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39, 1954

In the Privy Council.

No. 40 of 1953.

ON APPEAL FROM THE FULL COURT OF THE  
HIGH COURT OF AUSTRALIA

BETWEEN

HUGHES AND VALE PTY. LIMITED ... .. *Appellant*

AND

THE STATE OF NEW SOUTH WALES THE HONOURABLE  
WILLIAM FRANCIS SHEAHAN and THE DIRECTOR  
OF TRANSPORT AND HIGHWAYS ... .. *Respondents*

AND

THE COMMONWEALTH OF AUSTRALIA THE STATE OF  
VICTORIA and THE STATE OF QUEENSLAND ... *Interveners.*

RECORD OF PROCEEDINGS

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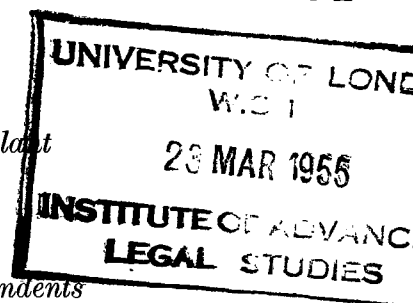
# In the Privy Council.

No. 40 of 1953.

## ON APPEAL FROM THE FULL COURT OF THE HIGH COURT OF AUSTRALIA

38051

BETWEEN  
HUGHES AND VALE PTY. LIMITED ... .. *Appellant*  
AND  
THE STATE OF NEW SOUTH WALES THE HONOURABLE  
WILLIAM FRANCIS SHEAHAN and THE DIRECTOR  
OF TRANSPORT AND HIGHWAYS ... .. *Respondents*  
AND  
THE COMMONWEALTH OF AUSTRALIA THE STATE OF  
VICTORIA and THE STATE OF QUEENSLAND ... *Interveners.*



## RECORD OF PROCEEDINGS

No. 1.

Demurrer Book.

(a) Amended Statement of Claim.

Cause No. 18 of 1952.

IN THE HIGH COURT OF AUSTRALIA.  
NEW SOUTH WALES REGISTRY.

Between

HUGHES AND VALE PTY. LIMITED ... .. *Plaintiff*

and

10 THE STATE OF NEW SOUTH WALES THE HONOURABLE  
WILLIAM FRANCIS SHEAHAN and THE DIRECTOR OF  
TRANSPORT AND HIGHWAYS ... .. *Defendants.*

In the High  
Court of  
Australia.

New South  
Wales  
Registry.

No. 1.  
Demurrer  
Book.  
(a)  
Amended  
Statement  
of Claim  
15th August  
1952.

### AMENDED STATEMENT OF CLAIM.

1.—The Plaintiff is a Company duly incorporated under the laws of the State of New South Wales and is entitled to sue in and by its corporate name.

In the High  
Court of  
Australia.

New South  
Wales  
Registry.

No. 1.  
Demurrer  
Book.

(a)  
Amended  
Statement  
of Claim.

15th August  
1952—  
*continued.*

2.—The Defendant, the Honourable William Francis Sheahan (hereinafter called the Minister) is the Minister of State for Transport of the State of New South Wales, and as such is the Minister responsible for the administration of the State Transport (Co-ordination) Act, 1931–1950, hereinafter referred to.

3.—The Defendant, The Director of Transport and Highways, is a body corporate.

4.—The Plaintiff carries on business as a carrier of general merchandise, and operates between Sydney in the State of New South Wales and Brisbane in the State of Queensland. 10

5.—The Plaintiff is the owner of certain vehicles in respect of which it holds licences, under Section 12 of the State Transport (Co-ordination) Act, 1931–1950, to operate the said motor vehicles as public motor vehicles within the meaning of the said Act.

6.—Such licences are issued subject to the following Special Conditions :—

“ SPECIAL CONDITIONS (Non-competitive Licence)

“ (1) The within-mentioned vehicle is authorised to operate as a goods motor vehicle on or in routes, roads, areas or districts within the State of New South Wales— 20

“ (a) on journeys none of which, for a distance exceeding fifty

“ (50) miles, is competitive with the Railways or Tramways ;

“ (b) when used solely for the transport of fresh fruit, vegetables,

“ eggs or poultry from farm to market on journeys of any

“ distance.

“ (2) In respect of any journey which is wholly or partly competitive with the railways or tramways, the licensee shall pay to the Commissioner for Road Transport and Tramways for the full competitive distance (in addition to any other sums payable under the State Transport (Co-ordination) Act, 1931, as amended, 30 and this Licence or either of them) :—

“ Three pence per ton, or part thereof, of the aggregate of the

“ weight of the vehicle unladen and of the weight of loading

“ the vehicle is capable of carrying for each and every mile,

“ or part thereof, travelled by the within-mentioned vehicle

“ along a public street.

“ (3) Provided that the terms conditions and authorities of or attached to this licence are complied with, the licensee and the driver of the vehicle herein referred to, and each of them, shall be exempt from the condition mentioned in Subsection 5 of Section 18 40 of the State Transport (Co-ordination) Act, 1931, as amended, and

10 “ unless the Commissioner otherwise determines, from the obligations  
 “ imposed by Regulations 9 and 10 under that Act in respect of any  
 “ journey which is not, for a distance exceeding fifty (50) miles,  
 “ competitive with the railways or tramways, or of a journey of any  
 “ distance when the vehicle herein referred to is used solely for the  
 “ transport of fresh fruit, vegetables, eggs or poultry from farm to  
 “ market. For the purposes of the terms, conditions and authorities  
 “ of or attached to this licence and of this exemption, where goods  
 “ are transhipped from one public motor vehicle to another or are  
 “ carried by a public motor vehicle to a receiving depot, shop or  
 “ store, and are carried from the place of transshipment or from such  
 “ receiving depot, shop or store by a public motor vehicle the whole  
 “ journey shall be regarded as one journey and if the vehicle to which  
 “ this licence relates takes part in it, it shall be regarded as having  
 “ undertaken the whole journey.”

