II. Commonwealth

Introductory.

The third period of the first session of the Twentieth Parliament began on 6th February 1952 and continued until 6th March. The fourth period started on 6th May and lasted until 4.30 a.m. on 6th June, no indication then being given to members when they would be required to meet again. Parliament re-assembled on 6th August, the first business being the presentation of the Budget for 1952-53; this, the fifth period of the session, ended on 6th November when both Houses adjourned after the usual expressions of goodwill which the approach of Christmas always evokes.

109 Acts were passed in 1952, few of them causing any violent controversy although the Opposition, in duty bound, formally opposed most of them. Priority was given—no doubt by accident—to measures to increase the number of ministers and their collective salaries, and to raise the remuneration and allowances of all members.

I. CONSTITUTIONAL

Ministers and members and their salaries.

By the Ministers of State Act (No. 1 of 1952) all earlier Acts on this subject are repealed. The maximum number of ministers remains at 20, but their collective salaries are raised from £29,000 to £41,000, divisible among them as they think fit. Each minister other than the Prime Minister is also to receive an allowance of £1,000 per annum; the Prime Minister's allowance is £3,500. These salaries and allowances are additional to what each minister is entitled to be paid as a member of the House of Representatives or of the Senate under the Parliamentary Allowances Act (No. 2 of 1952). This second Act gives to all federal members, not a salary and an allowance, but two forms of allowance. The first—which is in effect a salary though not so named—amounts to £1,750 per annum; the second, described as being "in respect of the expenses of discharging his duties", is at a flat rate of £550 per annum for all senators. For members of the House of Representatives there is a sliding scale, from £400 for members representing metropolitan electorates to £900 for those elected by large and distant country constituencies. All of what might be called "second category" allowances will be tax-free and are by no means unreasonable either in amount or in attributes; they represent the sort of "expense account" which most

businessmen get and which is not regarded as part of their taxable income.[1]

The Speaker of the House of Representatives and the President of the Senate will each receive an addition of £1,750 to his salary and of £250 to his allowance; the Chairman of Committees in each House, £900 additional salary. The Leader of the Opposition in the lower House will receive £1,750 and £1,000; his deputy in the same House, £750 and £250, which sums are also allotted to the Leader of the Opposition in the Senate, where no deputy Leader is recognised. The leader of any recognised political party in the House of Representatives consisting of not less than ten members of which none hold ministerial office is to receive £500 additional salary.[2] Finally, the "Whips" share in these windfalls. In the lower House the Government Whip gets £325 added to his salary, other Whips £275; the latter amount is paid to both Government and Opposition Whips in the Senate. All the "allowances" (i.e., those which are given in addition to salary however described) are specifically exempted from income tax by the Income Tax and Social Services Contribution Assessment Act (No. 4 of 1952).

The fourth Act of direct financial interest (and possible benefit) to federal members is the Parliamentary Retiring Allowances Act (No. 3 of 1952).[3] Apart from varying the method of calculating the contributions to be made to the pension fund out of consolidated revenue, the new Act gives an additional pension of £2 per week to a former member who is over 65 and is entitled to a pension under sec. 18 of the principal Act. Another new provision introduces special pensions for former Prime Ministers; it applies to any person who has been continuously Prime Minister for two years or for shorter periods amounting in all to three years, if he is over 45 and

[1] These salaries and allowances are based on the report and recommendations of a committee (consisting of a New South Wales judge, a businessman, and an accountant) which the government had invited to investigate the whole question. The cynic may perhaps be allowed to suggest that if the committee had recommended salaries and allowances at a *lower* level than obtained before 1952 neither the government nor the opposition would have thought it an urgent matter to give effect to the committee's findings!

[2] This provision can only benefit one person, namely, the Leader of the Country Party where that Party, in common with its Liberal friends, is sitting on the opposition benches. When Labour occupies those benches it usually constitutes the whole of the opposition.

[3] This amends some of the provisions of an Act of the same title passed in 1948, as to which see *Review of Legislation 1948*, 1 U. of West Aust. Ann. L. Rev. 326-327.

has ceased to be a member of either House. The pension is £1,200 per annum for his life; his widow (unless she re-marries) will receive £750.

Electoral machinery.

The formalities attendant upon the application, by an elector absent from Australia on a polling day, for a postal vote certificate and a postal ballot paper are substantially reduced by the Commonwealth Electoral Act (No. 106 of 1952). Under the older procedure the elector had to obtain an application form, complete it and send it to Australia; in the fullness of time he would receive a postal vote certificate and ballot paper. After filling in these documents he had to address them to the returning officer for the electoral division in which he was enrolled; but all his labours were in vain if certificate and ballot paper did not reach the returning officer within seven days of the closing of the poll. The new Act provides for the appointment of assistant returning officers *at places outside Australia;* such an official will issue the certificate and ballot paper to the elector, whose application he indorses and sends by air mail to the returning officer in Australia. The elector then completes the certificate and marks his ballot paper in the presence of an authorised witness, thereafter posting them to the returning officer of the electoral division in which he is enrolled.

The list of authorised witnesses comprises (a) officers in the army, navy, or air force of the Commonwealth or any other part of the Queen's dominions; (b) persons in the public service of the Commonwealth or of any other part of the Queen's dominions; and (c) justices of the peace, ministers of religion, and medical practitioners resident in any part of the Queen's dominions.

Nationality and citizenship.

