TRANSPORT POLICY IN AUSTRALIA

The Role of the Inter-State Commission

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1. INTRODUCTION AND OUTLINE

Transport has been one of the oldest and most enduring subjects in the history of the regulation of industry. Defoe complained bitterly about the rude and dishonest behaviour of unlicensed porters compared with those who were licensed (Defoe, 1725). The various Navigation Acts were the best known, but certainly neither the only nor the first, examples of transport regulation in the interests of trade and defence (Helander, 1938). A Navigation Act was passed in England in 1381, and the more famous Navigation Act in 1651. Adam Smith pointed to the harmful economic effects of the 1651 Act, but then said: “As defence, however, is of much more importance than opulence, the act of navigation is, perhaps, the wisest of all the commercial regulations of England” (Feaveryear, 1937, p. 672). Transport policy still serves a complex mixture of objectives, among which economic efficiency is important but not necessarily dominant.

Gilbert Ponsonby’s contributions to the debates on transport policy included the recognition of these wider elements, in which transport economics plays its part. This was shown not only in many of his publications (Ponsonby, 1969, for example), but in his lectures on transport economics at the London School of Economics, and in the programme of seminars for higher degree students in which academics and non-academics prominent in the various transport modes gave papers and debated the papers of others. Many of his students have made significant contributions to discussions on transport economics and policy in various parts of the world, and have played their part in the many changes of the last three decades. Gilbert Ponsonby’s influence on his students was based on his deep knowledge of the transport world, and on true academic enthusiasm for both subject and student.

The wider environment within which transport economics affects transport policy includes historical, institutional, constitutional and political elements and constraints, which differ significantly and most obviously between countries, but may also differ between regions. The effect of such factors is at present most clearly seen in the differences between the transport policies of the United Kingdom and the European Economic Community (Gwilliam, 1979). Australia is a

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much more homogeneous national entity than the EEC, but there are many similarities in the area of transport policy. Transport policy in Australia is one of the prime examples of the effects of constitutional and institutional constraints and complexities in a Federation composed of member States which are, in most other respects, remarkably similar. The six separate "colonies" merged into the Australian Federation on terms and conditions specified in The Commonwealth of Australia Constitution Act 1901. Each of the colonies, which became States, had a transport "policy" of its own, and it was recognised at the time of federation that conflict was likely between the interests of any one State and the interests of the Federation as a whole. The Constitution seemed to require the creation of an Inter-State Commission (ISC) to deal with such conflicts. However, apart from a brief existence between 1913 and 1920, the ISC was not re-activated till 1984.

The reasons for the establishment of an ISC in the Australian Federation, and some of the more important developments to 1984, are examined, very briefly, in section 2. The Inter-State Commission Act 1975, which prescribes the powers, functions, and procedures of the ISC which commenced in March 1984, is described in section 3. The main investigation completed by the ISC, with the recommendations made and the government's reactions, is the subject of section 4. The ISC's current investigations are discussed in section 5. Section 6 comments briefly on the work of the ISC and quotes some comments on possible future developments.

2. THE HISTORICAL BACKGROUND

Transport policy in a Federation

There are many reasons why countries or States form a Customs Union, Common Market, or Federation. One important reason is that it is economically more efficient to allow access to a larger market, and to allow freedom for factors of production to move to those activities in which they are most efficient. Direct and obvious barriers to the movement of goods and factors within the Federation are progressively removed. But preference may be given to the domestic products of any one State by other, less direct, devices: for example, by restrictive quarantine regulations or product standards, or by discriminatory transport charges and regulations. Some independent body is seen to be necessary to ensure that the objectives of the Federation are not frustrated. Transport was and is usually seen as one area in which an institutional watchdog is necessary.

In the United States the Interstate Commerce Commission (ICC) was established by the Interstate Commerce Act 1887, to ensure, inter alia, that the constitutional objectives were not frustrated in the transport sector. Though the name suggests that the ISC was modelled on the ICC, this was not so in fact in 1901, and is certainly not so now. Australia was, and is, unduly affected by what is done (or believed to be done) in the US and in the UK, and the intended ISC was thought to be a hybrid of then existing US and UK institutions. Quick and Garran (1901) wrote: "The Inter-State Commission thus provided for [in the constitution] has points of resemblance to and differences from the Inter-State
Commerce Commission in America and the Railway and Canal Commission in England” (p. 898). However, the present ISC is a very different body, with few similarities to either of the two institutions as they were thought to be then, or to what the ICC is now.

