultimate responsibility of the High Court for the resolution of constitutional issues has always been accepted by the Court, as expressed for example by Isaacs, Rich and Starke JJ.:—

> this Court is . . . the tribunal specially created by the united will of the Australian people, as a Federal Court and as a national Court. It has very special functions in relation to the powers, rights and obligations springing from the Constitution and the laws made under it—matters which concern the Commonwealth as the organisation of the whole population of this Continent, the States in their relations to the Commonwealth and to each other, and the people in their relation to the Commonwealth and to the States regarded as constituent parts of the Commonwealth.[81]

When such constitutional issues turn on facts, it would have been a strange procedure indeed not to permit the facts to be established.[82]

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[80] So far as the writer is aware the *Airlines' Case* [No. 2] has been the only case in which extensive written briefs have been submitted: see (1965) 113 C.L.R. 54, 58. It may be mentioned that the temptation to be expansive can be very great: in Canada, where there is a growing tendency to use the Brandeis brief, a successful appellant has been deprived of costs because his counsel subjected the Court to a brief of 912 mimeographed pages and an appendix of eighty-six pages: *Saumur v. Quebec* [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641.

[81] *The Commonwealth v. New South Wales* (1923) 32 C.L.R. 200, 209.

[82] See Frankfurter J., *Zorach v. Clauson* (1951) 343 U.S. 306, 322, 96 L. Ed. 954, 966.