MINISTER FOR JUSTICE OF WESTERN AUSTRALIA (EX REL ANSETT TRANSPORT INDUSTRIES (OPERATIONS) PTY LTD) v. AUSTRALIAN NATIONAL AIRLINES COMMISSION AND THE COMMONWEALTH[1]

Constitutional law — Territories power — Interstate trade and commerce power — Incidental power — Intrastate segment of state-territorial aerial service — Whether mere economic effect of intrastate activity on interstate or territorial activity sufficient nexus — Constitution ss. 51(i), 122 — Australian National Airlines Act 1945 (Cth) (as amended) ss. 19, 19B — Acts Interpretation Act 1901 (Cth) (as amended) s. 15A.

The action between these parties was generated when the defendant applied for an airline licence authorising it to conduct a service between Perth and Darwin under Regulation 198 of the Air Navigation Regulations, made pursuant to the Air Navigation Act 1920 (Cth). The Director-General issued a licence for one year authorising TAA to fly between Perth and Darwin "with such intermediate stopping places if any between those terminals, as are from time to time approved by the Director-General".[2] The Director-General authorised Port Hedland as a stopping place. The relator (Ansett Transport Industries (Operations) Pty Ltd) had for some time operated an air service between Darwin and Perth using intermediate stopping places including Port Hedland. When the defendant announced its intention to commence flying the Perth-Darwin route using Port Hedland as an intermediate stopping place, the relator objected. Under the procedures outlined in Schedule 2 of the Airlines Agreements Act 1952 (Cth), the dispute was at first referred to the co-ordinator, who found in favour of the defendant. The relator then appealed to the arbitrator who confirmed the co-ordinator's decision. The plaintiff, on the relation of Ansett Industries, then brought an action in the High Court before Stephen J. who directed that the case be heard before the Full Court.

At issue were several sections of the Australian National Airlines Act 1945 (Cth) (as amended) which created the Australian National Airlines Commission. The relevant parts are set out below.

> Section 19(1) The functions of the Commission are—
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> (a) to transport passengers and goods for reward by air between prescribed places;
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> (b) . . .;
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> (c) . . .;
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> and the Commission shall carry on business for the purpose of performing those functions.

[1] (1977) 12 A.L.R. 17. High Court of Australia: Barwick C.J., Gibbs, Stephen, Mason and Murphy JJ.

[2] (1977) 12 A.L.R. 17, 36.

(2) For the purposes of subsection (1), passengers or goods are transported between prescribed places if they are transported—

(a) between a place in a State and a place in another State;

(b) between a place in a Territory and a place in Australia outside that Territory;

(c) between a place in a Territory and another place in that Territory; or

(d) between a place in Australia and a place outside Australia, being places between which the provision of air transport by the Commission is approved by the Minister.

Section 19B(1) The Commission may, to the extent provided by sub-section (1), transport passengers or goods for reward by air or by land, or partly by air and partly by land, between places in the one State.

(2) The powers of the Commission under subsection (1) may be exercised for the purposes of the efficient, competitive and profitable conduct of the business of the Commission in respect of its function under paragraph (a) of subsection (1) of section 19 or otherwise as incidental to the carrying on of that business.

The defendant proposed to commence a service between Darwin and Perth using Port Hedland as an intermediate stopping place in order to ensure economic feasibility. This arrangement meant that the Perth-Darwin route contained a purely intrastate segment. The relator claimed that 19B was invalid and unsupported by sections 51(i), 51(xxxix) or 122 inasmuch as it purported to allow the Commission to establish an air service which included transportation between two places in the one State.

It was held by Stephen, Mason and Murphy JJ., Barwick C.J. and Gibbs J. dissenting, that section 19B was valid to the extent that it was related to section 122 of the Constitution; that is, its application was limited to air services to and from a territory. Barwick C.J. and Gibbs J., the two dissentients, held that section 19B could not be supported by sections 51(i), 51(xxxix) or 122 of the Constitution. Mere economic considerations, concerned with the profitability of interstate or territorial transportation, were insufficient to make section 19B a law with respect to interstate trade and commerce or a law for the government of a territory. Stephen J. substantially agreed with Barwick C.J. and Gibbs J. that economic effects were not sufficient to bring section 19B within section 51(i), but held that it could be supported by section 122. This was because section 122 was not subject to, nor limited by, the constitutional division between interstate and intrastate trade and commerce. Therefore, the economic connection between the intrastate leg and the larger Perth-Darwin route was enough to make section 19B a law for the government of a territory as long as section 15A of the Acts Interpretation Act 1901 (Cth) (as