The ISC and constitutional provisions

There are very great differences between the ISC’s role and functions as originally conceived, as put into practice in 1912, and as they are now. The Founding Fathers obviously had their ideas about the functions of the ISC; so did various governments; and so did the ISC when it was first activated in 1912. The High Court subsequently also had ideas about the ISC’s role and powers.

While the need was recognised for an independent body to ensure that the provisions in the Constitution relating to trade and commerce were adhered to, the authority of the ISC was to be determined by what Parliament deemed necessary. What the ISC can and cannot do thus depends on what powers and functions Parliament is willing to give to it in the Act which establishes it.

Thus section 101 of the Australian constitution states:

There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

Some of the other clauses in the Constitution referring to the ISC were specifically concerned with railway matters. Thus section 102 states:

The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

And again, section 104:

Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State, and to goods passing into the State from other States.

Furthermore, section 98 makes it clear that the Commonwealth has constitutional powers over railways, subject to the usual qualifications:

The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.
This importance given to railways was, of course, a consequence of the dominance of railways as the overland transport mode in the last decade of the nineteenth century. The monopoly powers of railways were then very considerable, and there was general concern to ensure that they were not misused. In many countries public ownership of railways was seen as appropriate to deal with this problem. In Australia at the time of Federation the railways were already publicly owned, but each State railway system pursued what was thought to be the interests of the State which owned it. After Federation the national interest was to be paramount, and there had, before and at the time of Federation, been much dispute over railway rates for the traffic from the border regions between the States of New South Wales and Victoria. The idea was that such disputes could be impartially resolved by the ISC. In fact, the conflict over the border traffic at that time was resolved by an agreement between the two railway systems.

The transport sector is now far more complex and competitive than it was at the time of Federation, and the specific mention given to railways in the 1890s would now be understood to include all the transport modes providing interstate services.

The first ISC, 1913–1920, and the dormant years, 1921–1974

The 1912 Act which established the first ISC gave it wide scope to be "the eyes and ears of the Parliament", including wide powers to initiate investigations and the power to issue injunctions if the ISC judged this to be necessary in particular circumstances. It was to be a "quasi-judicial" body, or so it was thought till the High Court, in the so-called Wheat Case in 1915, held that the ISC could not issue injunctions. When the terms of appointment of the Commissioners ended, no new appointments were made. The ISC faded from the scene.

However, the need persisted for independent bodies to investigate various problems in the Federation. The distribution of Commonwealth revenue between the States and the question of protection of industry were two of these continuing problems. Specially created institutions emerged to deal with them: the Tariff Board (now the Industries Assistance Commission) to deal with protection and the Commonwealth Grants Commission to deal with the distribution of revenue. Other bodies were created as the need arose, or problems were made the subject of ad hoc inquiries.

3. THE INTER-STATE COMMISSION ACT 1975

Problems associated with the national transport system were not dealt with by the creation of an on-going body, but were subjected to various limited investigations and inquiries. A serious disadvantage of this approach was that the experience gained from these investigations was quickly dissipated, since their personnel was recruited only on a temporary basis. In 1972 Mr. E. G. Whitlam became Prime Minister: he had long been interested in transport and communications, had been a member of the Joint Committee on Constitutional Review, and had on many occasions stated his strong support for an ISC. Steps were taken to re-establish the ISC.
The Bill introduced into Parliament in 1975 confined the ISC to transport matters, but still sought to give it adjudicatory and other substantial powers. Political opposition greatly reduced these powers, and the ISC Act which was passed in October 1975 reflected the results of the compromise.