In the High Court of Australia.  
 —  
 New South Wales Registry.  
 —  
 No. 1. Demurrer Book.  
 (a) Amended Statement of Claim.  
 15th August 1952—  
*continued.*

20 7.—The Regulations made under the State Transport (Co-ordination) Act 1931–1950 provide that the operators of public motor vehicles shall make application to the Defendant, The Director of Transport and Highways for the issue of a permit to operate a public motor vehicle for a specified day or days or for a specified period for the conveyance of specified goods (which permit is granted by the said Defendant on the payment by the applicant therefor of the charge mentioned in paragraph 8 hereof) before operating a vehicle for the carriage of general merchandise within the State of New South Wales upon journeys from or to any place in the State of Queensland which for a distance exceeding fifty (50) miles are competitive with the Railways or Tramways.

30 8.—The Defendants, The Minister and The Director of Transport and Highways have imposed a charge of three pence per ton per mile, calculated and assessed as mentioned in Condition 2 of the Special Conditions as set out in paragraph 6 hereof in respect of the operation of the said motor vehicles when carrying goods from the State of New South Wales into the State of Queensland, and from the State of Queensland into the State of New South Wales ; the amount of such charge being calculated as aforesaid in respect of the distance travelled in New South Wales.

9.—The Plaintiff is required by the Defendants, The Minister and The Director of Transport and Highways, in respect of the operation of its said motor vehicles when carrying goods in the State of New South Wales, to pay the charge mentioned in paragraph 8 hereof.

40 10.—The charge imposed and levied by the Defendants, The Minister and the Director of Transport and Highways, in respect of the operation of public motor vehicles when carrying goods, similar to the goods carried by the Plaintiff, on journeys in the State of New South Wales being part of journeys into and out of the States of Victoria and South Australia, is calculated and assessed at the rate of three pence per ton per mile for the first hundred miles competitive with the Railways or Tramways (hereinafter called competitive miles), two pence per ton per mile for the second hundred

In the High Court of Australia.  
 New South Wales Registry.  
 No. 1.  
 Demurrer Book.  
 (a)  
 Amended Statement of Claim  
 15th August 1952—  
*continued.*

competitive miles, and one penny per ton per mile thereafter for the whole of the competitive miles of the journey all of such charges being assessed in respect of the unladen weight of the vehicle, together with the weight the vehicle is capable of carrying, whether the vehicle be carrying that weight or some lesser weight.

11.—The charges levied upon journeys from Sydney to the northern border of New South Wales and from the northern border of New South Wales to Sydney are imposed at the said rates for the purpose of diverting the carriage of goods upon the said journeys from the Plaintiff and other operators of public motor vehicles to the Railways and to coastal ships. 10

THE PLAINTIFF CLAIMS :

1. A declaration that the State Transport (Co-ordination) Act, 1931–1950, is beyond the powers of the Parliament or the State of New South Wales and invalid.
2. Alternatively, a declaration that Sections 12, 13, 14, 15, 16, 17, 18, 19, 21 and 28 are beyond the powers of the Parliament of the State of New South Wales and invalid.
3. A declaration that the charges imposed and levied by the Defendants, The Minister and The Director of Transport and Highways, in respect of the operation of public motor vehicles in New South Wales are invalid ; or, alternatively, that the charges imposed and levied as set out in paragraph 8 of the Statement of Claim are invalid. 20
- 3A. An injunction restraining the Defendants, The Minister and The Director of Transport and Highways, from imposing and levying charges in respect of the operation of public motor vehicles upon interstate journeys at rates which differ according as to whether the goods are being carried into or out of the State of Queensland or into or out of the States of Victoria or South Australia.
- 3B. An injunction restraining the Defendants, The Minister and The Director of Transport and Highways, from imposing and levying charges in respect of the operation of public motor vehicles upon interstate or intra-state journeys for the purpose of diverting the carriage of goods upon the said journeys from the Plaintiff to the Railways or to coastal ships. 30
4. Such further or other order as to the Court may seem meet.
5. Costs.

Dated this Fifteenth day of August, 1952.

HIGGINS, DE GREENLAW & CO.,  
*Solicitors for the Plaintiff.* 40

This Statement of Claim is filed by Higgins, de Greenlaw & Co., whose address for service is 107 Elizabeth Street, Sydney.

## (b) Defence.

In the High  
Court of  
Australia.

## DEFENCE.

—  
New South  
Wales  
Registry.

Delivered the Twentieth day of August, 1952. The Defendants as to the Statement of Claim herein say as follows :—

—  
No. 1.  
Demurrer  
Book.  
(b) Defence.  
20th August  
1952.

1.—They admit paragraphs 1 to 6 inclusive thereof.

2.—They do not admit that the Regulations referred ot in paragraph 7 thereof are fully or sufficiently set forth therein.

3.—They admit paragraphs 8 to 10 inclusive thereof.

4.—In answer to paragraph 11 thereof and to the Statement of Claim 10 generally they say :—

(a) In pursuance of the provisions of the State Transport (Co-ordination) Act, 1931–1951, licences have from time to time been issued in respect of public motor vehicles subject to conditions in the form set forth in paragraph 6 of the Statement of Claim and permits have from time to time been issued in respect of public motor vehicles in accordance with the Regulations under the said Act.