amended) was used to restrict the application of section 19B to services to or from a territory. Mason J. concluded that section 122 validated section 19B to the extent that it was reasonably necessary for (and incidental to) the provision of a Perth-Darwin air service, to have a stopover at Port Hedland. Murphy J. thought that section 19B was supported by both section 51(i) and section 122 respectively. The provision of intrastate air transport for the stated purposes of efficiency, profitability and competitiveness was relevant to the provision of interstate air transport in that the stated purposes in section 19B(2) demonstrated a rational connection with the government of the territory.

Dealing with the judgment of Barwick C.J. first, it was clear that in his opinion[3] there was no need to expand the scope of section 51(i) beyond that enunciated in the *Airlines Case (No. 2)*.[4] Indeed, he seemed to be prepared to concede a narrower ambit to placita (i) and (xxxix) of section 51 than that which he had allowed in the *Airlines Case (No. 2)*. In that case his Honour affirmed that commercial realities alone did not warrant the conclusion that the Commonwealth could regulate intrastate air traffic. The mere fact that interstate air services profited by or, to a significant extent, depended upon, intrastate air services, did not ensure power in the Commonwealth to interfere with or authorise domestic air services.[5] Yet, he made an exception in cases where, in order for the Commonwealth law to be *effective* on interstate trade and commerce, the Commonwealth must be allowed to regulate aspects of intrastate trade and commerce.[6] In short, the question of whether the Commonwealth law on interstate trade and commerce could extend into intrastate air activities hinged upon a matter of degree as to whether it was necessary to render the Commonwealth law effective, or whether the Commonwealth activity depended only in a commercial or economic sense upon a regulation of intrastate services. If the former applied, the Commonwealth could safely intrude into the area of intrastate air services. If the latter was more applicable then the proposed law would be invalid.

In the present case, Barwick C.J. relied on the strict rationale that profitability, efficiency and competitiveness were insufficient reasons for including an intrastate activity within the law's ambit.[7] His Honour made no reference to the consequences of a refusal to allow a stopover at Port Hedland, which, taking a broad view, could have resulted in the economic impossibility of maintaining the Perth-Darwin route and, therefore, could have resulted in the ineffectiveness of the Commonwealth law providing for its maintenance. The lack of comment suggests that his Honour placed a narrow and technical interpretation on the meaning of "effective" in his remarks in the *Airlines Case (No. 2)*.

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[3] *Id.* 20.

[4] *Airlines of N.S.W. Pty Ltd* v. *New South Wales (No. 2)* (1965) 113 C.L.R. 54, 77.

[5] *Id.* 88.

[6] *Id.* 78.

[7] (1977) 12 A.L.R. 17, 20.

The Chief Justice's attitude towards the claim that the efficiency, profitability and competitiveness of Territory-State air services were part of the subject-matter of section 122 of the Constitution was no less uncompromising. The law authorising air services between places within one State was not a law for the peace, order and good government of the Northern Territory.[8] His refusal to concede that mere economic considerations could ever provide a relevant nexus for the purpose of section 122 echoes his earlier comments with regard to section 51(i) and sits very oddly with his remarks in *Spratt* v. *Hermes*.[9]