The Inter-State Commission Act 1975 gives the ISC powers like those of a Royal Commission to investigate matters referred to it by the Federal Minister for Transport. The ISC is required to present its recommendations on such matters to the Minister and to Parliament. The Minister, in referring a matter to the ISC, is limited to those matters specified in the Act. The manner in which the investigation must be conducted is largely prescribed by the ISC Act. The ISC has no powers of its own to initiate investigations. When an investigation is completed, a report must be given to the Minister, who is required to table it in the Parliament within 15 sitting days. Whether the ISC's recommendations are implemented is entirely a matter for the government of the day.

The Minister may refer all matters relating to inter-state transport to the ISC, except matters concerning scheduled air transport of passengers. This is covered by the Airlines Agreement Act 1981, and the Independent Air Fares Committee Act 1981. However, air freight is not excluded from the scope of the ISC.

4. INVESTIGATION OF THE TASMANIAN FREIGHT EQUALISATION SCHEME

The first two Commissioners were appointed on the same day as the Minister gave his first direction to the ISC — 15 March 1984. The matter referred to it was the Tasmanian Freight Equalisation Scheme (TFES), which had been in operation since 1976. The terms of reference were extended in August 1984 to include an investigation of the arrangements relating to the transport of wheat to Tasmania. The date set for completion of both matters was 31 March 1985, and the report was handed to the Federal Minister for Transport by that date.

The scheme in operation at the time when the ISC was directed to investigate it was a subsidy scheme, to compensate persons shipping general goods between Tasmania and the mainland for the disadvantages suffered because sea transport had to be used. The method used to calculate the amount of subsidy was based on the principle that no more should be paid for transport between Tasmania and the mainland than would have been paid for the same type of goods over similar distances on the Australian mainland. As was to be expected, there were many disputes over which rates, on the mainland or between it and Tasmania, were to be used in any particular case; on what were similar goods; and many more.

The ISC recommended a compensation scheme which was not based on the differences between the transport costs between Tasmania and the mainland for transport over equivalent distances (Inter-State Commission, 1985). The report pointed out that the geographical fact that Tasmania was and is an island is of no more consequence by itself than the fact that other locations (for example, Broken Hill in western New South Wales) are a long way from the sea. To compensate for locations which have high transport costs for reasons created by nature would clearly be impossible, because this would, in some sense, be applic-
able to very many locations. It would also prevent the selection of the most efficient locations, given the geographical, topological, and other physical characteristics of alternative locations at which production could take place. If all transport modes were provided under identical conditions, including especially high levels of competition and similar levels of cost recovery, any subsidy payments to particular groups of freight transport users in Australia would result in economic inefficiencies. These would include production at places which were subsidised instead of at places which would otherwise have been selected on grounds of efficiency.

The ISC's investigation showed, however, that similarity of conditions for the various transport modes did not in fact exist. Central to Tasmania's transport problem is the inability to use rail or road transport to transport goods across Bass Strait. While users of interstate rail and, to a lesser extent, road transport on the mainland benefited from services which were subsidised, or cross-subsidised, there was no subsidy for the transport of goods by ship between Tasmania and the mainland. Furthermore, the freight rates at which coastal sea transport was available across Bass Strait were high by international standards, and this was judged in part to be a consequence of coastal sea transport policies which effectively reserved the coastal shipping trade for Australian owned and manned ships. The objective of the payments recommended by the ISC was to compensate those who ship general goods between Tasmania and the mainland for the detrimental effects of government policies, so that any discrimination would be removed.

The recommended payments are the same regardless of the location of the origin of the goods in Tasmania or on the mainland, or of the location of their destination on the mainland or in Tasmania. This is consistent with the fundamental reasons for the compensation scheme — for those parts of any journey for which land transport modes are available and can be used, those whose goods are transported between Tasmania and the mainland do not suffer from any disadvantage compared with those who use land transport. The need to transship goods would arise even if the costs of the various transport modes had not been differentially affected by State and Federal government policies.

The recommended scheme was a significant departure from the existing freight equalisation scheme. The government has implemented the scheme as recommended, to apply from 1 September 1985. However, the Federal Minister for Transport stated that "the government had rejected the Commission's assessment that the reason for this cost disadvantage rested with the disproportionate effect of government transport policies on Tasmania" (media release, 25 July 1985).