20 (b) In pursuance of the said Act, the Regulations thereunder and the conditions subject to which licences and permits have been issued, the Defendant the Director of Transport and Highways requires payment of charges in respect of the operation of certain public motor vehicles when carrying certain goods on certain journeys on public roads in the State of New South Wales.

(c) For the purpose of collecting and receiving payment of such charges the Defendant the Director of Transport and Highways has authorised District Motor Registries in the State of New South Wales to issue permits under the said Act and Regulations and to require and receive payment of such charges.

30 (d) The Defendant the Director of Transport and Highways has from time to time caused directions and instructions to be given to District Motor Registries with respect to the issue of permits and the payment of charges and such directions and instructions have been formulated after consideration by the said Defendant of all transport facilities available.

(e) Since the 1st day of June, 1951, and prior to the institution of this action the said Defendant has caused to be issued to all District

In the High  
Court of  
Australia.

New South  
Wales  
Registry.

No. 1.  
Demurrer  
Book.  
(b) Defence.  
20th August  
1952—  
*continued.*

Motor Registries directions and instructions as set forth in Schedules A, B, C and D hereof which said Schedules shall be deemed to form part of and be incorporated in this Defence.

- (f) On the 27th day of June last the said Defendant caused to be issued to certain District Motor Registries, namely, those at Euston, Balranald, Tocumwal, Hay, Penrith, Newcastle, Gosford, Hornsby, Manly, North Sydney, Burwood, Parramatta, Kogarah, Goulburn, Albury, Liverpool and Camden the instruction as set forth in Schedule E hereof which said Schedule shall be deemed to form part of and be incorporated in this Defence. 10
- (g) The Defendants say that the charges levied and imposed upon the Plaintiff have been levied and imposed in conformity with the directions and instructions referred to in the sub-paragraph (e) hereof and that the charges referred to in paragraph 10 of the Statement of Claim have been levied and imposed in conformity with the instruction referred to in sub-paragraph (f) hereof.
- (h) The Defendants further say that the purpose for which the said charges have been levied and imposed appear from the said Act, Regulations, directions and instructions and not otherwise.

5.—That the State Transport (Co-ordination) Act 1931–1951, and the Regulations thereunder and each provision thereof is a valid law of the Parliament of the State of New South Wales. 20

F. P. McRAE,  
*Crown Solicitor for the State of New South  
Wales and Solicitor for the Defendants,*  
237 Macquarie Street,  
Sydney.

Schedule  
“ A ”

### Schedules to Defence.

#### SCHEDULE “ A ”

Circular No. C.51/74. 30

(ALL DISTRICT MOTOR REGISTRIES)

Department of Road Transport  
and Tramways,  
Sydney.  
50/M20/1743.  
5th June, 1951.

In view of the difficulties experienced by the Railways in connection with the carriage of goods by rail, approval has been given for conditions applicable under the State Transport (Co-ordination) Act, 1931, to carriage



by road for distances exceeding 50 miles in competition with the railways to be liberalised.

*Goods exempt from charges or subject to reduced charges.*

As from 11th June, 1951, until further notice, permits will be issued for the carriage of goods by road exempt from charges or subject to charges on a flat rate basis or at reduced mileage rates as shown in the schedule attached.

*Maximum charge.*

10 In respect of the carriage of wool by road, the maximum charge prescribed in the Act (3d. per ton per mile on the aggregate of the weight of the vehicle unladen and the weight of loading it is capable of carrying) will continue to apply for the full distance in competition with the railways.

In the case of goods other than wool, the maximum charge as from 11th June will be calculated on the basis of the aggregate of the weight of the vehicle unladen and the weight of loading it is capable of carrying in accordance with the following scale—

Distances up to 100 miles—3d. per ton per mile ;  
Distances from 101 to 200 miles—2d. per ton per mile ;  
Distances over 200 miles—1d. per ton per mile.

20 For example, the charge on the carriage of general goods on a motor lorry, tare 4 tons, carrying capacity 6 tons, in competition with the railways for a distance of 250 miles would amount to £22 18s. 4d. calculated as follows :—

Aggregate weight of tare and carrying capacity—10 tons.  
100 miles at 3d. per ton per mile— £12 10s. 0d.  
100 miles at 2d. per ton per mile— £8 6s. 8d.  
50 miles at 1d. per ton per mile— £2 1s. 8d.

*Availability of permits.*

30 Where motor lorry owners propose to regularly carry timber or other exempt goods, permits authorising the use of their vehicles for these purposes may be issued for periods of up to 3 months. In the event of a vehicle being used on any occasion to carry goods subject to charges, it will be necessary that a separate permit be obtained and the charges paid prior to the commencement of the journey.

*Maximum loads.*

40 The Minister for Transport has emphasised the need for strict compliance by road operators with the Regulations relating to maximum loads. Registry Officers should direct the attention of applicants for permits to the provisions of Ordinances 30C and 30D under the Local Government Act. Owners of motor lorries with a gross weight (tare and carrying capacity) of 9 tons or more should be advised to apply to the Department of Main Roads, 309 Castlereagh Street, Sydney, for an assessment as to the maximum weight of loading authorised by the Ordinances to be carried on their vehicles.

In the High  
Court of  
Australia.

—  
New South  
Wales  
Registry.