Gibbs J., the other dissentient, entered into a more careful discussion of section 51(i) than the Chief Justice, but still found himself unable to avoid the formidable authority of Dixon J. in *Wragg* v. *State of New South Wales*[10] and Kitto J. in the *Airlines Case (No. 2)*[11] to the effect that the distinction made in section 51(i) between interstate trade on the one hand, and intrastate trade on the other, must be preserved. Like Barwick C.J., he resorted to the principle laid down by both the Chief Justice and Kitto J. in the *Airlines Case (No. 2)* that merely consequential or economic adverse effects are insufficient to make the law a valid exercise of the power under placita (i) and (xxxix) of section 51.[12] Both Barwick C.J. and Gibbs J., then, followed precedent flawlessly while dealing with section 51(i) and proceeded to apply the same reasoning to section 122. As the Chief Justice put it, "the substantial reasons why s 19B(1) is not a valid law within s. 51(i), in my opinion, do require the same conclusion as to the validity of the section as an exercise of the power granted under s. 122".[13] Their Honours imposed upon section 122 the dictum of Kitto J. in the *Airlines Case (No. 2)* that, because there is a distinction made by the Constitution between interstate and intrastate trade and commerce which must be preserved, the scope of the power and its incidental penumbra must not obliterate or blur that distinction. However, if the remarks of Kitto J. are to be extended to cover section 122, there appears to be nothing in logic to prevent those remarks from applying to every other grant of legislative power to the Commonwealth.

An indication of the Chief Justice's concern with restricting Commonwealth legislative power can be seen in the manner in which he referred to the issue at hand. Throughout his judgment he characterised the law as one "authorizing the carriage of persons and goods between places within one State. . .".[14] Expressed thus, such a law would certainly be beyond the ambit of section 122. Dixon C.J. noted in *Lamshed* v. *Lake*[15] that the subject matter of section 122 is to make laws "for" or "with respect to" the government of a territory. But he

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[8] *Id.* 21-22.
[9] (1965) 114 C.L.R. 226, 245.
[10] (1953) 88 C.L.R. 353, 385-386.
[11] (1965) 113 C.L.R. 54, 115.
[12] *Id.* 88, 115.
[13] (1977) 12 A.L.R. 17, 22.
[14] *E.g. id.* 21.
[15] (1958) 99 C.L.R. 132, 141.

went on to amplify this by quoting the conclusion he had previously reached in the *Airlines Case (No. 1)*:

> It is absurd to contemplate a central government with authority over a territory and yet without power to make laws, wherever its jurisdiction may run, for the establishment, maintenance and control of communications with the territory governed.[16]

With respect, it appears that this is precisely what section 19B sets out to do. Only by permitting a stopover at Port Hedland would it be practicable to establish and maintain communications between Darwin and Perth. The Perth-Port Hedland sector was a necessary prerequisite for maintaining the larger Perth-Darwin air service. Therefore, by authorising the Commission to fly an intrastate leg on a State-territorial route, section 19B assisted in maintaining communications with the Northern Territory and was a law "for" the government of a territory.

Returning to the judgment of Gibbs J., he was concerned with the consequences that might flow if the Commonwealth was to be permitted henceforth to regulate intrastate trade whenever it would render the Commonwealth's interstate activities more profitable. He said:

> Indeed, any regulation or control of intrastate trade by the Parliament would then appear to be permissible if effected for the purpose of making such a commercial undertaking more profitable.[17]

With respect, such fears of opened flood gates ought not to determine the question. In *Lamshed* v. *Lake,* Dixon C.J. pointed out:

> Provided that the law is otherwise within the power, in my opinion it will operate according to its tenor wherever the jurisdiction of the Parliament extends. It must of course be within power but I see no reason why the expression 'for the government of any territory' should not receive a wide meaning or why everything that is fairly incidental to the legislative power should not fall within it.[18]

Only when the proposed law is within power—that is, "for" the government of a territory—will it operate validly throughout the Commonwealth. Tenuous connections with the government of a territory will not suffice.

Stephen J., who formed part of the majority, took a stand on section 51(i) with which Barwick C.J. expressly agreed, even though he saw elements of both State—territorial and intrastate movement involved in the Perth-Port Hedland-Darwin route.[19] His Honour proceeded to examine briefly the leading authorities on the trade and commerce power and concluded that section 51(i) and section 51(xxxix) were not sufficient to support that part of section 19B which did not relate to territorial services. However, he was prepared to use section 15A of

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[16] *Id.* 144-145. The Chief Justice was quoting from *Australian National Airlines Pty Ltd* v. *The Commonwealth* (1945) 71 C.L.R. 29, 85.
[17] (1977) 12 A.L.R. 17, 24-25.
[18] (1958) 99 C.L.R. 132, 146.
[19] (1977) 12 A.L.R. 17, 26.