Four amendments of the Nationality and Citizenship Act 1948 are made by one Act of the same title (No. 70 of 1952). They are: (1) the reduction of the period of residence required as a prerequisite to naturalisation in respect of an alien who voluntarily enlists for overseas service in the armed forces of the Commonwealth or of any other part of the Queen's dominions; the time so spent in the forces will be regarded as residence in Australia for twice its duration. If the alien has enlisted in the Citizen Forces of the Commonwealth and has volunteered to serve abroad, the actual period of

his service is increased by 25% and credited to him as residence. (2) An alien under 21 need not advertise his intention to apply for naturalisation. (3) Minor changes are made in the form of the oath of allegiance. (4) Where a person is deprived of citizenship by order of the Minister, he must "upon demand by the Minister" surrender his certificate of registration or naturalisation.

II. INDUSTRIAL LAW

Industrial arbitration.

The purpose of the Conciliation and Arbitration Act (No. 34 of 1952) is to insert into the principal Act of 1904-1951 a system of appeals and references from Conciliation Commissioners to Court so that the latter may be able to review the entire wage.[4] This may be effected in one of three ways. (1) An organisation or person bound by an award made by a Conciliation Commissioner may within fourteen days of the date of the award apply to the Chief Judge for leave to appeal to the Full Court; but the Chief Judge is to grant leave only when he is of opinion that the award deals with a matter of such importance that it is in the public interest to review it. (2) A Conciliation Commissioner, on application by any party to a dispute before him, may refer the whole dispute or any part of it to the Full Court if he thinks it in the public interest to do so. (3) If the Conciliation Commissioner rejects an application for the reference of a pending dispute to the Full Court, the applicant may seek leave from the Chief Judge to appeal to the Full Court. It will be noticed that the Act does not give the unlimited right of appeal which is available under the industrial law of some of the States.

The coal industry in New South Wales.

Coalmining in New South Wales would normally be within the exclusive competence of that State; but by agreement between it and the Commonwealth the federal Parliament in 1946 passed the Coal Industry Act which *inter alia* created a Joint Coal Board (with substantial control over the operations of the industry, which for the most part is privately owned) and a Coal Industry Tribunal for the hearing and settlement of disputes. The powers of the Tribunal

4 The "basic wage" is fixed by the Court; the main function of the Conciliation Commissioners is to determine "margins" for skill in particular industries.

were enlarged by Act No. 61 of 1951; the Coal Industry Act (No. 30 of 1952) is merely explanatory of the authority conferred on the Tribunal by the Act of the previous year "to consider and determine industrial disputes".

Patent law.

The whole of the existing patent law (based mainly on the Patents Act 1903-1946) is repealed by a new Patents Act (No. 42 of 1952), which nevertheless retains much of the superseded legislation. Certain new provisions, however, call for brief comment. (1) The Commissioner may now disclose (under sec. 56) the existence of prior complete specifications discovered by an examiner during an official search by him. (2) The period of patent protection—which is 16 years, as it was under the older Act—now commences from the date of lodgment of the complete specification (sec. 67); it used to begin on the date of filing the application, but the applicant could not sue for an infringement alleged to have been committed after the application had been filed but before the complete specification was published. (3) A person who seeks to make an article or use a process which *may* be covered by an existing patent may seek a declaration from the High Court that his proposed activities will not constitute a patent infringement. But before approaching the Court he must take fully into his confidence the supposed patentee or exclusive licensee and must undertake to pay a reasonable sum to enable patentee or licensee to take legal advice; he can only seek a declaration from the Court (and normally he will have to pay the cost of all parties) if patentee or licensee refuses to admit that the applicant's proposal will not constitute an infringement or if he ignores the applicant's request (sec. 120). (4) The Commonwealth or any State, or a person authorised by the Commonwealth or a State, may without permission of a patentee make and sell any patented article or use any patented process "for the services of the Commonwealth or (a) State". Compensation is to be paid, and may be fixed by agreement; in default of agreement the High Court has jurisdiction; no action for infringement will lie (sec. 125). (5) Secs. 6, 96, 114, and 127 seek to clarify the position of an "exclusive licensee", defined as a person who has the right to make, use, exercise and vend a patented invention throughout Australia to the exclusion of all other persons including the patentee himself. The "exclusive licensee" is put in the position of the patentee himself in regard to (a) the extension of the patent, (b) actions for infringement, and (c) compensation for Commonwealth or State use of the patent. (6) It is no

longer assumed that all lawyers are expert in patent matters. Part XV of the Act—Patent Attorneys— (I) authorises the registration as a patent attorney of any legal practitioner (i) who has passed the prescribed examinations or (ii) who satisfies the Commissioner of Patents that he practised as a patent attorney before 1st January 1952; and (II) prohibits all other legal practitioners from preparing specifications except on the instructions of a registered patent attorney (which of course includes another legal practitioner qualified to act as a patent attorney). (7) Secs. 77 to 89 make it easier to amend a specification, both before and after publication, so that a claim for an invention is not likely to be jeopardised by drafting defects. (8) A new Appeal Tribunal is set up under Part XVII and is to consist of a single judge of the High Court, who may direct a case or question to be argued before the Full Court; in any event the Full Court may grant leave to appeal to it from the decision of the Appeal Tribunal.

III. FISCAL MEASURES.

Income tax collection.