—  
No. 1.  
Demurrer  
Book.  
(b) Defence.  
(Schedule  
" A " )  
thereto)—  
*continued.*

In the High  
Court of  
Australia.  
—  
New South  
Wales  
Registry.  
—  
No. 1.  
Demurrer  
Book.  
(b) Defence.  
(Schedule  
"A"  
thereto)—  
*continued.*

It will be necessary that Registry Instructions relating to the payment of charges be read in conjunction with this Circular. Accordingly, Registry Instructions Nos. 332–340 inclusive should be endorsed "See also Circular C51/74."

A. A. SHOEBRIDGE,  
*Commissioner for Road Transport  
and Tramways.*

(Registry Circular No. 51/6.)

Circular No. C51/74.

(1) *Goods exempt from charges.*

Eggs, fish, rabbits, poultry, milk and cream ; 10  
Fresh fruit and vegetables ; seedlings, ornamental plants ;  
Green skins, hides, tallow ;  
Calves, lambs, bees and bee-farming equipment ;  
Pedigreed stock other than racehorses travelling to and from  
race meetings ;  
Show exhibits ;  
Returned empty drums, casks, cylinders, cases, crates ;  
Commercial travellers' samples, daily newspapers ;  
Earthenware pipes, asbestos pipes, cement pipes, concrete blocks ; 20  
Carbon black ;  
Zinc oxide ;  
Petrol and oils on vehicles which carry empty drums from country  
districts ;  
Raw materials, machines or machine parts carried for distances up  
to 200 miles to decentralised factories ;  
Partly manufactured goods when being carried from one factory  
to be completed at another.

In addition to the goods abovementioned, exemption from charges will also apply in respect of goods of a type which, if consigned by rail in full trucks loads would be carried at "miscellaneous" or a lower rate. Such 30 goods will include—

Shellgrit, scrap (metal, rubber and batteries), waste paper ;  
Cement, bricks, tiles, dressed timber ;  
Megass, gypsum, gyprock, fibro sheets ; fertiliser ;  
Flour, bran, pollard ; coal, coke ; ores ; limestone ; gravel ; stone ;  
Wheat and other grains ; hay, straw, chaff ; rock salt, stock foods.

(2) *Goods subject to charges on flat rate basis.*

Contractors' plant, viz. scaffolding, tank-sinking equipment, etc.	£20 per annum or £5 per quarter.	
Showmen and equipment travelling from show to show throughout the State	£5 per annum or £1 5s. 0d. per quarter.	40
Hawkers distributing goods from town to town	£5 per cwt. of saleable goods up to a maximum of 5 cwt.	

	Benzol, methanel and other liquids in bulk tank waggons operating between Sydney and Albury	£10 per trip.	In the High Court of Australia.
	Car bodies on vehicles operating between Sydney and Albury	£1 per unit—maximum charge £5 per trip.	New South Wales Registry.
	Car bodies on vehicles operating between Melbourne and Brisbane	£2 per unit—maximum charge £10 per trip.	No. 1.
	Lorry bodies on vehicles operating between Sydney and Albury	£2 per unit—maximum charge £10 per trip.	Demurrer Book.
10	(3) <i>Goods subject to reduced mileage charges</i> (Excepting as determined by the Commissioner for Road Transport and Tramways to meet special circumstances, the mileage charge for goods shown hereunder to be calculated on the basis of the aggregate of the weight of the vehicle and the weight of loading it is capable of carrying).		(b) Defence. (Schedule "A" thereto)— <i>continued.</i>

*Mileage charge of 1d. per ton per mile* to apply in respect of the carriage of—

- 20
- Iron pipes, roofing iron, fencing posts and wire, iron gates ;
  - Caneite, masonite ;
  - New cartons, cases, bottles, drums ;
  - Periodicals ;
  - Slagwool ;
  - Prefabricated buildings (complete) ;
  - X-ray equipment ;
  - Icecream ;
  - Second-hand furniture ; farm machines ;
  - Racehorses travelling to and from race meetings ;

*Mileage charge of 1½d. per ton per mile* to apply in respect of the carriage of—

- 30
- New furniture ; plate glass ;
  - Doors, sashes, prefabricated building parts ;
  - Baths, sinks, stoves, refrigerators.

Provided that in respect of any journey for the carriage of *goods other than wool*, the maximum charge will be calculated at—

- 3d. per ton per mile for distances up to 100 miles ;
- 2d. per ton per mile for distances from 101 miles to 200 miles ;
- 1d. per ton per mile for distances over 200 miles.

In respect of the carriage of wool, the charge is to be calculated at 3d. per ton per mile of the full distance carried in competition with the Railways.

- 40 This and the three preceding pages form the Schedule "A" referred to in the Defence of the State of New South Wales, the Honourable William Francis Sheahan and the Director of Transport and Highways delivered the 20th day of August, 1952.

F. P. McRAE,  
*Solicitor for the Defendants.*

## SCHEDULE " B "

Circular No. C51/139.

In the High  
Court of  
Australia.

New South  
Wales  
Registry.

No. 1.  
Demurrer  
Book.  
(b) Defence.  
(Schedule  
" B "  
thereto).

(ALL POLICE STATIONS AND DISTRICT MOTOR REGISTRIES.)

Department of Road Transport  
and Tramways,

Sydney.

50/M109/1636

11th October, 1951.