the Acts Interpretation Act 1901 (Cth) (as amended) to read down section 19B to the point at which it could be regarded as within power. He restricted section 19B to apply only to carriage by air within a territory and to or from a territory thereby enabling him to rely on the territories power.[20]

Recognising from the first that section 122 is a power different in nature from section 51 powers, in that it is plenary, Stephen J. said:

> [T]here is, I think, no reason for the exclusion of laws whose connexion with 'the government of a territory' is confined to the production of desirable qualities in functions of government; thus a law which has as its object the reduction in cost of or the improvement in efficiency of some governmental activity related to a Territory is, I think, a law with respect to the government of that Territory.[21]

This reasoning, though far-reaching in its implications, conforms with the comments of Dixon C.J. in *Lamshed* v. *Lake* quoted above. Plainly, the maintenance of the Perth-Darwin air service would improve communications between the two cities and assist in providing for the good government of the Northern Territory. If the provision of a stopover at Port Hedland is an appropriate way to maintain the route, then a law providing for this stopover is a law that is incidental to, if not actually for, the good government of a territory.

However, it may be that Stephen J. adopted too broad an approach when he said:

> [I]t is not clear to me that any question of implied incidental legislative power can arise in the case of s122 which itself confers a plenary legislative power, leaving little room for any implication of incidental power. Rather than speak of an implied incidental power in connexion with s122 it may be preferable to regard the express words of grant as including within the power the entirety of power necessary to legislate for the government of a Territory.[22]

In holding that section 122 is plenary to the exclusion of any implied incidental power, or, if there is such a power, that it is not restricted to what is necessary and essential,[23] his Honour seemed to be saying that all matters which previously have been regarded as ancillary to the main power should now be seen as within the power itself. One may wonder whether it was necessary to take the territories power quite so far. Perhaps his Honour felt understandably constricted by the narrow scope of section 51(i) and decided to emphasise the width of the territories power in order to ensure that section 19B fell within the subject matter of section 122.

Stephen J. highlighted the distinction between section 51(i) and section 122 when, after observing that section 19B was cast in absolute terms, he said:

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[20] *Id.* 30-31.
[21] *Id.* 32-33.
[22] *Id.* 33.
[23] *Ibid.*

> [I]t matters not whether the undertaking of [intrastate transportation] assists the Territory transportation towards an unattained goal of efficient, profitable and competitive carriage by air or merely enhances the degree to which that transportation, already possessing those qualities, answers that description.[24]

This contrasts glaringly with the restricted application of section 51(i) to only those areas where a direct or physical interference is being legislated against, rather than where mere economic or consequential adverse effects can be demonstrated. Nevertheless, it is submitted that this dictum of Stephen J. can again be supported by what was said by Dixon C.J. in *Lamshed* v. *Lake*.[25]

In the result, his Honour had no difficulty in concluding that section 19B validly applied to that part of the Commission's function which was confined to transport within and to or from a territory. Measures designed to increase the efficiency and profitability of such transport services were very much part of the subject matter of section 122.

The judgment of Mason J. was notable in that it was the only one which contained no consideration at all of section 51(i). His Honour concentrated upon the power contained in section 122 which, quoting the words of Dixon C.J. in *Burton* v. *Honan* includes "everything which is incidental to the main purpose of a power . . . so that it extends to matters which are necessary for the reasonable fulfilment of the legislative power over the subject matter".[26] Following that principle and the decision in *Lamshed* v. *Lake* which laid down that the Commonwealth may provide an air service between a territory and a state, he decided that if it was reasonably necessary to call at Port Hedland in order to maintain the Darwin-Perth service, then legislative provision for such a stopover was within the incidental area of the territories power.

He agreed with Stephen J. that the dichotomy between physical and economic considerations had no relevance to section 122. He differed slightly, however, over the extent of the incidental power.[27] While Stephen J. saw no reason to restrict the incidental area to situations where it was "necessary" to make the law effective,[28] Mason J., after carefully perusing established authority, decided that, at the least, there was a requirement of reasonable necessity. A real connection between the power and its incidental area had to be demonstrated.

