AUSTRALIA'S TWO-AIRLINE POLICY— LAW AND THE LAYMAN

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One is not often called upon to review for a law journal a book which is not written either by a lawyer or specifically for a lawyer. Mr Stanley Brogden's *Australia's Two-Airline Policy*[1] is such a book and its paper jacket states that the book is of particular interest for students of economics, public administration, business administration, political science and for general readers and libraries. Since, however, the Melbourne University Press is noted for its publication of serious and scholarly works, and further, because the two-airline policy cannot properly be understood without an adequate grasp of the legal and constitutional framework in which it operates, it seems quite proper to make an assessment of Mr Brogden's work. Mr Brogden is a very experienced aviation writer as the book will quickly demonstrate. It is the purpose of this review not only to assess the book on its merits but also to supplement the account of the two-airline policy by a closer examination of legal issues and some observations on the future implications of the policy.

Airlines Case 1945

The book gets away to a bad start if one is to pay any attention to the description of its contents appearing on the jacket. There it is said of the Australian aviation industry:

> This subject has continued to provoke intense political feeling since the 1944-5 Labor government's attempt to nationalize the gigantic, monopolistic Australian National Airways, backed by extensive shipping interests. Thwarted by the High Court of Australia, the federal Labor government then set up Trans-Australia Airlines. The struggle of the 1950s ended with the collapse of ANA in 1957, and its takeover by the Ansett transport group.

If ANA can be characterized as a giant in 1939, the most that can be said is that it was a giant amongst midgets. The reference to the High Court is to the case of *Australian National Airways Pty Ltd v. The Commonwealth* in 1945.[2] As is well known, in that case the High Court considered the validity of the Australian National Airlines Act 1945

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[1] *Australia's Two-Airline Policy*, by Stanley Brogden. (Melbourne University Press, 1968), pp. i-xiv, 1-235. $5.75 (cloth), $2.95 (paperback). This comment is both an extended review of the book and an appraisal of the two-airline policy itself.

[2] (1945) 71 C.L.R. 29.

(Cth) which had two substantial purposes, the first being to establish the Australian National Airlines Commission (TAA) to operate a Commonwealth-owned domestic airline and the second to provide that the airline would have a monopoly of interstate and territorial air services through the withdrawal of licences of rival operators or refusal to issue new ones as soon as the Commission was providing an adequate service.[3] For this purpose a service was adequate if the Minister said so in a *Gazette* notice. The Court upheld the right of the Commonwealth to operate an airline through a statutory instrumentality but held that the monopoly provisions relating to interstate services were in violation of the freedom of interstate trade and commerce guaranteed by section 92 of the Constitution. Although TAA did not commence business until September 1946 its formation did not arise out of the invalidity of the monopoly provisions of the Act. On the contrary, the Government persevered with its statutory scheme for a Commonwealth-owned airline even though the interstate monopoly provisions had been declared invalid. Mr Brogden does not repeat the error in his text but his account of the *Airlines* case [4] is not very much better and needs re-writing.

Airline Facts

The book is full of facts and aviation historians will be delighted to read the detailed account of early commercial operations in Australia and the Territory of Papua and New Guinea.

In a work of this kind some errors of fact are to be expected and the author has made his share. Some are printer's errors or obvious slips which the reader will easily detect but minor errors of substance are fairly numerous. For examples, MacRobertson Miller Airlines Limited is stated not to be a subsidiary of Ansett yet it is clearly a subsidiary within the meaning of the various Australian Companies Acts;[5] the absorption of ANA in 1957 was not the first Ansett takeover as the author states;[6] and the trade agreement with the United Kingdom under which the import of foreign aircraft in preference to aircraft manufactured in the United Kingdom renders the airline liable to the payment of customs duty does not refer to "comparable machinery available in Britain" but to machinery "suitably equivalent" and "reasonably available", a difference of wording of considerable consequence.[7] In spite of the statement that Ansett regarded TAA as being too firmly established in public esteem for a takeover bid, Ansett actually made a written

[3] Australian National Airlines Act 1945 (Cth) sections 46, 47 and 49.
[4] Brogden, *Australia's Two-Airline Policy* (1968) 61-62.
[5] *Ibid.* 3.
[6] *Ibid.* 23.
[7] *Ibid.* 188.

proposal in 1950 to take over TAA;[8] the price paid by TAA to Qantas for equipment and property utilized on New Guinea operations was £700,000 and not £1,000,000;[9] and the Unkles-Coleman committee appointed by arrangement between New South Wales and the Commonwealth to discuss New South Wales intra-State route allocation did not produce recommendations which were available when outgoing Premier Renshaw had to face a general election.[10] The committee was appointed by the new incoming Premier Askin and the Commonwealth following the defeat of the Labor Government.

Some errors tend to confuse. Mr Brogden refers to two Airlines Equipment Acts, the first in 1958 and the second in 1959.[11] There is no second Act and this is a mistake seen before in other writing. The Act described as the Civil Aviation Agreement Act 1961 should read the Airlines Agreements Act 1961 (Cth).[12]

Other errors affect argument or the weight of opinion. For example in attributing extremely efficient management to TAA the author pays tribute to the late W. C. Taylor as "possibly the most useful and powerful member of the Australian National Airlines Commission for almost twenty years, the only member to stay so long".[13] In fact Taylor was not a member of the Commission after 1950. In describing TAA's statutory limitations on the scope of its activities the author suggests that the airline is precluded from employing its engineering resources even for government contracts for aircraft repair and maintenance.[14] In fact TAA engages in some work of this character and claims legal capacity to do so as incidental to the operation of airline services. Mr Brogden also considers that the first Civil Aviation Agreement Act of 1952 (Cth), provided a successful system of rationalization of domestic air services. Under it the airlines had the primary responsibility but each had a right to require a conference under an independent Chairman who in the event of disagreement was himself empowered to decide the dispute. The author concludes that the fact that only one matter went to the Chairman between 1952 and 1957 when the second agreement was made is evidence of a "first class system".[15] In fact there was negligible consultation at airline level and rationalization under the 1952 agreement was largely a dead letter. Extensive changes were made to the system in 1957 by the formation of a Rationalization Committee under a Chairman known as the Co-ordinator. The Co-ordinator had the power