When the practice was instituted[5] of requiring contributions towards income tax to be made regularly throughout the year of income, it was first applied only to salaries and wages, the onus being on the employer to make regular deductions on the scale prescribed by the regulations. It was not until 1944[6] that an analogous system was applied to the earnings of taxpayers whose income cannot be estimated in advance; for example, professional men earning fees, farmers, etc. Such a taxpayer was required to pay "provisional tax", which was usually based on the assumption that his taxable income for the current year would be approximately the same as in the previous year; the amount so paid would later be offset against the taxpayer's assessment to tax. This system worked well so long as prices (and professional and similar incomes) remained relatively stable; but the major alterations in the level of prices and incomes which have occurred in the last few years frequently resulted in provisional tax being substantially less than actual liability. The Income Tax and Social Service Contribution Assessment Act No. 2 (No. 28 of 1952) attempts to deal with this problem. An assessment to provisional tax will be issued on the assumption that the taxpayer's income in the current year will be the same as in the previous

[5] By the Income Tax Assessment Act (No. 2), No. 65 of 1940.
[6] By the Income Tax Assessment Act, No. 3 of 1944.

year; but the taxpayer, on receiving that assessment, must himself estimate what his total income will be in the current year, and must pay provisional tax on the income so estimated. To encourage the taxpayer to put in an estimate, and to discourage him from underestimating his income, the Act provides that if he puts in no estimate or if his estimate is less than four-fifths of what proves to be his actual income, he is liable to a penalty of ten per cent. of the difference between the provisional tax actually paid and the tax he ought to have paid. On the other hand, the Act recognises the special position of woolgrowers who, if assessed to provisional tax on the basis of their income in the previous year (when wool prices rose to record heights), would be very heavily hit at a time when wool prices had fallen. A woolgrower was to be allowed to submit an estimate of his income for the current year; thereupon the Commissioner was authorised to reduce by two-fifths the provisional tax based on the previous year's income. To obtain this concession the taxpayer need not be engaged exclusively in wool production; he was entitled to it if in the previous year not less than one-tenth of his assessable income were derived from wool production.

Land tax.

Federal taxation on land was terminated by the Land Tax Abolition Act (No. 81 of 1952). This form of taxation was first introduced in 1910 by the Fisher (Labour) Administration and was primarily designed to render unprofitable the holding idle of large areas of land. There was a general exemption of £5000 (unless the holder or owner were an absentee, who was entitled to no exemption whatever); above that amount a graduated scale of tax was levied on unimproved capital value.[7] Although the Act applied to land in the cities and towns as well as to land in the country, its major purpose was to compel country landowners either to make a full economic use of their holdings or to sell to persons who would.

When the federal Treasurer introduced the Bill on 25th September 1952 he said that not only had the tax failed in its purpose, but that it was in itself inequitable as being a tax on capital; more

7 For discussion of the Bill in the House of Representatives, see 56 Commonwealth Parliamentary Debates, 1535-1545, 2197-2244, 2289-2360, 2433-2470, 2500-2527, 2579-2620; 57 Commonwealth Parliamentary Debates, 2925-2936, 3075-3134, 3270-3303, 3309-3338, 3389-3432 (second reading debate); 57 Commonwealth Parliamentary Debates, 3628-3646, 3677-3703, 3745-3783, 3824-3880, 3953-3992, 4018-4038, 4119-4161, 4231-4248 (committee stage).

than 75 per cent. of the revenue derived from the tax came from city properties.[8] He was unmoved by threats from the Opposition to re-impose the tax when it has ceased to be the Opposition.

An international loan.

For the second time in two years Australia has raised a loan from the International Bank for Reconstruction and Development, the money to be used for (1) agriculture and land settlement, (2) coal mining, (3) iron and steel industries, (4) electric power extension, (5) railway development and expansion, (6) road transport, (7) exploitation of non-ferrous metals and industrial minerals, and (8) general industrial development. In all cases money can only be spent on machinery and equipment either not manufactured in Australia or made in insufficient quantities. The amount of the loan raised in 1950 was $100,000,000 (see Loan (International Bank for Reconstruction and Development) Act, No. 74 of 1950); the amount of the loan authorised by the Loan (International Bank for Reconstruction and Development) Act, No. 73 of 1952, is $50,000,000. The earlier loan bore interest at 4¼%; the new loan, at 4⅜%. The first loan is repayable by instalments spread over 20 years and commencing on 1st September 1955; the second by instalments spread over 15 years, the first to be paid on 1st June 1957.

Grants to the States.

In 1949 the High Court held[9] that the War Service Land Settlement Agreements Act 1945, insofar as it affected the States of New South Wales, Victoria, and Queensland, was invalid on the ground that it was an act for the acquisition of property on terms that were not just (contrary to the requirements of sec. 51 (xxxi) of the Constitution), and that State legislation enacted in pursuance of the Agreement, although not in itself invalid since State constitutions contain no provision that land can only be acquired "on just terms", was inoperative insofar as it purported to give power to resume land for the purpose of the Agreement. Since the date of *Magennis' Case* the practice of the Commonwealth Parliament has been merely to make moneys available to the States (under section 96 of the Constitution) for the purpose of war service land settle-

[8] See Commonwealth Parliamentary Debates, No. 22 of 1952, at 2114-2115. For the second reading debate see No. 23 of 1952, at 2441-2484.

[9] In *P. J. Magennis Pty. Ltd. v. The Commonwealth*, (1949-50) 80 C.L.R. 383.

ment; thus, apart from the financial sanction (the possibilities of which were adumbrated by Latham C.J. in the *Uniform Tax Case*[10]), it permitted the States to carry out the land resumptions, etc., necessary to the scheme under their own laws and in accordance with their own policy. This solution of the problem posed by *Magennis' Case* was upheld by the High Court in *Tunnock v. Victoria*[11] and *Pye v. Renshaw.*[12]

The States Grants (War Service Land Settlement) Act, No. 21 of 1952, is a short measure based on sec. 96 of the Constitution, and provides for payments to the States "in connexion with war service land settlement" in such amounts and subject to such conditions as the Minister may determine.