The Minister for Transport has directed that following the increase in rail freight rates as from 22nd October, everything possible should be done to ensure that rail services will be used as far as practicable for the carriage of wool from country centres. 10

The position has been discussed at a Conference attended by the Director of Transport and Highways, the Commissioner for Railways and the Commissioner for Road Transport and Tramways and it has been decided that special steps will be taken by the Department of Railways to supply trucks and other equipment for the carriage of wool and that as from 22nd October, 1951, where it is established that rail services are reasonably available, applications for permits under the State Transport (Co-ordination) Act, 1931, to carry wool by road for distances exceeding 50 miles in connection with the railways will be declined. It is pointed out that, in the event of a road vehicle being used on such a journey without a permit, proceedings may be instituted pursuant to Section 28 of the Act. 20

Motor Registry Officers should keep closely in touch with Railway Station Masters in connection with the availability of railway services from wool producing centres. It is considered that rail services should be regarded as reasonably available where trucks and other equipment can be supplied within five days of the date for which orders were lodged. Should it be agreed that longer periods may elapse before rail trucks can be supplied and consignors elect to forward their wool by road the circumstances may be met by the issue of road permits on payment of the prescribed charge per mile of 3d. per ton of the weight of the vehicle and the weight of loading it is capable of carrying. 30

A. A. SHOEBRIDGE,  
*Commissioner for Road Transport  
and Tramways.*

(Registry Circular No. 51/13.)

This is the Schedule " B " referred to in the Defence of the State of New South Wales, the Honourable William Francis Sheahan and the Director of Transport and Highways delivered the 20th day of August, 1952.

F. P. McRAE,  
*Solicitor for the Defendants.*

40

## SCHEDULE " C "

Circular No. C52/67.

(ALL DISTRICT MOTOR REGISTRIES.)

Department of Road Transport  
and Tramways,  
Sydney.

52/M109/494

1st May, 1952.

In the High  
Court of  
Australia.

New South  
Wales  
Registry.

No. 1.  
Demurrer  
Book.  
(b) Defence.  
(Schedule  
" C "  
thereto).

10 Further to the instructions contained in Circular No. C51/139 regarding the issue of permits to carry wool by road in competition with the railways for more than 50 miles, consideration has been given to representations by wool growing interests that, in certain circumstances, graziers should be permitted to use their own motor vehicles in the carriage of their wool to the selling centre notwithstanding that rail facilities may be available.

20 Approval has been given for the issue of permits to authorise the use of a grazier's motor lorry for this purpose on occasions *when he is genuinely obliged* to run his vehicle to Sydney or one of the other selling centres (e.g. to pick up urgently required machinery or materials for use on his property), subject to payment of the prescribed charge per mile of 3d. per ton on the weight of the vehicle and the weight of loading it is capable of carrying. Where it is proposed to transport only a few bales of wool, the charge payable should be determined in accordance with the procedure outlined in Registry Instruction 288 (3).

Circular C51/139 should be endorsed " See also Circular No. C52/67."

W. L. CARTER,  
*Deputy Commissioner for Road  
Transport and Tramways.*

(Registry Circular No. 52/8.)

30 This is the Schedule " C " referred to in the Defence of the State of New South Wales, the Honourable William Francis Sheahan and the Director of Transport and Highways delivered the 20th day of August, 1952.

F. P. McRAE,  
*Solicitor for the Defendant.*

In the High  
Court of  
Australia.

New South  
Wales  
Registry.

No. 1.  
Demurrer  
Book.  
(b) Defence.  
(Schedule  
" D "  
thereto).

SCHEDULE " D "

Circular No. C52/100.

(ALL DISTRICT MOTOR REGISTRIES.)

Department of Transport and  
Highways,

Sydney.  
52/M20/278

23rd June, 1952.

Following an examination of the transport position in relation to the rail services at present available and in sight, the Director of Transport and Highways has decided to vary the conditions under the State Transport (Co-ordination) Act, 1931, as shown in Circular C51/74 for the carriage of goods by road. On and from 1st July, 1952, the conditions applicable to the operation of goods motor vehicles for distances exceeding 50 miles in competition with the railways will be as set out in Statement " A " attached. 10

The conditions as approved have been drawn up in accordance with a policy which has regard to the extent that motor lorries carrying various types of goods would compete with rail and shipping services. Statement " A " shows the goods for which—

- (a) road permits will be issued exempt from charges under the Act ;
- (b) road permits will be issued on payment of charges as prescribed in the Act ; 20
- (c) road permits will be declined at times that rail trucks and other services are reasonably available.

It is anticipated that, generally, conditions (as shown in paragraphs 1, 2 and 2a of the attached statement) providing for the issue of permits exempt from charges or on payment of reduced charges will continue unaltered for a period of at least twelve months. However, conditions providing for the payment of charges at maximum rates are designed to discourage the carriage of goods by road in unnecessary competition with available railway services and, in those cases, arrangements for dealing with applications for permits may be reviewed from time to time in the light of surveys of traffic on the road. 30

Special steps have been taken by the Commissioner for Railways to improve services for transport of general merchandise by rail. In this connection, the Director of Transport and Highways desires that attention of road operators and others be invited to the improved services and, in particular, to the arrangements which can be made for goods to be transported by rail under " Composite " truck rates and conditions. Any person seeking further information on rail freight rates and services should be advised by Motor Registry Officers to contact the local Station Master or to communicate with the Railway Chief Traffic Manager, Central Railway Station, Sydney. 40

N. McCUSKER,  
*Secretary.*

## STATEMENT " A "

Department of Transport and Highways,  
Co-ordination Section,  
99 MacQuarie Street, Sydney.

23rd June, 1952.

In the High  
Court of  
Australia.

New South  
Wales  
Registry.

No. 1.  
Demurrer  
Book.  
(b) Defence  
(Schedule  
" D "  
thereto)—  
*continued.*

Conditions relating to charges under the State Transport (Co-ordination) Act, 1931, applicable as from 1st July, 1952, in respect of the carriage of goods by road on journeys which compete with the railways for more than 50 miles.