[8] *Ibid.* 78.
[9] *Ibid.* 153. See also *Annual Report by the Minister for Civil Aviation* (1960-1961) 22.
[10] Brogden, *op. cit.* 166.
[11] *Ibid.* 129.
[12] *Ibid.* 135.
[13] *Ibid.* 67.
[14] *Ibid.* 3.
[15] *Ibid.* 101.

to make a conclusive decision subject, however, to an appeal by either airline to a Chairman (since 1961 called the Arbitrator). Sir Donald Anderson was appointed Chairman of the Committee and Mr Brogden rightly praises his work. He notes that there was only one appeal from the Co-ordinator's decisions in nine years following his appointment.[16] In fact there were three appeals, one of which was discontinued.

It would be unfair to say that the errors of fact in the book seriously detract from its value but they are numerous and if a second edition is to appear much more careful attention to detail is necessary.

The Misfortunes of ANA

Mr Brogden has written an absorbing account of the history of early commercial aviation in Australia and the development of regular air services up until the outbreak of world war in 1939. Equally interesting is his account of the growth of ANA in the early post-war years and of its subsequent misfortunes leading to its eventual absorption by Ansett Transport Industries Limited. ANA's misfortunes were of course coupled with the formation and growth of TAA and the author has handled this aspect of his subject admirably.

The author shows that ANA was forced to compete with TAA on unfavourable terms, for example, it was subject to discrimination in the issue of import licences, and allocation of airport facilities and whereas TAA had adequate recourse to cheap money for the purchase of aircraft, ANA was to find it increasingly difficult to attract new capital, a task made all the more difficult by TAA's success. Even so, Mr Brogden considers that many of ANA's troubles stemmed from policies pursued by its managing director, the late Sir Ivan Holyman. It is the author's view, for example, that Holyman was never able to assess accurately the demands of the travelling public.[17] Thus when TAA selected the two-engined Convair 240 which offered full pressurisation, Holyman stuck grimly to his decision to order DC4s, a four-engined aircraft with no pressurisation and a cruising speed of a mile a minute less than the Convair. Altogether Mr Brogden is of the opinion that Holyman was a greatly overpraised public figure who contributed to an almost unbelievable degree to the final collapse of his airline, his final major mistake being to decline an opportunity to order Viscounts in favour of ordering DC6Bs. The Viscount, chosen by TAA and the first prop-jet aircraft to operate in Australia, produced a much greater impact on the Australian public than the DC6Bs (though in their later years DC6Bs were to prove profitable and reliable work horses in runs to the Territory of Papua and New Guinea).

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[16] *Ibid.* 155.
[17] *Ibid.* 81.

Civil Aviation Agreement 1952

It is common knowledge that when the Menzies Government first took office following the Labor defeat of 1949 it wrestled with the problem of whether it should sell or abolish TAA. Eventually the Prime Minister announced that the Government had decided to retain the airline and that it was no part of its policy to foster either a government monopoly or a private monopoly on the major air routes. The Government would wish to retain TAA in fair competition with ANA. The announcement was made at a time when ANA's fortunes were declining rapidly.

This led the Government in 1952 to seek to improve ANA's competitive position by various means such as providing guarantees for the repayment of loans to the company for the purchase of heavy aircraft of the Vickers "Viscount" or other type required by the company (ANA selected DC6 and later DC6B aircraft). The terms of agreement are set out in the Civil Aviation Agreement of 1952, that agreement constituting the first formal recognition of a two-airline system in Australian domestic aviation.

One is indebted to Mr Brogden for his account of the policy decisions which eventually led to the 1952 agreement between the Commonwealth and ANA. The Civil Aviation Agreement Act 1952 (Cth) gave parliamentary approval to the agreement. According to the book the whole basis of the Act was to provide concessions for ANA and maintain a two-airline system "by intention, however, not by rigid, legal protection". Thus it is stated, the Act laid down the framework of the policy "without providing the means for compelling its continuance against outside pressures".[18] It is difficult to know what is meant by these observations. Short of the Commonwealth agreeing not to permit the import of aircraft by outside operators, which involved a question of constitutional power only to be decided in 1965, the Commonwealth cannot give rigid legal protection to the duopoly. In all probability it was the hope of the Commonwealth that competition from Ansett would decline were ANA to regain its feet with the assistance of the agreement. After all, TAA by sheer competition was within reach of achieving a monopolistic position which had successfully been sought for it in the Labor legislation of 1945 challenged in the *Airlines* case.

Second Civil Aviation Agreement in 1957

The crystallization of the two-airline policy is found in the Civil Aviation Agreement of 1957 following the acquisition of ANA by Ansett and the recognition by the Commonwealth Government of Ansett as the future competitor of TAA. Mr Brogden writes a fairly full account of these events and of the further airlines agreement in 1961.

[18] *Ibid.* 99. (Both quotations).

Despite his claim to have had background discussions with the Director-General at least once a month for many years one has the impression that his judgments are those of a person looking at the growth of a two-airline system from the outside without really knowing how the policy developed within the counsels of the Government. He gives due recognition to the role of the Director-General of Civil Aviation, Sir Donald Anderson, but little is said of the late Senator Sir Shane Paltridge who was Minister for Civil Aviation from 1956 to 1964. Paltridge played a very dominant part in the emergence and maintenance of the policy and was not a cipher for his Director-General and departmental advisers.