The States Grants (Special Financial Assistance) Act, No. 56 of 1952, raises the total of Commonwealth reimbursements to the States to £135,000,000, divisible among them according to the elaborate formula contained in the States Grants (Tax Reimbursement) Act 1946-1948. Needless to say the grant represents the usual compromise between what the States think they ought to get and what the Commonwealth thinks they should have. This Act takes no account of the special grants made to three only of the States to compensate them for special disabilities from which they are said to suffer because of the incidence of federal financial policy; these special grants are made by the States Grants Act, No. 66 of 1952, as follows:—

South Australia	£6,343,000
Western Australia	8,041,000
Tasmania	1,550,000
	£15,934,000

IV. DEFENCE.

Atomic energy.

Control of materials in demand for purposes of atomic energy was first introduced in 1946 by the Atomic Energy (Control of Materials) Act. This has now been amended by an Act with the same title, No. 27 of 1952, the purpose of which is to give the

10 *South Australia and others v. The Commonwealth* (1942) 65 C.L.R. 373, at 417-418.
11 (1950-51) 84 C.L.R. 42.
12 (1950-51) 84 C.L.R. 58.

Commonwealth clearer powers to undertake or authorise mining for "prescribed substances" in Commonwealth Territories. "Prescribed substances" for the purpose of the Act include fissionable materials such as uranium, thorium, plutonium, neptunium and their respective compounds, and any other substances which in the opinion of the Minister may be used in the production or use of atomic energy or in research connected therewith.

By sec. 6 of the 1946 Act "prescribed substances" in the Territories[13] were vested in the Crown. But other powers were conferred by the Act in relation to substances found *anywhere* in the Commonwealth *and* required for defence purposes; these powers were therefore not plenary as were the powers exerciseable in relation to the Territories.

A new section 13A enables the Minister to authorise persons to enter property, to take possession of land, to carry on mining operations, to erect and instal buildings, and to exclude other persons from land where mining operations are carried on. Sec. 13 of the 1946 Act had required an order with respect to the mining of prescribed substances to be served on "the persons appearing to be in possession" of the uranium-bearing land. In practice it proved difficult or even impossible to identify the owners of some of these lands, for example in the Rum Jungle area. The new section, which is limited in its application to Commonwealth Territories, dispenses with the need for service on the persons appearing to be in possession.

Closely related to the foregoing in its general purpose is the Defence (Special Undertakings) Act, No. 19 of 1952, which gives power to establish and enforce security measures for the protection of the official secrets relating to the explosion of the first British atomic bomb at the Monte Bello Islands, off the coast of Western Australia. A prohibited area is specified; the movement of unauthorised persons within the area is restricted, and penalties (up to seven years' imprisonment) are imposed for breaches of the Act. From the point of view of the international lawyer there is an interesting provision in sec. 5, which incorporates in the prohibited area a circle of the high seas, having a radius of 45 miles from a specified point on one of the Islands. The enactment of this provision, necessary for the protection of human life as well as the security of the tests, is yet another example of the futility of the "three-mile limit" and of encroachment upon the concept of "the freedom of the high seas".

[13] I.e., the Northern Territory, Papua, New Guinea, etc.

National security regulations.

Ever since the end of World War II some of the war-time regulations, in ever decreasing number and importance, have been kept alive and operative by Defence (Transitional Provisions) Acts. The Defence Transition (Residual Provisions) Act, No. 104 of 1952, conforms to type; it continues three sets of regulations for six more months, and certain others until otherwise provided. It appears to be the intention of the legislature either to let the surviving regulations lapse in the near future or to embody them (or such of them as still appear to be necessary) in permanent legislation.

V. REPATRIATION

The Re-establishment and Employment Act, No. 89 of 1952, extends for three more years the preference in employment which ex-servicemen of the 1939-1945 war have enjoyed under the principal Act as enacted in 1945. That Act limited the duration of preference to seven years; the new extension will cause the period to expire on 3rd September 1955.

A new scale of pensions payable to the widow or widowed mother of a deceased member of the forces, or to a member himself who is totally incapacitated, is contained in a schedule to the Repatriation Act, No. 58 of 1952, which also makes a number of minor amendments to the principal Act of 1920. A separate measure —the War Pensions Appropriation Act, No. 20 of 1952—sets aside £34,000,000 for the payment of war pensions in the then current financial year.

VI. THE PUBLIC SERVICE

The Public Service Arbitration Act, No. 36 of 1952, provides another illustration of the attempt to obtain uniformity in wage and salary determinations by giving the final say to the Commonwealth Court of Conciliation and Arbitration. Upon an application by (1) the (Public Service) Board itself, or (2) any minister affected by a claim or application, or (3) the claimant organization (of public servants), the (Public Service) Arbitrator may, if he is of opinion that the claim before him should in the public interest be dealt with by the Court, refer it to the Court if the Chief Judge thereof concurs; if the Arbitrator refuses to refer the claim an appeal may be taken from that refusal to the Chief Judge. The Court which, provided that the approval of the Chief Judge has been obtained, hears the reference is to consist of not less than three

judges. Where the Arbitrator has determined a claim without any application having been made for a reference to the Court, any of the persons or bodies which might have asked for the claim to be referred may now appeal to the Court against the determination; but leave to appeal will not be given unless the Chief Judge is of the opinion that the determination deals with a matter of such public importance that an appeal from it should be heard.

VII. INTERNATIONAL ENGAGEMENTS, etc.

Peace treaty with Japan.