10 (1) *Goods in respect of which permits may be issued exempt from charges.*

Eggs, fresh fish, rabbits, poultry, fresh milk and fresh cream ;  
Fresh fruit and vegetables ; seedlings ; ornamental plants ;  
Pigs, calves, lambs, bees and bee-farming equipment ;  
Pedigreed stock other than racehorses travelling to and from race meetings ;

Show exhibits ;

Returned empty drums, casks, cylinders, cases, crates ;

Commercial travellers' samples, daily newspapers ;

20 Earthenware pipes, asbestos pipes, cement pipes, concrete tubs ;

Carbon black ;

Scrap rubber ;

Zinc oxide ;

\*Raw materials, machines or machine parts carried on journeys of up to 200 miles between decentralised clothing, textile or footwear factories ;

\*Partly manufactured clothing, textiles or footwear when being carried on journeys of up to 200 miles from one factory for completion at another.

30 \* *Note* : Where other manufacturing interests consider that special circumstances would justify extension of this exemption to their use of road vehicles for purposes similar to those specified above, they may submit their cases for consideration, to the Department of Transport and Highways.

Cement on journeys from Cement Works to Sydney and other places in Metropolitan District ;

Shellgrit ;

Tiles ; gyprock, fibro sheets ; fibrous plaster ;

Fertiliser ;

40 Petrol and oils on vehicles which carry empty drums from country districts—exemption to be allowed only during month of July, 1952. Arrangements have been made for petrol and oils to be carried by rail as from 1st August, 1952.

<p>In the High Court of Australia.</p> <p>—</p> <p>New South Wales Registry.</p> <p>—</p> <p>No. 1. Demurrer Book.</p> <p>(b) Defence (Schedule "D" thereto)—</p> <p><i>continued.</i></p>	<p>(2) <i>Goods subject to charges on flat rate basis.</i></p> <p>Contractors' plant, viz. scaffolding, tank-sinking equipment, etc., on contractor's own vehicles</p> <p>Showmen and equipment travelling from show to show throughout the State</p> <p>Hawkers distributing goods from town to town</p> <p>Benzol, methanol and other approved liquids in bulk tank waggons operating between Sydney and Albury</p> <p>Car bodies on vehicles operating between Sydney and Albury</p> <p>Car bodies on vehicles operating between Melbourne and Brisbane</p> <p>Lorry bodies on vehicles operating between Sydney and Albury</p>	<p>£20 per annum or £5 per quarter : £1 13s. 4d. per month or per journey.</p> <p>£5 per annum or £1 5s. 0d. per quarter.</p> <p>£5 per cwt. of saleable goods up to a maximum of 5 cwt.</p> <p>£10 per trip.</p> <p>£1 per unit, maximum charge £5 per trip.</p> <p>£2 per unit, maximum charge £10 per trip.</p> <p>£2 per unit, maximum charge £10 per trip.</p>	<p>10</p>
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(2a) *Goods subject to reduced mileage charges* (excepting as determined by the Director of Transport and Highways to meet special circumstances, the mileage charge for goods shown hereunder to be calculated on the basis of the aggregate of the weight of the vehicle and the weight of loading it is capable of carrying.) 20

*Mileage charge of 1d. per ton per mile* to apply in respect of the carriage of :

Caneite, masonite ;  
 New cartons, cases, bottles, drums ;  
 Periodicals ;  
 Slagwool ; insulwool ;  
 Prefabricated buildings (complete) ;  
 X-ray equipment ;  
 Icecream ;  
 Second hand furniture ; farm machines ;  
 Racehorses travelling to and from race meetings.

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*Mileage charge of 1½d. per ton per mile* to apply in respect of the carriage of :—

New furniture ; plate glass ;  
 Refrigerators, washing machines ;  
 Hot water systems.

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(3) Special arrangements have been made for the provision of rail services for goods as shown below and in those cases applications for road permits will be declined or otherwise determined in accordance with local instructions issued to Officers-in-charge of Motor Registries in the areas concerned :—



- Wool—applications for road permits should be dealt with in accordance with instructions contained in Circulars C51/139 and C52/67. In the High Court of Australia.
- iron pipes and other iron and steel products from Newcastle and Port Kembla— New South Wales Registry.
  - applications for road permits to be declined. No. 1.
- beer and other loading from Sydney breweries— Demurrer Book.
  - applications for permits to be declined. (b) Defence (Schedule "D" thereto)—
- 10 general merchandise from Sydney to South Coast towns, Milton to Eden— continued.
  - applications for permits to be declined unless otherwise provided in Instructions forwarded to Motor Registries in Metropolitan and South Coast districts.

(4) In respect of applications for permits to carry goods not covered in paragraphs 1, 2, 2a and 3 of this Instruction, permits may be granted (unless otherwise determined by the Department of Transport and Highways in regard to carriage of specified goods or the operation of vehicles on particular routes) on payment of a charge calculated at 3d. per ton per mile based on the aggregate of the weight of the vehicle unladen and the weight of loading it is capable of carrying.

(5) Where the owner of a vehicle or of goods to be carried expresses an objection to the payment of a charge as prescribed in this Instruction he should be advised to forward particulars of the case to the Department of Transport and Highways, Co-ordination Section, for consideration.

(Registry Circular No. 52/14.)

This and the preceding three pages form the Schedule "D" referred to in the Defence of the State of New South Wales, the Honourable William Francis Sheahan and the Director of Transport and Highways delivered this 20th day of August, 1952.