As Mr Brogden so clearly demonstrates, the Government had little alternative but to accept Ansett as the private operator in competition with TAA and Ansett acquired ANA knowing this to be so. The acquisition was closely followed by the second agreement in 1957. On this occasion the Commonwealth felt itself able in the agreement to subscribe expressly to a policy of seeking to secure and maintain a position in which there were two, and not more than two, operators of trunk route airline services, one being the Commission, each capable of effective competition with the other. Once again Parliament approved the arrangement but the Civil Aviation Agreement Act 1957 (Cth) did not make Ansett a party to the 1952 agreement as Mr Brogden suggests. The position was that the 1957 agreement as approved by Parliament provided for the extended application of certain provisions of the Civil Aviation Agreement of 1952. These provisions related primarily to rationalization. Australian National Airways Pty Ltd remained in existence, the agreement merely noting that Ansett had purchased all its shares. Later it was renamed Ansett Transport Industries (Operations) Pty Ltd of which Ansett-ANA is an operating division.

Airlines Equipment Act 1958

Mr Brogden asserts that the 1957 legislation had serious weaknesses because plainly the two-airline policy would not succeed if Ansett continued to operate his own aircraft plus the inferior fleet acquired through purchasing ANA. Further, the Act imposed no control over the acquisition of additional aircraft by the operators. It is suggested in the book that these weaknesses were foreseen in the press and in debates but apparently not by the Government until some time later. Eventually the Government acted and Parliament passed the Airlines Equipment Act in 1958 providing additional financial assistance to both TAA and Ansett to purchase aircraft as the first step in a fleet re-equipment programme. However, the Equipment Act was not some kind of afterthought as the book suggests. As a perusal of the Act will indicate, the rationalization arrangements for future fleet equipment are novel and were the result of study initiated prior to the takeover. In the meantime because of the Ansett acquisition of all ANA shares a further interim

airlines agreement with supporting legislation was a most urgent matter which could not be deferred until equipment problems were sorted out.

The Airlines Equipment Act 1958 (Cth) repays closer study than is given it in the book, although the inclusion of part of Senator Sir Shane Paltridge's explanation of the measure to Parliament[19] helps in part to explain the legislation. Also there are probably not many who will understand the Minister's determination of aircraft capacity and supporting calculations baldly printed in Appendix 3 under the heading "Airlines Equipment Act 1958". Such determinations provide the indicia governing the size of the fleets of the two selected operators. Under the Act neither operator can provide aircraft capacity in excess of that allowed under the Minister's determination. An operator in breach of the obligation risks ministerial action which may even be a direction to the operator to dispose of surplus aircraft. Moreover, neither operator may acquire additional aircraft unless the Minister certifies that it will not result in its having excess capacity and further that the type of aircraft proposed to be obtained would not be detrimental to the stability of the domestic air transport industry. The obligations set out in section 13 of the Act were originally imposed on the Commission by the force of the Act itself and applied to Ansett as the result of a separate contractual undertaking required by the Minister under section 10 as a condition precedent to the guarantee of loans to the company for the purchase of the two Electra aircraft for which the Act also provided. When the loans were repaid the statutory obligation of TAA and the contractual undertaking of Ansett would have lapsed but before this occurred they were further extended by clause 7 of the 1961 Airlines Agreement.

The crucial variable factors in the determination of total fleet capacity are the estimated traffic growth and the "optimum revenue load factor", which the Minister adopts in determining total aircraft capacity for a given period. "Revenue load factor" is the percentage that the revenue value of the work performed by the aircraft during the period of the determination bears to the total revenue value of the work that could have been performed.[20] The Minister's discretion to fix a revenue load factor is virtually without qualification while his estimate of traffic growth is tempered only by the fact that its accuracy is known at the end of the relevant period. In practice the Minister's estimates have been, as a general rule, remarkably accurate. By fixing a high revenue load factor or underestimating traffic growth he can severely circumscribe competition between the two operators, particularly in the high density routes where competition would normally be expected to be keenest. On the

[19] *Ibid.* 133-134.

[20] See section 11 Airlines Equipment Act 1958 (Cth) for definition of "revenue load factor" and also Richardson, "Aviation Law in Australia" (1964-1965) 1 *Federal Law Review* 242, 271-273.

other hand, an optimistic estimate of growth and a load factor fixed too low over the competitive routes could result in the total services of the two airlines becoming unprofitable, contrary to one of the major objectives of the two-airline policy of maintaining regulated competition having regard to the interests of the public and a proper relation between earnings and costs. However, the right of airlines to have the Rationalization Committee (and Arbitrator) fix load factors in pursuance of clause 10 (d) of the Airlines Agreement 1961 in relation to specified groups of competitive routes provides substantial protection against capricious ministerial determinations in the most improbable event of it being necessary.

Airlines Agreement in 1961

In chapter 7 Mr Brogden, under the heading "Stability with Struggle", deals with the solidifying of the two-airline policy in the Airlines Agreements Act 1961 (Cth). This Act gave parliamentary approval to a third airlines agreement reiterating the objects so dramatically stated for the first time in 1957 to secure the position in which there were two and not more than two operators of trunk route airline services. The 1961 agreement extends the operation of the 1952 agreement until 1977 and the 1961 agreement also operates until 1977. It is Mr Brogden's opinion that the Commonwealth has effectively committed itself to the policy until that date. It would be legally possible for another Government to obtain passage of federal legislation releasing the Commonwealth from its commitment, but as Prime Minister Menzies pointed out in the parliamentary debates: "So far in our history no parliament has yet though fit to repudiate a contract ratified by a previous parliament, and I do not think that one ever will".[21] As the agreements stand, they vest legal rights and legal obligations in the parties. Some interesting questions could arise if the parties were to fall into disagreement, as for example, the remedy which Ansett or TAA would have if the Minister were to be in breach of his statutory duty under section 15 of the Airlines Equipment Act requiring him not to discriminate unfairly in favour of one operator as against the other. One may speculate further whether the grant to foreign airlines of cabotage rights and the right to carry passengers brought to Australia by other airlines over domestic routes (called international "on-carriage") is inconsistent with the fifth recital of the Airlines Agreement 1961 to have only two operators of trunk route airline services and, if so, what is the nature of the remedy. The recent grant of limited cabotage rights to BOAC between Perth and Sydney and Brisbane is not financially serious but if, when Tullamarine is opened, such rights together with unrestricted rights of international on-carriage are granted in respect of flights between Melbourne and

[21] *Commonwealth Parliamentary Debates*, vol. 220, 3989, 30 October 1952.