5. THE ISC'S CURRENT INVESTIGATIONS

The Federal Minister for Transport had appointed an inquiry into the National Road Freight Industry in September 1983. A comprehensive report was completed by September 1984, containing many recommendations (National Road Freight Industry Inquiry, 1984). Some of the recommendations were concerned with the level of cost recovery in road and rail transport. One particular problem
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identified by the Inquiry was that only nominal registration fees were paid by trucks which were exclusively engaged in inter-state transport, whereas trucks providing intra-state transport services paid substantial fees (which differed between States).

As part of its response to this report, the Federal government decided to introduce legislation to collect a cost recovery charge in respect of vehicles engaged in interstate trade and commerce. The directions were given to the ISC on 18 June 1985, and the Interstate Road Transport Act was passed by Parliament in December 1985.

The intention of this legislation is "to remove the anomaly of road freight and passenger vehicles registered for interstate operations avoiding the payment of reasonable cost recovery charges" (Terms of Reference dated 18 June 1985). However, the government was also aware of the implications of any additional charges for all land transport and "has decided that any determination of the level of recovery of costs to be achieved in respect of interstate vehicles should take into account the level of recovery of costs in respect of interstate railway services" (ibid.). In his second reading speech, the Minister recognised the problems inherent in what might be called comparative cost recovery levels when he said: "I have referred to the Commission the vexed issue of the relative levels of cost recovery for interstate road and competing rail operations".

It is necessary to view this new legislation as part of a number of initiatives, which have collectively become known as the "fast-track package", including higher levels of cost recovery in interstate rail. The Minister has said that he expected the new vehicle registration charges would only be instituted after substantial progress had been made by the States in implementing the other parts of the package.

The other current investigation is a follow-up to the ISC's report on the TFES. The rates of payment recommended by the ISC in that report, and accepted and implemented by the government, were based on a number of considerations, including especially the comparative general levels of freight rates between relevant origins and destinations on the mainland and between the mainland and Tasmania. Recent changes in shipping services between Tasmania and the mainland, and on mainland routes, may have changed relative freight rates. If they have done so to a marked degree, changes may be required in rates of payment under the scheme.

6. THE ISC: CAPABILITIES AND CONSTRAINTS

An assessment of the ISC's capabilities and constraints was given in the Australian Senate by Senator Vigor, in commenting on the Commission's annual report. His comments are best quoted at some length (Senate Hansard, pp. 573/4, 16 September 1985):

The Inter-State Commission has quickly, in little more than a year, established a role for itself in the Australian transport industry. However, it is not an independent role. The Commission's role is qualified by the Inter-State Commission Act, by which it was created in 1975. The legislation was
amended by the Senate so that only the Minister has the power to initiate investigations by the Commission. This means that the Commission is purely advisory and dependent upon the Minister. It cannot commence an investigation of any transport matters of concern without the Minister’s reference, it has to report back to the Minister, and it is the Minister who decides whether the Commission’s report of its investigations will be implemented. It does not have the regulatory role that was originally envisioned when as a Bill it was introduced into the Senate.

The reliance upon ministerial initiative has created an appalling waste of talent and knowledge. An important feature of the Inter-State Commission is that it will be an ongoing independent body that will accumulate and retain expertise on Australia’s transport. That expertise, generated by its investigations, will make it aware of other issues in the area of transport that even the Minister, himself, may not be aware of. Under the present legislation the Commission will not be able to initiate investigations.

Another serious restriction upon the Inter-State Commission is that under section 6 of the Act it cannot investigate matters arising out of the Airlines Agreement Act 1952–1973. This prevents the total co-ordination of interstate transport and makes Australia’s transport policy somewhat “itty-bitty”. An example of this problem is that the current review of the two-airline agreement is being carried out by one single person. But for section 6 of the Act, that agreement could have been investigated by the three commissioners of the Inter-State Commission and have been fitted into the general pattern of Australia’s land, sea and air transport needs.

Like all such bodies, the ISC will evolve over time. There has not yet been enough time for comments on any observable trends in that evolution. However, as Senator Vigor’s comments indicate, the ISC’s role and functions must be reviewed in the near future if its experience and expertise are to be used in the most effective way.

REFERENCES


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