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F. P. McRAE,  
*Solicitor for the Defendants.*

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SCHEDULE "E."

Schedule  
"E"

Department of Transport and Highways,  
Sydney.

June 27, 1952.

The Officer-in-Charge,  
Motor Registry.

SUBJECT: Conditions as to charges applicable under the State Transport (Co-ordination) Act, 1931, Carriage of Goods by road from the

In the High Court of Australia.

Sydney and Newcastle districts to Melbourne or Adelaide and vice versa.

New South Wales Registry.

The conditions as set out in Registry Circular No. C52/100 will apply generally on and after the 1st July, 1952, except in the case of vehicles operating in the carriage of goods from the Sydney or Newcastle districts to Melbourne or Adelaide and vice versa.

No. 1. Demurrer Book. (b) Defence. (Schedule " E " thereto)—*continued.*

The exemptions and reductions set out in Circular No. C52/100 will apply also to this traffic but the maximum charge will remain as at present, viz., one calculated at the rate of :—

- 3d. per ton per mile for distances up to 100 miles. 10
- 2d. per ton per mile for distances from 101 to 200 miles.
- 1d. per ton per mile for distances over 200 miles

based on the aggregate of the tare weight and carrying capacity of the vehicle.

It is mentioned for your information that early discussions with Victorian Transport Authorities have been arranged with a view to establishing the availability of rail services in that State and determining conditions as should apply in future in both States to the carriage of goods by road between Sydney-Newcastle districts and Melbourne and Adelaide.

N. McCUSKER, 20  
*Secretary.*

This is the Schedule " E " referred to in the Defence of the State of New South Wales, the Honourable William Francis Sheahan and the Director of Transport and Highways delivered the 20th day of August, 1952.

F. P. McRAE,  
*Solicitor for the Defendants.*

(c) Demurrer of Plaintiff. 20th August 1952.

(c) Demurrer of Plaintiff.

DEMURRER.

The Plaintiff demurs to the whole of the Statement of Defence filed herein, and says that the said Statement of Defence does not disclose any 30 defence to this action, on the grounds that :—

- (1) The State Transport (Co-ordination) Act, 1931-1950, is beyond the powers of the Parliament of the State of New South Wales and invalid.

- (2) Sections 12, 13, 14, 15, 16, 17, 18, 19, 21 and 28 of the said Act are beyond the powers of the Parliament of the State of New South Wales and invalid.
- (3) The Defendant, the Director of Transport and Highways, in levying and imposing the charges referred to in sub-paragraphs (d), (e), (f) and (g) of paragraph 4 of the Statement of Defence, have exercised powers not authorised by the said Act, or, if so authorised, not within the powers of the Parliament of the State of New South Wales.

In the High Court of Australia.

New South Wales Registry.

No. 1. Demurrer Book.

(c) Demurrer of Plaintiff. 20th August 1952—  
*continued.*

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Dated at Sydney this Twentieth day of August, 1952.

HIGGINS DE GREENLAW & CO.,  
*Solicitors for the Plaintiff.*

HIGGINS DE GREENLAW & CO.,  
107-109, Elizabeth Street,  
Sydney.

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No. 2.

Judgments.

No. 2. Judgment. 16th April 1953.

(a) DIXON, C.J.

(a) Dixon, C.J.

20 The facts are few upon which the Plaintiff company is content to rest the right it asserts in this action to relief by way of declaration of right and injunction, and a brief statement of what matters will suffice. The facts are to be collected from the pleadings ; for the proceeding before us is a demurrer to the defence delivered by the Defendants.

30 The Plaintiff is a company incorporated in New South Wales. Its business is that of a carrier of general merchandise and it owns certain motor vehicles. With them it operates, that is to say it carries goods, between Sydney and Brisbane. In respect of the vehicles it holds licences from what I shall call the road transport authority of the State of New South Wales. The legislation under which the licences were issued, as well as the conditions of the licences, is impugned by the Plaintiff as involving an impairment of the constitutional freedom of interstate trade commerce and intercourse. Some description of that legislation will afterwards become necessary, but in the meantime it will be convenient to state what is done without referring, at this point, to the provisions purporting to require such licences and to authorize the conditions.

The road transport authority of the State imposes upon the Plaintiff Company in respect of the journeys made by its vehicles between Brisbane and Sydney a tonnage charge or levy per mile. The weight upon which

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it is calculated consists in an aggregation of the carrying capacity of the vehicle and its actual tare weight. It is not a charge computed on the weight of the goods actually carried but on the weight of the vehicle and the weight the vehicle is capable of carrying. The rate is threepence a ton of this weight for every mile travelled. From June, 1951, to 1st July, 1952, the tonnage rate of threepence applied only up to one hundred miles of the journey. From one hundred miles to two hundred miles it was twopence a ton and over three hundred miles it was one penny a ton. But from July, 1952, it became threepence a ton throughout. An exception was made of vehicles operating between Adelaide or Melbourne and the Sydney or Newcastle districts. To vehicles employed in such journeys the old and more lenient tonnage rate continued to apply. Subject to this qualification, the tonnage rates, old or new, were of general application and were charged in respect of all journeys which for more than fifty miles competed with the State railways, unless the vehicle carried exclusively goods of a description included in a long list of things that were exempt altogether or else the subject of reduced mileage charges or of flat rate charges. 10

The means employed by the road transport authority of the State for exacting these charges depends upon a use of his power to grant licences subject to conditions and upon a supposed additional power to grant permits. 20

The licences granted to the carriers authorize the carriage of goods on journeys none of which, for a distance exceeding fifty miles, is competitive with the railways or tramways or on journeys of any distance from farm to market if solely for the carriage of fruit vegetables eggs or poultry. The authority is contained in Clause 1 of the licence.