Sydney there would be an erosion to foreign airlines of traffic traditionally regarded as domestic.

The current legislation supporting the two-airline policy is, in addition to the Airlines Equipment Act, the Airlines Agreements Act 1952-1961 (Cth) and the 1961 amendments to the financial provisions of the Australian National Airlines Act (Cth).[22] The first schedule of the Airlines Agreements Act contains the text of the 1952 agreement and the second schedule sets out the 1961 agreement. The Civil Aviation Agreement of 1957 has ceased to be operative and more precise provisions relating to rationalization of air services were inserted in the 1961 agreement in relation to the matters which the Commission and the company agreed to keep under review.[23]

Commonwealth Constitutional Power over Aviation

Commercial aviation is a glamour industry and facts and policies relating to it rarely fail to arouse widespread interest. Mr Brogden's book adds much to that interest. In Australia there is the added zest provided by a federal system of government with legal powers divided between the Commonwealth and the States making possible divergent Commonwealth and State views in respect of matters over which all seven legal entities in the federation have some legal powers. The federal Constitution also creates some power vacuums notably in the area of interstate trade and commerce. In consequence the two-airline policy has had to be woven into a legal background of unusual complexity and legal considerations have in several vital respects dictated the shape of the policy. Unfortunately Mr Brogden, excusably enough, does not appear to have a sufficient grasp of constitutional issues and references to constitutional questions are rarely accurate and sometimes are simply incorrect. As a result the average reader, though he is likely to learn a great deal about the emergence of the two-airline policy and the three agreements from the book, is likely to remain very confused about Commonwealth legal powers in general and the bases on which the agreements and the various implementing Acts rest.

Mr Brogden's opening sally on legal powers reads as follows:

> The original Commonwealth power over civil aviation had been granted by the States in 1920 to allow the Commonwealth to sign the Paris Convention of 1919 for the control of pilots and aircraft. The Air Navigation Act 1920 (Royal Assent received on 2 December) gave effect to provisions of that Paris Convention 'and for the purpose of providing control of civil aviation within the Commonwealth and Territories.' Though Victoria, Queensland, Tasmania and South Australia passed statutes to refer powers to the Commonwealth, only Tasmania proclaimed one. The Commonwealth

[22] See, however, clause 9 (2) of Airlines Agreement 1961.

[23] The Act as amended to 1961 is available as an official reprint.

> rested on its constitutional power to implement international agreements, the colonies having referred those powers to the Commonwealth in the Constitution.[24]

The States did not grant power to the Commonwealth in 1920 to allow it to sign the Paris Convention of 1919 and the Commonwealth has never had an express legislative power over the subject of civil aviation. The federal Constitution vests the Commonwealth Parliament with power to make laws with respect to external affairs[25] and acting on that power alone the Commonwealth could have become a party to the Paris Convention. Further, the Commonwealth has the power under section 51 (i.) of the Constitution to make laws with respect to interstate and overseas trade and commerce. The Paris Convention was concerned primarily with international commercial aviation and it was within Commonwealth power at the relevant time, as it is now, to subscribe to such a convention and give effect to it under the federal power to legislate with respect to overseas trade and commerce. However, the Air Navigation Act 1920 (Cth) not only provided that the Governor-General could make regulations to give effect to the Paris Convention but also purported to vest him with power to make regulations for the control of air navigation throughout the Commonwealth. In this way the Act assumed a power to regulate intra-State aviation at federal level whereas the Commonwealth had no direct power to make laws with respect to the subject of intra-State commerce.

In 1936 there was a successful challenge to the validity of the Air Navigation Act 1920 (Cth). In the *Goya Henry* case [26] the High Court held that the trade and commerce power did not authorize the Commonwealth to exercise general control over the subject of civil aviation including intra-State civil aviation as the Commonwealth argued. The Court recognized that the Commonwealth Parliament could legislate to give full effect to the Paris Convention but noted that the Convention did not require the Commonwealth to provide a compulsory licensing system applicable to intra-State aviation and the Court held, therefore, that in so far as regulations under the Act purported to impose such a requirement they could not be supported by the external affairs power.

Mr Brogden refers to the unsuccessful attempt by the Commonwealth to obtain an express legislative power over air navigation by resorting to a referendum following the *Goya Henry* case. He also mentions that following the defeat of the referendum the Commonwealth and States met in 1937 and "agreed that the States pass identical legislation legalizing Commonwealth Air Navigation Regulations within those States and empowering the Commonwealth's civil aviation administration

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[24] Brogden, *op. cit.* 52.

[25] Section 51 (xxix.).

[26] *The King v. Burgess*; *Ex parte Henry* (1936) 55 C.L.R. 608.

as the authority to exercise control".[27] The agreement between the Commonwealth and States referred to by Mr Brogden was that the States should pass uniform Air Navigation Acts adopting the Air Navigation Regulations of the Commonwealth as State laws. As passed, each State Act provided that the federal regulations from time to time applicable to air navigation within the territories of the Commonwealth should apply *mutatis mutandis* in relation to air navigation within a State. This was the scheme of legal control which continued until 1964. Throughout the period the States had neither the administrative capacity nor the wish to regulate intra-State air navigation within their own borders.

Federal and State Operational Licences

All States were content that Commonwealth Air Navigation Regulations should operate as State laws and the States thus accepted a system of federal licensing of intra-State air services. However most of them wished to retain a residual control over the provision of intra-State air services and most also required State-issued licences in addition to federal licences for an operator to conduct intra-State air services. The sharing of legal power in this manner was to become a legal battleground between 1963 and 1965 after the New South Wales Labor Government decided to cancel some intra-State licences held by Airlines of New South Wales Pty Limited, an Ansett subsidiary, and to re-allocate the services affected to the rival operator, East-West Airlines Limited.