The Treaty of Peace (Japan) Act, No. 5 of 1952, sets the seal of parliamentary approval on the treaty signed at San Francisco on 8th September 1951 and incorporated in the Act as a schedule thereto. From the Australian point of view the most important provisions of the Treaty are to be found in Articles 5 and 9. By the former Japan accepts the obligations of Article 2 of the Charter of the United Nations; in return the signatories of the Treaty concede that Japan is a sovereign state possessing "the inherent right of individual or collective self-defence referred to in Article 51 of the Charter". By Article 9 Japan undertakes promptly to enter into "negotiations with the Allied Powers for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas". Japan's only obligation is to negotiate, not to conclude, agreements; in fact no agreement between Japan and Australia has yet been concluded as to sedentary fisheries in Australia's northern waters—or in the northern waters which we are determined to regard as Australian.

Reparation provisions include the power to sell the property in Australia of Japanese nationals,[14] and arrangements for the liquidation of Japanese assets in former enemy countries and for the distribution of the proceeds, through the International Committee of the Red Cross, among former prisoners of war and their dependants. Japan's renunciation of all claims to any part of Antarctica is particularly satisfactory to Australia in view of the latter's interests and responsibilities in that inhospitable region.

Fisheries in Australian waters.

The Fisheries Act (No. 7 of 1952) and the Pearl Fisheries Act (No. 8 of 1952) both relate to fisheries in Australian waters and

[14] See also Trading with the Enemy Act 1952, page 654 *infra*.

both derive from the same source whatever validity they have. They are based on sec. 51 (x) of the Constitution, which confers on the Commonwealth Parliament a power to make laws as to "Fisheries in Australian waters beyond territorial limits". The Constitution does not define those waters; there are no judicial decisions in which the meaning of the words has been discussed. The two Acts are silent on the point; by sec. 7 of the Fisheries Act and sec. 8 of the Pearl Fisheries Act "the Governor-General may, by Proclamation, declare any Australian waters to be proclaimed waters for the purpose of this Act." What is the effect? When the Acts were passed it was by no means clear whether they were intended to have a purely domestic operation or were also designed to affect foreign ships and therefore to have *some* operation in international law. But the amendments made in 1953 to the Pearl Fisheries Act[15] and the regulations issued thereunder,[16] together with certain proclamations, make it clear that so far as affects the sedentary fisheries in the proclaimed waters the legislation and the regulations are intended to apply to all persons and ships whatsoever.

In regard to fisheries, unless some doctrine of "contiguous zones" can be introduced, it would be difficult to proclaim effectively any waters outside orthodox territorial limits without international agreement. In this context it is submitted that the *Norwegian Fisheries Case*[17] is not relevant to the activities of the Commonwealth. Owing to the nature of the Commonwealth power under sec. 51 (x) of the Constitution it seems that the *Norwegian Fisheries Case* does not supply an analogue for the operation of Commonwealth laws. Wide as was the area of waters conceded to Norway they were all deemed to be Norwegian territorial waters; but waters proclaimed under the Fisheries Acts must ex hypothesi be outside the territorial limits of the Commonwealth (or of the States?). It may then be that the waters of Shark Bay or of the Barrier Reef could only be proclaimed by Western Australia and Queensland respectively, and if such proclamation were recognised by other countries as valid the waters to which they related would be deemed to be territorial waters of the two States and therefore outside the operation of sec. 51 (x).

A proclamation of waters under the Pearl Fisheries Act may, it is submitted, be more effective in international law than a similar proclamation under the Fisheries Act. It has been argued that the

15 By Acts 4 and 38 of 1953.
16 Commonwealth Statutory Rules, No. 84 of 1953.
17 International Court of Justice Reports, 1951, page 116.

doctrine of occupation could be extended to permit States to occupy parts of the sea bed outside territorial waters;[18] furthermore, the continental shelf doctrine could be made applicable in this context so that, although Australia might not be able effectively to proclaim the waters *above* the continental shelf, it might be justified in proclaiming the resources of the sea bed and subsoil of the continental shelf as being within its exclusive jurisdiction and control. In this context it may be noted that in the Petroleum (Prospecting and Mining) Ordinance 1951 the Commonwealth included the continental shelf off Papua and New Guinea in the concept of "land" for the purposes of the Ordinance. Moreover, in recently drafted Articles on the continental shelf to be submitted to the United Nations General Assembly the International Law Commission has extended the term "material resources" to include sedentary fisheries.

The "Anzus" Pact.

The tripartite Treaty between Pacific Powers, offered to Australia and New Zealand as a quid pro quo for their signature of the Japanese Peace Treaty, received legislative endorsement by the Security Treaty (Australia, New Zealand, and the United States of America) Act, No. 6 of 1952. The mutual obligations undertaken by the signatories are, broadly speaking, threefold. Firstly, each agrees to maintain and develop its industrial capacity to resist armed attack but without committing itself to any specific level of armaments. Secondly, the parties agree to consult together whenever, in the opinion of one of them, the political independence or territorial integrity or security of any one of them is threatened in the Pacific. Thirdly, each party recognises that an armed attack in the Pacific on either of the others would be dangerous to its own peace and safety, and undertakes "to act to meet the common danger in accordance with its constitutional processes." Thus recognition is given to the constitutional inability of the Executive in the United States to commit the country to automatic participation in hostilities. On the other hand, in Australia and New Zealand there is no constitutional check on the Executive, though it would be a bold government which committed either country to war in the Pacific without the consent of Parliament.

Diplomatic immunities.