His Honour's judgment was typical of his particular approach to characterisation. Feeling unconstrained by precedent, he turned at once to a consideration of the practical realities of the matter and looked at the volume of traffic, the economics of the operation and other technical factors which govern commercial airline operations. He took the common sense view that, as the stopover at Port Hedland made the

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[24] *Ibid.*

[25] (1958) 99 C.L.R. 132, 146.

[26] (1977) 12 A.L.R. 17, 38. Mason J. was quoting from (1952) 86 C.L.R. 169, 177.

[27] *Id.* 40.

[28] *Id.* 33.

Perth-Darwin route more "efficient, profitable and competitive", it was an activity which was reasonably necessary for the fulfilment of the grant of power to fly that route.

Mason J., like Stephen J., was prepared, if necessary, to use section 15A of the Acts Interpretation Act 1901 (Cth) (as amended) to read down section 19B to enable the excision of section 19(2)(a). However, he found it irrelevant to the main issue inasmuch as it did not affect the validity of operations under section 19(2)(b).[29]

Characteristically, Murphy J. chose to take a totally different line. In a succinct judgment his Honour first established that any of the Commonwealth Parliament's laws which do not conflict with a constitutional guarantee or prohibition, attract to themselves a strong presumption of validity.[30] He proceeded to make the following observations: first, that the scope of the Australian commerce power is at least as wide as, if not wider than, the United States equivalent;[31] secondly, that section 51(i) should not be construed narrowly;[32] thirdly, that it has been construed narrowly in the past only through a mistaken persistence in adhering to the States' reserve powers doctrine;[33] and fourthly, that one should not ascertain the scope of section 51(i) by reference to a division between interstate and intrastate trade and commerce.[34] In his view, interstate and intrastate trade and commerce are but opposite sides of the same coin. Furthermore, he rejected the distinction drawn by Kitto J. in the *Airlines Case (No. 2)* between physical and economic effects,[35] holding that economic or commercial effects are within the subject matter of the commerce power. Therefore, the Commission's grounds for seeking a stopover at Port Hedland—greater profitability, efficiency and competitiveness—were sufficient to bring section 19B within section 51(i) of the Constitution. Equally, in the judgment of Murphy J., section 19B was a law within the power conferred by section 122 as long as it was concerned with efficient, profitable and competitive transport to or from a territory.[36]

In *R.* v. *Burgess: Ex parte Henry*[37] the High Court firmly rejected the so-called "commingling" theory developed by the United States Supreme Court in decisions such as *Southern Railway Co.* v. *United States.*[38] Instead, the High Court's attitude has been that:

> The distinction which is drawn between inter-State trade and the domestic trade of a State for the purpose of the power conferred upon the Parliament by s. 51(i) to make laws with respect to trade and commerce with other countries and among the States may well be considered artificial and unsuitable to modern times. But it is a

[29] *Id.* 41.
[30] *Id.* 44-45.
[31] *Id.* 45.
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*
[35] *Id.* 46. See Kitto J. at (1965) 113 C.L.R. 54, 115.
[36] *Ibid.*
[37] (1936) 55 C.L.R. 608, 629, 672, 677.
[38] (1911) 222 U.S. 20; 56 Law. Ed. 72.

> distinction adopted by the Constitution and it must be observed however much inter-dependence may now exist between the two divisions of trade and commerce which the Constitution thus distinguishes.[39]

In the *Airlines Case (No. 2)*, Kitto J. discussed at length the interpretation given to the commerce power under the United States Constitution.[40] His conclusion was that "[t]o import the doctrine of the American cases into the law of the Australian Constitution would in my opinion be an error".[41]

Thus, the position taken by Murphy J., which amounts to an application of the American commingling doctrine to Australian constitutional law, is confronted with a substantial body of contrary authority. However, there is considerable merit in his Honour's view. Since the *Engineers' Case*,[42] the High Court has slowly, and sometimes sporadically, extended Commonwealth power into areas previously thought to be exclusively within the domain of the States. Shackled by a peculiarly rigid formula, the Court has so far been unable to enlarge appreciably the scope of section 51(i) with the result that it has sidestepped the problem by the use of other Commonwealth powers such as those contained in sections 51(xx) and 122.