The Labor Government's action in New South Wales culminated in a challenge by Airlines of New South Wales to the validity of the State licensing system. The plaintiff argued that federal licensing of air transport services under the Air Navigation Act and Regulations extended to all air navigation within Australia and any State legislation setting up an additional licensing system was inconsistent with the Commonwealth law and was therefore rendered inoperative by section 109 of the Constitution which accorded paramountcy to federal laws over State laws. The Court held that the provisions of the State Act were not inconsistent with the federal law and therefore that the plaintiff could not use aircraft within New South Wales without holding a licence under the State Act.[28] The High Court's decision is picturesquely summed up by Mr Brogden in the words:

> The High Court heard the dispute in December 1962, deciding that the N.S.W. cabinet ambitions did not conflict with Commonwealth law or any item in the Constitution.[29]

The Court heard the dispute in July 1963 and gave its decision in February 1964. This was the case in which *dicta* in some judgments

[27] Brogden, *op. cit.* 53.
[28] *Airlines of New South Wales Pty Limited v. New South Wales* (1964) 113 C.L.R. 1.
[29] Brogden, *op. cit.* 163.

suggested that Commonwealth power to control air navigation by reason of developments in commercial aviation since the *Goya Henry* case in 1936 was not as limited as previously thought but extended into the area of intra-State commerce. Fortified by the *dicta*, Prime Minister Menzies wrote to the State Premiers pointing out that the Commonwealth bore the financial brunt of providing and maintaining aviation facilities in Australia. He informed the Premiers that the Commonwealth intended to assume comprehensive legal control over civil aviation in lieu of the existing divided control. The Commonwealth then extended the federal Air Navigation Regulations to apply to intra-State air operations. Henceforth, they no longer applied to intra-State operations only because they were made to apply by State Acts of Parliament.

Commonwealth action plus the continuance of the New South Wales operators' dispute precipitated a second challenge to the New South Wales licensing legislation. In *Airlines of New South Wales Pty Limited v. New South Wales* [No. 2][30] the High Court by a six to one majority upheld the federal regulations providing a licensing system for all commercial airline services in Australia. It also held, however, that it was beyond the competence of the federal Parliament to assume sole authority to initiate air transport operations purely within a State. This was beyond any form of legal control which could be connected with the Commonwealth's newly deliniated power to control all the navigational aspects in Australia. In the result therefore a State may maintain a licensing system and prohibit intra-State air transport operations even though the operator holds a Commonwealth licence provided the law for the exercise of State control is directed to other considerations than navigational ones.

Mr Brogden has commented on this situation as follows:

> Nobody had even considered that the law existed to consider public convenience, but to many non-legal observers the judgment appeared to be a poor result for such expense.[31]

Certainly there are lawyers who are not impressed by the High Court's attempt to uphold on the one hand the authority of the *Goya Henry* case and, on the other, that the need to regulate interstate and overseas aviation now justified a licensing law applicable to intra-State flight as a measure for the protection of overseas and interstate aviation against possible physical danger.

So far State licensing disputes have had only a marginal effect on the two-airline policy but they could become more significant in future as large centres of population develop away from capital cities. As the situation now exists following the second *Airlines of New South Wales*

[30] (1965) 113 C.L.R. 54.

[31] Brogden, *op. cit.* 165.

decision, either the Commonwealth or a State can bring any intra-State operator to a standstill by a refusal to issue a licence. In the last analysis the Commonwealth, particularly having regard to the extent of its financial support of intra-State operations, is in a stronger position than a State but it cannot grant full legal protection to its chosen trunk route airlines, either TAA or Ansett.

For several years East-West Airlines has, with federal and State approval, operated an Albury/Sydney air service partly in competition with a TAA service operating Melbourne/Albury, then via Canberra to Sydney and Newcastle. In the course of this service TAA has an extensive business in the carriage of intra-State traffic between Albury and Sydney via Canberra. East-West Airlines now seeks to have TAA denied the right to carry purely intra-State passengers on these services. The Commonwealth could validly refuse East-West a federal operating licence or it could in the case of intra-State flights, if it wished, deny East-West the use of federally controlled air space or landing privileges at Commonwealth-owned aerodromes but it has not done this and if it did it would expose TAA to political and legal challenge in respect of the intra-State traffic the airline handles between Albury and Sydney. Interesting legal questions would also arise as to the legal consequences of the TAA intermediate stop in Commonwealth territory and the volume of intra-State traffic which could be justified as being incidental to the operation of State-territorial services.

Constitution, Section 92

Section 92[32] of the Constitution has not made the inroads on the two-airline policy which might have been expected in the light of the current interpretation of the section under which a burden imposed by a federal or State law or executive act on an interstate operator will violate the section as amounting to an infringement of interstate trade and commerce.[33] Because of section 92 the Commonwealth cannot maintain a discretionary licensing system for interstate air services under which it can confer a licence on one operator yet for policy reasons deny a licence to another.

A recital in the first aviation agreement in 1952 stated that it was expedient in the opinion of the Commonwealth to make provision for the purpose of ensuring the continued existence of ANA and TAA and the maintenance of competition between them. Ansett was not given a chance to participate in the arrangements of 1952. However, though

[32] Section 92 reads: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

[33] *The Commonwealth v. Bank of New South Wales* (the *Banking Case*) (1949) 79 C.L.R. 497, 639-641.

the 1952 agreement sought to achieve rationalization between the two selected operators, in the words of Mr Brogden:

> A problem in the minds of ANA and TAA executives was how any agreement on route rationalization would help Ansett Airways, which was not a party to the Airlines Agreement. Ansett could force the Commonwealth to agree to any application to be second operator on a rationalized route because the Constitution was on his side with the section 92 referring to restrictions on interstate trade.[34]

This is to say that Ansett could continue as an interstate operator as long as it had aircraft and could satisfy the safety provisions of the Air Navigation Regulations. The continued operation of Ansett in the early 1950s was one of the major problems confronting ANA and the problem remained after 1952 as a threat to the two-airline policy.