Although the resident High Commissioners representing other members of the British Commonwealth of Nations do not fit easily

[18] See L. F. E. Goldie, *The Occupation of Sedentary Fisheries off the Australian Coasts,* (1952) 1 Sydney L. Rev. 84.

into the "diplomatic" category, it would nevertheless be anomalous if they were to continue to have lesser privileges and immunities than those accorded to the envoys of foreign countries. The purpose of the Diplomatic Immunities Act, No. 67 of 1952, is to give to the various High Commissioners (and their staffs) the same immunity from suit and legal process and the same inviolability of their premises and archives as are at present conceded to the ambassadors and ministers of foreign Powers; in point of fact the Act may be said to give formal statutory approval to a practice already observed. Sec. 6 is designed to ensure reciprocity of treatment; where the Governor-General is of opinion that a member of the British Commonwealth to which the Act applies is failing to accord to the Australian representative the same treatment as Australia grants to the representative of that member, he may issue regulations providing that the Act shall cease to apply wholly or in part to that member's High Commissioner.

VIII. GENERAL.

Ex-enemy assets.

The assets of ex-enemies, at present held under the control of the High Court of Australia, are to be vested in a Controller of Enemy Property by virtue of the Trading with the Enemy Act, No. 77 of 1952. There is however to be no automatic transfer. The Court may direct that the payment of money or the transfer of investments to the Controller of Enemy Property shall be subject to such conditions as the Court may think fit to impose; it may also order (a) the retention in Court of moneys or investments which in its opinion should be retained or applied in meeting just claims, and (b) the retention in Court of any books and accounts. The moneys paid to the Controller, and certain other Japanese moneys held by the Commonwealth, are to be used as follows: (1) £25,000 to be paid to trustees appointed by the Prime Minister for the benefit of Australian civilians who suffered mental or physical injury as the result of internment by the Japanese, and (2) the balance[19] to be distributed in accordance with the direction of the Prime Minister for the benefit of all members of the Defence Forces who were prisoners of war in Japanese hands.

Guardianship of migrant children.

The Immigration (Guardianship of Children) Act, No. 45 of 1946, vested in the Minister for Immigration an overriding legal

[19] Estimated at £745,000; see Commonwealth Parliamentary Debates, No. 27 of 1952, at 3283.

guardianship in respect of immigrant children as defined therein, other than children who came to Australia with their parents or other relatives or who arrived separately for the purpose of living with parents or relatives. In 1948 the Act was amended (by No. 62 of that year) to empower the Minister to act as legal guardian of the estates of these immigrant children, to place them in the care of private persons, and to make his consent a condition precedent to the departure of such children from Australia.

Difficulties arose with respect to immigrant children who came to Australia with or to join relatives themselves under 21 years of age. The Act has now been amended by No. 29 of 1952 to bring such children within its scope. New provisions make a certificate of an authorised officer of the Commonwealth or any State, that a named person is an immigrant child, evidence of the fact, and authorise the Minister to issue orders that a particular child or a particular class of children is to be exempt from the provisions of the Act.

Mineral rights in the Northern Territory,.

When what is now known as the Northern Territory was detached from the State of South Australia and transferred to the Commonwealth, a federal Act (the Northern Territory Acceptance Act, No. 20 of 1910) confirmed all existing land titles by providing in sec. 10 that "All estates and interests, held by any person from the State of South Australia within the Northern Territory at the time of the acceptance, shall continue to be held from the Commonwealth on the same terms and conditions as they were held from the State". The majority of land titles in the Northern Territory were granted during the later years of the 19th century and contained no reservation of minerals in favour of the Crown—a reservation which for many years past has appeared in all grants made by Commonwealth or States. Moreover, the Commonwealth practice, since 1910, has been to make leasehold, not freehold, grants of land in the Northern Territory.

If sec. 10 were regarded as fundamental and inviolable, landowners whose titles were derived from South Australian grants would be exempted from the operation of Commonwealth ordinances affecting land in terms inconsistent with those grants. But the Commonwealth is not prepared to allow a preferred class of landholders to exist in the Northern Territory; it wants to be able to authorise prospecting for and mining of uranium and other minerals in any part of the Territory, and to protect the Crown in relation

thereto. The Northern Territory Acceptance Act, No. 13 of 1952, achieves this object very simply by amending sec. 10 of the principal Act, which now reads (the words added by the 1952 amendment being italicised), "All estates and interests, held by any person from the State of South Australia within the Northern Territory at the time of the acceptance, shall, *subject to ordinances in force under the Northern Territory (Administration) Act 1910-1949,* continue to be held from the Commonwealth on the same terms and conditions as they were held from the State".

Air transport.

Some of the most acrimonious debates of the session took place over a quartette of Bills which became the Civil Aviation Agreement Act (No. 100), the Air Navigation (Charges) Act (No. 101), the Australian National Airlines Act (No. 102), and the Income Tax and Social Services Contribution Assessment (Air Navigation Charges) Act (No. 103). These cognate measures were considered at the one second-reading debate,[20] and give effect to the government's policy of supporting private enterprise in preference to public utilities.

The two major airline operators in Australia are Australian National Airlines Pty. Ltd. (commonly known as A.N.A.), a private company whose major shareholders are three Australian, one New Zealand, and one English shipping company, and Trans-Australia Airlines (T.A.A.), a statutory corporation created out of public funds in 1945. Despite frequent assertions of its "pioneering" role, A.N.A. was *not* responsible for the early development of civil aviation in Australia; it entered the field (or the air) in 1936 at a time when civil aviation had already established itself through the agency of a number of independent operators. By a process of absorption and amalgamation it quickly became the major operator and by the outbreak of war in 1939 had acquired a substantial monopoly of the major routes. Although its capital was then (and still is) only £A1,500,000, it had sufficient resources to equip itself with better machines than any possible rival; it had a very good record for safety, and on the whole provided excellent services, particularly interstate, and received an indirect public subsidy from the carriage of airmail. But, like all virtual monopolies, public or private, it tended (through the mouths of some, but by no means all, of its staff) to adopt a "take it or leave it" attitude towards the travelling public.