In a recent number of this Review, Professor Zines described the "attempt to extract from the words of the Constitution a need to ensure that the commerce power did not expunge the distinction between intrastate trade and other trade"[43] as unconvincing and containing a hint of the old reserve powers doctrine. He argued that Commonwealth control over intrastate trade would not mean that Australia had ceased to be a federal state.[44] This argument is convincing. Further, the benefits that would flow from a uniform set of standards and controls and the reduction in the duplication of effort in the bureaucracy would far outweigh the questionable disadvantage of the increase of Commonwealth power *vis-à-vis* that of the States. In an article examining judicial approaches to the interpretation of the commerce power in Australia and the United States, Nygh made the observation that the *Airlines Case (No. 2)* represented the beginning of an Australian movement in the direction taken by the American Supreme Court. He commented:

> Yet, despite this rejection of the commingling theory, the Justices all agreed that the Commonwealth could impose safety controls on intrastate navigation as well as interstate and overseas operations.[45]

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[39] *Wragg* v. *State of New South Wales* (1953) 88 C.L.R. 353, 385-386 *per* Dixon C.J.

[40] (1965) 113 C.L.R. 54, 113-116.

[41] *Id.* 115.

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

[43] Zines, "The Australian Constitution 1951-1976" (1976) 7 F.L. Rev. 89, 111.

[44] *Ibid.*

[45] Nygh, "An Analysis of Judicial Approaches to the Interpretation of the Commerce Clause in Australia and the United States" (1967) 5 Sydney Law Review 353, 397.

Professor Zines[46] was more cautious about this case as a real advance towards an adoption of the commingling theory than Mr Nygh, but both of them agreed that some progress had been made towards breaking the ice on intrastate inviolability. The words of Barwick C.J. in the *Airlines Case (No. 2)* deserve special note. He said:

> there are occasions . . . when it can be no objection to the validity of the Commonwealth law that it operates to include in its sweep intra-State activities, occasions when, for example, the particular subject matter of the law and the circumstances surrounding its operation require that if the Commonwealth law is to be effective as to inter-State or foreign trade and commerce that law must operate indifferently over the whole area of the relevant activity, whether it be intra-State or inter-State.[47]

In the present case the Chief Justice appeared to place a narrow interpretation on that dictum. However, it remains on the books and, until disapproved, will offer a centralist-orientated court an excellent opportunity to extend Commonwealth power into areas hitherto exclusive to the States.

It is suggested, therefore, that it may well be time to consider anew the established doctrine on section 51(i) and determine whether, since *Wragg's* case, the expansion of some of the other heads of power in the Constitution has left section 51(i) a lonely and unnecessary anomaly. There seems to be scant reason why the Court's stiffly conceptual approach in which no notice is taken of economic and social factors, should not be tempered with some understanding of the particular context in which the power is found. That Murphy J. should raise again the issue of section 51(i) is interesting, for with Stephen J. paying lip service to accepted doctrine but then taking a broad view of Commonwealth power, and with the familiar preference of Mason J. for adopting a practical approach wherever possible, we could conceivably see an expansion of the commerce power towards the American interpretation in the foreseeable future.

Another aspect worthy of passing comment is that, with the exception of Mason J., all the Justices in this case adopted strong stands one way or the other. Murphy J., of course, adopted the American approach to section 51(i), while Stephen J. decided to give section 122 so wide an ambit that he doubted if there could be any room left for an incidental area. Barwick C.J. and Gibbs J. took the opposite course and effectively applied the restrictions insisted upon by Kitto J. with respect to section 51(i) in the *Airlines Case (No. 2)* to all of the Commonwealth's constitutional powers. While it might be unwise to draw a definite conclusion from this behaviour, it is respectfully suggested that it indicates a considerable degree of confusion and re-assessment behind the scenes in the High Court.

Finally, this case is also notable insofar as it confirms the trend that started with *Lamshed* v. *Lake* and *Spratt* v. *Hermes* with regard to

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[46] Zines, *op. cit.* 110-111.
[47] (1965) 113 C.L.R. 54, 78.

section 122. Whereas Dixon C.J. laid down the fundamental rules governing movements to and from a territory in *Lamshed* v. *Lake*, it is now clear that Commonwealth instrumentalities may undertake intra-state activities when there is a commercial or economic connection with some aspects of the good government of a territory.

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