In chapter 8 the author discusses attempts of erstwhile operators to break into the interstate airlines business. He deals with IPEC's attempt to establish an interstate all-freight air service. Had the IPEC attempt succeeded in the courts even the most profitable trunk line routes would have been open for exploitation by newcomers and no doubt they would have been exploited. However, as the author states, IPEC's challenge in *The Queen v. Anderson*; *Ex parte Ipec-Air Pty Ltd*[35] failed. If the two-airline policy is to continue it is important to the theme to know why IPEC failed and regrettably the book offers little explanation.

In the case before the Court, Ipec-Air had lodged an application for a charter licence under the Air Navigation Regulations to carry freight by air mainly between the mainland capitals. The company was able to bring evidence before the Court that the Director-General of Civil Aviation had indicated he was satisfied the company could comply with the Regulations. Notwithstanding, the Director-General had refused to issue the charter licence on the ground that the company did not have the aircraft to conduct the service.

Australia has to import aircraft capable of undertaking the operations which IPEC wished to undertake. However, the Commonwealth, under its legislative powers to make laws with respect to overseas trade and commerce, may prohibit the import of any goods into Australia. In the case of aircraft the Customs (Prohibited Imports) Regulations provided that no one could import an aircraft without the permission in writing of the Director-General of Civil Aviation. IPEC applied to the Director-General for permission to import five DC4 freighters but was refused. The Director-General advised the company by letter that the provision of further facilities for the operation of trunk route freight services by air was not justified on economic grounds and having regard to the Government's policy views the application was refused.

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[34] Brogden, *op. cit.* 101.

[35] (1965) 113 C.L.R. 177.

The company sought writs of *mandamus* to compel the Director-General to issue a charter licence and to grant a permit to import the aircraft. The company alleged that in refusing to grant either the licence or the permit the Director-General was acting beyond his statutory powers and further that the decision not to allow the importation of aircraft was made so that the company would not be able to operate interstate air services. In these circumstances, argued the company, the Director-General's refusal to grant an import licence was an infringement of section 92 of the Constitution.

The majority of the High Court held that a writ of *mandamus* should go commanding the Director-General to issue the charter licence, the Director-General having exhausted the limits of discretion allowed him under regulation 199. However, the majority of the Court also held that the Director-General had acted within the scope of his powers in refusing to grant an import permit. So far as section 92 of the Constitution was concerned, the Court conceded that the refusal of permission to import aircraft had the effect of precluding the company from operating its interstate services. Nevertheless, the refusal operated on the act of importation which was not itself part of interstate trade and commerce. Further, it did not operate in reference to, or in consequence of, any matter forming part of interstate commerce. In these circumstances, section 92 was not infringed. In the face of this decision Mr Brogden has said at the beginning of the book[36] that the two-airline monopoly is in breach of section 92. It is not.

The Brogden Envoi

Mr Brogden sums up his review as follows:

> Looking at the two-airline policy as a whole, I believe it has been very successful in relation to the problems it was formulated to solve. The policy saved the industry from monopoly in 1957 and possibly again in 1961. It has provided a stable industry which in turn provides a good standard of transport at a reasonable fare. Such success is too valuable to be thrown away for reasons of mere pique or politics. With adjustments the policy should remain valid until the early 1970s.[37]

This is the conclusion of a writer who has revealed himself as being well-informed and at the same time opposed to either a private or government monopoly of the Australian air transport industry. If one is not committed to the view that there should be public monopolies of utilities, including the means of transport, Mr Brogden's conclusion seems unimpeachable. The success of the policy is that a private operator has remained in competition with a government-owned operator and it would not have been able to do so in the absence of the tripartite

[36] Brogden, *op. cit.* 1.
[37] *Ibid.* 207-208.

arrangements between the Government and the airlines. A more searching examination of the implications of the two-airline policy might have been expected from someone of Mr Brogden's stature. Such an examination would have thrown some light on the years ahead whereas all Mr Brogden has said is that the next few years should witness close evaluation of the policy being made by government agencies and politicians with a view to the formulation of a new policy about 1973.

To some extent the Commonwealth has committed itself to the present operators by the heavy capital expenditure it is incurring in the process of constructing major international and domestic terminals at Mascot (Sydney) and Tullamarine (near Melbourne), each in one building complex designed and planned to meet the long term requirements of the two-airline system. These developments are also costly to the airlines, for example TAA and Ansett will each spend initially about $10,000,000 in transferring their operation from Essendon to Tullamarine. Expenditure on airport facilities is a heavy airlines cost and would deter most, if not all, erstwhile Australian-owned private operators from engaging in the air transport business in extensive competition with the two established airlines. Mr Brogden has also not mentioned the significance of the major capital sums which both airlines must find in the next five years for actual projected additional aircraft of the Boeing and DC9 type. In the present financial situation the negotiation by the two airlines of overseas loans of sufficient size is impossible without government support and guarantee. Until recently aircraft loans have been repayable over seven years but for aircraft delivered in 1970 loans probably will not be repaid until 1980. A private operator requires positive assurances of the ability to use the equipment until fully amortized before shareholders' funds are committed and if the Government is to guarantee the repayment of loan monies it needs to ensure a viable two-airline policy until repayment is effected. One of the intriguing aspects of the two-airline policy, therefore, is that the Government seems committed to keeping the policy alive for up to ten years after each major aircraft purchase.

Components of the Two-Airline Policy

The two-airline policy really consists of three main components. First there is rationalization of fleet equipment, second, rationalization of air services and, third, the adjustment of TAA's role to ensure that it does not enjoy competitive advantages over the private operator.