[20] See Commonwealth Parliamentary Debates, No. 29 of 1952, at 3736-3744, 3874-3904, and No. 30 of 1952, at 3905-3954, 3966-3998.

In 1945 the Chifley (Labour) Administration, partly to break this monopoly but principally because of its preference for public as opposed to private activities, obtained the passage of the Australian National Airlines Act,[21] which created an Australian National Airlines Commission and directed it to establish one or more airline services, for passengers, freight, and mails. These services could only operate, however, (a) interstate, (b) within Commonwealth territories, and (c) between a Commonwealth Territory and any place in Australia outside that territory. A sum of £A3,000,000 was to be made available to the Commission, out of consolidated revenue or loan funds, and such other sums as Parliament might grant; the operations of the Commission would be subject to all taxation other than income tax. A most unwise attempt was made by sec. 46 to give the Commission, if certain named conditions were observed, a monopoly of interstate air transport; but this attempt was frustrated by the decision of the High Court in *Australian National Airways Pty. Ltd. v. The Commonwealth*,[22] which upheld the power of the Commonwealth to establish its own airlines, but denied to it, as infringing sec. 92 of the Constitution, the power to confer a monopoly on its own creature.

Under the extraordinarily able direction of the first Chairman of the Commission,[23] Trans-Australia Airlines was created and operated with a high degree of efficiency. Faced by acute and indeed active hostility from the commercial community, but aided by a monopoly of mail carriage and by a service which more and more commended itself to the travelling public, T.A.A. gradually overhauled its private rival except in freight traffic,[24] and contributed

21 For the Act as amended in 1947 see Commonwealth Acts 1901-1950, Vol. 1, 270.

22 (1945) 71 C.L.R. 29. The plaintiff company, dissatisfied with that part of the Court's decision which upheld many sections of the Act, sought leave to appeal to the Privy Council against those findings only; but the High Court held that an *inter se* question under sec. 74 of the Constitution was involved, and in accordance with precedent refused to grant a certificate (see 71 C.L.R. 115).

23 Mr. A. W. Coles, a Melbourne businessman, and a former Independent member of the House of Representatives. It was the defection of Mr. Coles and another Independent which brought down the Menzies-Fadden Coalition in 1941 and ushered in the first Curtin (Labour) government.

24 When introducing the four Bills to the House of Representatives the Minister gave the following figures:

Year ending 30 June 1952:	Passenger miles:	Freight ton miles:
A.N.A.	277,000,000	14,000,000
T.A.A.	320,000,000	7,500,000

(The fleets of the two airlines, though differing in composition, had much the same load-carrying capacity).

towards giving to Australia pride of place in the number of passenger miles per head of population.[25]

So long as a Labour government held office there was no prospect of help for A.N.A., but with the defeat of the Chifley government in 1949 and the advent of a Liberal-Country Party Coalition A.N.A. might hope for better things. It first approached the government with a proposal for the amalgamation of the two airlines; but though it was confidently asserted in the press that many members of the government were well disposed to amalgamation, the proposal was rejected because of disagreement among members of the coalition, the united opposition of Labour, and—surprisingly enough—press criticism. The government thereupon entered into an agreement with A.N.A. which was ratified by the Civil Aviation Agreement Act and, in the government's opinion, provides for "equality of competition" between the two main airlines. The main heads of agreement are:—

(1) the government will guarantee a loan of £A3,000,000 by the Commonwealth Bank to A.N.A. to enable it to buy not more than six modern heavy aircraft;

(2) if at any time the Australian Airlines Commission buys more heavy aircraft for T.A.A. the government will guarantee further borrowings by A.N.A. to enable it to keep pace with its rival; but the maximum of guaranteed borrowing is not at any time to exceed £A4,000,000;[26]

(3) A.N.A. is to receive a half share of the mail freight on all routes in which it competes with T.A.A.;[27]

The financial results of their operations were disclosed as:

	1949-50	1950-51
A.N.A.	£216,682 loss	£10,221 loss
T.A.A.	£214,818 profit	£205,799 profit

(T.A.A.'s profit would have been substantially larger if, like its rival, it had refused to pay the air route charges to which reference is made later in the text).

25 According to the Minister the number of passenger miles flown per head of population in Australia in 1951-52 was 50% greater than the corresponding figure in the United States of America. Of the total passenger miles flown, A.N.A. and T.A.A. accounted for 85 per cent.

26 The absence of any provision requiring the Company to raise fresh capital pari passu with the guaranteed loans was strongly criticised by the opposition, as was the government's refusal to require A.N.A., as a condition of aid, to publish its balance sheets.

27 There is no similar provision for the sharing of other freight, in the carriage of which a substantial advantage (see note 24, *supra*) is enjoyed by A.N.A.

(4) the holder of a government warrant for a passenger flight or for freight will be allowed to use A.N.A. or T.A.A.;

(5) A.N.A. and the Commission are to collaborate in the "rationalisation of services" so as to avoid "unnecessary overlapping of services and wasteful competition"; if they cannot agree, they are each to nominate a representative to meet under an independent Chairman (who is to be appointed by agreement—or, failing agreement, will be a retired High Court or State Supreme Court Judge appointed by the Minister[28]);

(6) the government will reduce air route charges by fifty per cent., and will discontinue its action commenced against A.N.A. in 1948 in consideration of a payment of £A327,717 6s. 0d. by A.N.A. in satisfaction of air route charges already incurred but not paid;

(7) A.N.A. will supply to the Minister each year a copy of its audited profit and loss account and balance sheet;

(8) the agreement is to remain in force for fifteen years from 18th November 1952, the date of the passing of the Act.

The effect of the second part of clause 6 is to reduce by two-thirds the air route charges imposed on A.N.A. between 1st August 1947 and 30th June 1952; airline operators (including T.A.A.) which have always paid the charges will receive a refund of two-thirds of what they have paid. The new charges to which the agreement refers are imposed by the Air Navigation (Charges) Act, while the Income Tax and Social Services Contribution Assessment (Air Navigation Charges) Act provides by sec. 4 (2) that refunds of air route charges are not to be deemed assessable income for taxation purposes. The fourth Act, the Australian National Airlines Act, amends the principal Act in several respects. (1) The Commission is not required to pay interest on the capital advanced to it by the Commonwealth, but shall in each year pay to the Commonwealth, out of its profits, such sum as the Treasurer determines. (2) In future the Commission will pay income tax on T.A.A.'s profits. (3) The balance of the Commission's profits in any year (i.e., after payment to the Commonwealth of such sum as the Treasurer has determined) are to be applied in such manner "as the Minister, with the concurrence of the Treasurer, determines"; but before deciding how to apply the

28 This provision was used in 1953, when Sir John Latham, former Chief Justice of the High Court of Australia, was appointed Chairman to resolve a disagreement between A.N.A. and the Commission.

surplus they "shall have regard to" any advice tendered by the Commission. (4) The Commission may, for temporary purposes, borrow not more than £A1,000,000 from the Commonwealth Bank or any other bank; such loans are not guaranteed by the Commonwealth, but are secured against the assets of the Commission.

Sale of oil shares.

In 1920, by agreement with the Anglo-Iranian (then known as Anglo-Persian) Oil Company, a company was formed with a capital of £500,000 to establish an oil refinery in Australia and to be known as Commonwealth Oil Refineries Limited. Of the authorised capital the Commonwealth itself was to take 250,001 shares, Anglo-Iranian or its nominees to take the remainder.[29] At the expiration of fifteen years from the completion of the first oil refinery the Commonwealth was entitled to purchase, at an agreed valuation, the whole of Anglo-Iranian interest in the Refinery Company. Although a small refinery was built at Laverton, Victoria, in 1924, no Commonwealth government sought to exercise the right to purchase Anglo-Iranian's shareholding; the greater part of Commonwealth Oil Refineries' business became the wholesale and retail distribution of refined oil imported from abroad.

When Anglo-Iranian decided to establish a large refinery at Kwinana in Western Australia[30] it proposed to close down the Laverton refinery and to use Commonwealth Oil Refineries Ltd. (commonly described as C.O.R.) as the distributing agency of Kwinana products. It made alternative proposals to the Commonwealth: (1) that Anglo-Iranian and Commonwealth should contribute equally to the cost of the Kwinana refinery and of the necessary expansion of C.O.R.; (2) that Anglo-Iranian should meet all the Kwinana costs, sharing the C.O.R. expansion costs equally with the Commonwealth; (3) that Anglo-Iranian should meet the whole of both sets of costs. At this stage the government was advised that the Commonwealth had no constitutional powers, even under the head of defence, to invest in what would become merely a distributor of petrol and oil refined in Australia; it therefore offered to sell to Anglo-Iranian its majority holding in C.O.R. at a valuation, later

29 See Oil Agreement Act, No. 13 of 1920. Further increases of capital were authorised by the Oil Agreement Acts of 1924 (No. 7) and 1926 (No. 14), but so that the Commonwealth always held a bare majority of shares. The technical and commercial management of the Refinery Company was left entirely in its hands, Commonwealth nominees being in a minority on the board of directors.

30 See pp. 417-419, *supra*.

agreed at £6 10s. od. for each £1 share. Its Bill to confirm this arrangement was subject to bitter but unavailing attack by the Opposition; it might have found another opponent in a Liberal member, the late William Morris Hughes, who had been Prime Minister of the government which sponsored the original agreement of 1920 and who had already, on 21st August 1952, spoken against the rumoured sale of the Commonwealth shareholding in C.O.R. But Hughes, at the time of the second reading debate which began in the House of Representatives on 8th October, was very ill; he died on 28th October, and on the next day the Government's Bill, having already passed the House of Representatives, was "gagged through" the Senate.[31]

Amendment of existing legislation.

The following amendments of existing legislation, among others, were made in 1952:—

(1) Whaling Industry Act (No. 11), amending No. 33 of 1949;[32]

(2) Naval Defence Act (No. 14), amending the principal Act of 1910-1949;[33]

(3) Public Service Arbitration Act (No. 36) amending the principal Act of 1920-1950;

(4) Social Services Consolidation Act (No. 41), amending the principal Act of 1947-1952;

(5) Aliens Act (No. 68), amending No. 22 of 1947;

(6) Overseas Telecommunications Act (No. 69), amending No. 23 of 1946;

(7) Navigation Act (No. 109), amending the principal Act of 1912-1950.[34]

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F. R. BEASLEY.

31 For the official record of the debates in both Houses see Commonwealth Parliamentary Debates, No. 24 of 1952, at 2681-2686; No. 26, at 3033-3065, 3141-3186; No. 27, at 3246-3251; No. 29, at 3768-3798.

32 As to which see 1 U. of West. Aust. Ann. L. Rev., 549-550.

33 As to which see Commonwealth Acts, 1901-1950, Vol. III, 2770.

34 As to which see Commonwealth Acts, 1901-1950, Vol. III, 2792.