Fleet Equipment

Of all the supporting legislation the Airlines Equipment Act 1958 (Cth) is without doubt the most fundamental enactment providing the general basis of regulation of the Australian industry in an environment in which public monopoly is not acceptable. The operation of the Act

has enabled the Commonwealth to cope satisfactorily with two crucial problems that have plagued air transport industries elsewhere, first, the problem of excess capacity of a total air transport industry and, second, the problem of diversification of aircraft types leading to cost difficulties notably in the provision of spare parts and aircraft maintenance facilities. Scheduled international air services operating between America and Europe under a miscellany of bilateral agreements have in fact produced a situation of substantial excess capacity making it almost impossible for some smaller international operators to perform profitably. Of course no domestic air transport industry of any size, such as in the United States, Canada and England, remains free from governmental regulation and each country has its own means of certifying or licensing domestic operations. None, however, has matched airline capacity and public demand more closely than Australia.

In 1958 the combination of Ansett and ANA fleets found Ansett with a heterogeneous fleet of aircraft, an ominous warning against indiscriminate purchasing without regard to an overall informed judgment of the total needs of a country. The Airlines Equipment Act has succeeded in reversing the trend towards excessive diversification and it should ensure that an unsatisfactory situation does not develop in future even if the present two-airline policy should undergo very considerable modification as for example by withdrawing its frontiers to cover only the major trunk line routes upon which the two operators are now in competition with each other or extending those frontiers to include regional international services to New Zealand and the South Pacific. Now that it is clear that the Commonwealth, as a matter of legal power, can exercise control over imports under its trade and commerce power to achieve policies in domestic aviation of its own choosing, legislation on the pattern of the Airlines Equipment Act becomes a potent weapon even in the absence of a two-airline policy.

Nonetheless the existence of the two-airline policy considerably simplifies the Commonwealth's problem of maintaining a domestic air transport industry at an economic level. The legislation has danger points. For example, as the Annual Reports of the Minister for Civil Aviation show, the Government is anxious above all else to avoid a position of excess capacity in the industry and, in these circumstances, it is always possible that the Minister, in exercising his discretion to grant or withhold the certificate which is a prerequisite to the importation of aircraft under the Airlines Equipment Act, will act too rigorously so that in fact a situation of insufficient capacity will develop. At times the pressure on some of the trunk line services seems to indicate that there is a marginal situation of this kind in Australia. It could develop greater depth very easily if one operator should prove substantially more attractive to the public than the other. If it should the Government is then led to

adjust the competitive position of one airline *vis-à-vis* the other. On the other hand if predicted traffic growth is not achieved a reverse situation could eventuate at considerable cost to both airlines each being committed to programmes for the purchase of expensive jet equipment for delivery over a period of years. Another inherent difficulty of the Airlines Equipment Act lies in the choice of new front line aircraft. Initially there were serious differences between TAA and Ansett about the purchase of new aircraft but in recent years they seem to have had little difficulty in independently reaching similar decisions to purchase United States-built Boeing 727 and Douglas DC9 aircraft. In the purchase of jet aircraft the two operators displayed resoluteness in spite of strong political pressures to buy British-made aircraft. Under the trade agreement between Britain and Australia aircraft are liable to customs duty but the Commonwealth may remit the duty after consulting the British Government to determine whether suitably equivalent British aircraft are reasonably available and taking account of British representation. The tenor of the agreement is that appropriate British aircraft would be admitted without payment of duty and the British offerings were the Trident 1E and the BAC-500. Initially the Commonwealth imposed duty but this was later remitted when the airlines (with the benefit of hindsight) were able to furnish new evidence of a conclusive nature that the Trident 1E was not suitably equivalent and that the BAC-500 had not, in fact, been available. In the light of known facts since the airlines placed their American orders a serious situation would have emerged in the air transport industry in Australia if the two airlines had been responsive to the pressures brought upon them and bought British aircraft instead. Not only would the aircraft have been less satisfactory than the American jets in important technical respects such as capacity and range but deliveries would have been subject to considerable delays. Experience in other countries moreover, particularly in England, shows that political pressures must not govern or channel the selection of aircraft for an industry which is expected to operate at economic levels. Other problems arise under the equipment legislation in the event of a disagreement between the two selected operators as to aircraft types. Though the Act does not obligate them to purchase identical equipment the specific policy of the Act is not to allow the importation of types of aircraft which may be detrimental to the stability of the industry, and, translated into practice, this means that the two airlines must reach an extensive measure of agreement and order closely comparable aircraft. Thus at the outset in 1958 TAA was unable to proceed with orders for French Caravelle aircraft when Ansett preferred to buy American Lockheed Electra aircraft.[38] While co-ordinated

[38] Had the Commonwealth agreed to the operation of Caravelles it would have incurred additional expenditure on its aerodromes and airport facilities which, in the event, it avoided for about six years until the pending introduction of the Boeing 727s.

purchasing continues there is little chance of either airline becoming a favoured customer of a manufacturer anxious for various reasons to obtain early orders for proposed new designs.

Rationalization

Rationalization of air services, the second component of the two-airline policy, became meaningful for the first time after the negotiation of the second civil aviation agreement in 1957. In the decade since, under a series of decisions of the Co-ordinator and two vital appeals to the Arbitrator, the principle has emerged of equal access to the major competitive routes and this may now be regarded as a primary feature of rationalization of air services in Australia. It has meant the erosion, at least in part, of natural advantages which one or the other operator has enjoyed on particular routes so that the area of competition rests on the ability of each operator to fill up the seats which are nominally empty under the application of predetermined revenue load factors fixed by reference to the overall determination of an optimum revenue load factor under the Airlines Equipment Act. A side effect which has attracted much public attention is parallel time-tabling as Mr Brogden has indicated. On the whole the public has not become restive about rationalization in practice. The rates structure is also bound up with rationalization since both airlines are expected to make profits. Obviously rationalization will only work according to the statutory plan if the two airlines charge similar fares for similar services and this has always been the case. Both airlines lay just claims to reasonable efficiency and both operate at a rate of profit which would be considered moderate by any standards of a non-socialist society so that there is little room for rate competition in any event, certainly not the kind introduced by Ansett in 1947 shortly after TAA commenced operations. Nevertheless, rationalization tends to produce conservatism in air operations and though the Australian public gets good value for money it is the operators in consultation with the Department of Civil Aviation and not the public who decide the level of services which the public should have. Lower fares for overnight travel and true economy type services using older aircraft are not part of the Australian scene. Air charter passenger work is also at a minimum. Labor parliamentarians criticize the Government's policy and its sponsorship of Ansett in particular but most of the criticism stems from dogmatic adherence to an exclusive government airline policy. Mr Brogden's frequent condemnations of Labor attitudes appear harsh but it is only too true that little emerges from the parliamentary debates which serves to improve the lot of the public. Nevertheless an unmentioned fact, material to the two-airline policy's future, is that the Australian Labor Party platform now provides that the Commonwealth should compete actively with private enterprise in interstate transport by sea, air or land.[39]

[39] Australian Labor Party, *Platform, Constitution and Rules*, Adelaide 1967, 23.

In 1965 TAA pleaded publicly through its former Chairman, Sir Giles Chippindall, for a freer hand to compete with its rival. One of the measures suggested was that each airline should be free to deploy its fleet as it wished provided that its overall capacities did not exceed those specified in the Minister's determination under the Airlines Equipment Act. The proposal, which would involve reversal of a number of major decisions of the Co-ordinator, would allow each airline more flexibility in working out its economic destiny and from a consumer viewpoint it is at least superficially attractive. The difficulty about the proposal is that each airline, given a profit target, would seek maximum exploitation of the profitable high density routes and several lesser routes would almost certainly suffer varying degrees of neglect. Australian political and social traditions are in sympathy with the strengthening of the weak in this expanding land of opportunity and the Australian public seems fully prepared to accept the cost to it of the air service network which serves rural and provincial areas. If a means could be discovered of protecting the less profitable routes from neglect the case for more freedom in the deployment of fleets is strong.

Last year the federal Government approved the introduction of commuter services in country areas. The Minister for Civil Aviation stated that the services were to consist of regular flights by charter firms with small aircraft operating to fixed and published time-tables. The Government's intention was to provide regular air links between centres, towns and country areas, either not served by the major airlines or having no direct air services with their capital or nearest major provincial city. If commuter services are allowed to develop according to the policy they should grow considerably with the expansion of Australia's newly discovered inland resources and they could reach a level at which they entrench on the vested interests of the two major operators. Judging from the continued operations of East-West Airlines in New South Wales, it seems possible, moreover, to operate regional air services economically, and if the two-airline policy should become the subject of review in the early 1970s, one question for consideration would be whether the frontiers of the current policy should be reduced so that the policy operates in respect of major domestic routes leaving the development and maintenance of regional services to another plan of government regulation. It is unnecessary to sharpen pencils with an axe and smaller operating units using lighter equipment can in some circumstances achieve flexibility and economies not always possible in an enterprise established primarily to conduct large-scale scheduled operations. The two airlines tend to be vulnerable politically because of their size. A few months ago, for example, the New South Wales Minister for Transport was reported as urging TAA to "move over a little and give the smaller fellow a go"[40] on the Sydney/Albury route. The little fellow was East-West Airlines.

[40] *Border Morning Mail*, Albury, New South Wales, 26 March 1968.

Adjustment of competitive positions

The third component of the policy, the adjustment of the respective competitive positions of TAA and ANA, has quite unique problems. It is probably impossible to work out a set of rules which will allow equal competitive conditions for two operators when one is owned by the Government and the other is private. A federal Government can confer so many advantages on its own instrumentality as to make effective competition impossible. For instance if TAA were given the maximum freedom of operation that the Commonwealth Constitution allows, a monopoly of federal government business, access to all necessary loan funds at a cost not greater than the cost to the Commonwealth of raising the loan funds, and had an obligation not to make profits but simply to cover costs including the cost of capital employed in the enterprise, it is doubtful if a private airline could compete. But TAA is not in such a position. It has been unable to take advantage of every opportunity from State sources to operate intra-State air services. It cannot operate hotels or engage in diversified non-aviation activities and the Australian National Airlines Act requires the Commission to direct its policy to making sufficient profits to meet a target set each year by the Minister for Civil Aviation and pay its profits to the Treasury. The third aspect of the two-airline policy is therefore devoted to equalizing the competitive position of Ansett and TAA. As long as TAA has natural advantages flowing from government ownership, such as access to loan monies for financing aircraft purchases which the Commonwealth is able to obtain at lower rates of interest than Ansett, though Ansett be equally efficient, it cannot compete on an equal footing. Accordingly, as TAA continues to maintain its share of the market because of its efficiency and attractiveness to the public, it must, in line with the policy which the Government has initiated, face the possibility of further reductions in the advantages it enjoys or be required to achieve higher profit targets, or both.

There is some scope for improving general airline profitability by general concessions to aviation such as the stabilization or reduction of landing charges, but concessions of this kind run counter to the philosophy of the Government that the airlines should genuinely pay their way under any tripartite agreement between the Government and them. Substantial fare increases to benefit either or both the operators seem to be out of the question, both because they are already at levels which inhibit travel and because of growing competition of other forms of travel between capital cities.

Concessions by the Government at the expense of TAA should not be regarded however as necessarily being at the cost of the taxpayer. There is nothing wrong in the principle, for example, of requiring a government airline to make a profit. The fare paying passenger is then simply

making a modest contribution to the consolidated revenue fund which, in theory at any rate, is used for the benefit of the Australian public. Profits which Ansett earns in any year and distributes to shareholders are of smallest consequence in federal budgetary affairs in return for the maintenance of a policy in an important industry. Probably the major additional cost factors would be found not in the purchase and utilization of aircraft, but in the extent to which duplication of airline facilities such as maintenance workshops, training programmes and office and terminal buildings and equipment increase total airline costs. Yet, though added costs may result, there are offsetting advantages in duplication such as accelerated technical progress and efficiency resulting from competition. No one has yet produced a study of the real cost of the two-airline policy and if the Government has actively investigated the possibilities of extending rationalization into the area of airline organizations, it has remained silent about them.