Then there is a condition, forming Clause 2, that in respect of any journey which is wholly or partly competitive with the railways or tramways the licensee shall pay for the full competitive distance the rate of threepence per ton of the aggregate weight of the vehicle unladen and of the weight of the loading the vehicle is capable of carrying for each and every mile travelled by the vehicle along a public street. 30

A further condition, forming Clause 3, provides that if the terms, conditions and authorities are complied with the licensee and his driver are to be exempt from the conditions mentioned in the legislative provisions (Section 18 (5) of the State Transport (Co-ordination) Act) authorizing the imposition of charges and of certain other obligations. These clauses have been long in use and they were considered in *Duncan and Green Star Trading Co. Pty. Ltd. v. Vizzard*, 1935, 53 C.L.R. 493, where at pp. 566-7, Evatt, J. explained their effect in the following passage, the first reference in which is to Clause 3. "The verbiage of this clause may be subject to "criticism, but its intendment and meaning are not in doubt. Its object "is to grant an exemption from the payment authorized to be imposed "by Section 18 (5) of the Act, and actually imposed in respect of the full "competitive distance by Clause 2 of the special conditions. Clause 3, in "its last sentence, describes itself as an 'exemption.' The exemption 40

“ gives relief from the restrictions mentioned, but it is strictly coterminous  
 “ with the authority to operate the vehicle granted by Clause 1 of the  
 “ special conditions. The vehicle is to be ‘ exempt . . . in respect of any  
 “ ‘ journey which is not, for a distance exceeding fifty miles, competitive  
 “ ‘ with the railways or tramways.’ It is also to be ‘ exempt . . . in  
 “ ‘ respect . . . of a journey of any distance when the vehicle . . . is used  
 “ ‘ solely for the transport of fresh fruit . . . from farm to market.’ It is  
 “ impossible to imply from these conditions any authority to drive or  
 “ operate the vehicle on any journey which is, for more than fifty miles,  
 10 “ competitive with the railways. On the contrary, the exemption granted  
 “ by Clause 3 may be said to offer an inducement to observe the main  
 “ condition contained in Clause 1 of the licence. The exemption from the  
 “ money payment imposed by Clause 2 of the special condition is strictly  
 “ conditioned by the observance of Clause 1.”

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By a practice which also appears to be by no means recent, permits  
 are granted in respect of the licensed vehicles for journeys which are not  
 authorized by the licence because they compete with the railways for more  
 than fifty miles of their length. Of course, the journeys of the Plaintiff's  
 vehicles between Sydney and Brisbane so compete with the railways.

20 On the occasion of the issue of such a permit the road transport  
 authority of the State exacts payment of the tonnage charge per mile.  
 That permits are so used is a fact which does not appear distinctly in the  
 Pleadings, but the course of practice was made clear to us during the  
 argument. What statutory authority there is for issuing permits for the  
 carriage of goods I do not know. As was pointed out in effect in the case  
 of *Duncan and Green Star Trading Co. Pty. Ltd.*, 1935, 53 C.L.R. 493, at  
 p. 503, per Rich, J. and at p. 508 per Evatt, J., the power expressly conferred  
 by the legislation to grant permits is restricted to the carriage of passengers.  
 The relevant statutory provisions have not been changed. However,  
 30 the Pleadings do not raise the question what warrant exists for the  
 administrative procedure of issuing permits and making that the occasion  
 of collecting the charges. To show that the permits were invalidly issued  
 would be of little profit to the Plaintiff, if the clauses of the licence be valid.  
 For they would expose the licensee to the same charges. That, at all events,  
 is the operation given to the clauses in the passage already cited from the  
 Judgment of Evatt, J. Even if the clauses of the licence, still assuming  
 them to be constitutionally valid, failed so to operate as to impose the  
 liability, yet there would remain Section 37 (1) of the State Transport  
 (Co-ordination) Act, which enables the road transport authority of the  
 40 State to impose upon a person operating such motor vehicles in contravention  
 of the Act an obligation to pay such sums as the authority determines  
 not exceeding what would be exigible by means of a licence. If this  
 provision be constitutional, the same amounts could be imposed as have  
 already been collected.

The legislation under which all this is done begins with the State  
 Transport (Co-ordination) Act, 1931 (No. 32 of 1931) but it has a confused  
 subsequent history, chiefly because of the many changes made in the

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organization for the control of land and air transport in New South Wales. It is not necessary to trace its course. The writ in this action was issued on 7th July, 1952, and it is enough to state briefly the result of the legislation as it now stands so far as it is material to the decision of the case. The source of the powers exercised by the road transport authority of the State is the State Transport (Co-ordination) Act, 1931-1951. Its provisions cover the carriage of passengers and of goods, but in this case we are concerned with the provisions only as they affect the transportation of goods. It is made an offence to carry or offer to carry goods for hire or for any consideration or in the course of business by a motor vehicle unless the vehicle is licensed under the Act; Section 12 (1) and Section 3 (1) defining "operate" and "public motor vehicle." The offence is extended to the case of a man carrying his own goods (except goods not intended for sale) or goods which he has sold: Section 12 (2). It is also an offence for a person to send his goods by an unlicensed vehicle: Section 13. These provisions cover not only mechanically propelled vehicles on the surface but also aircraft. A licence is annual: Section 16 (2). It may authorise the vehicle to operate on specified routes or roads or in specified districts and may contain terms and conditions. By means of such conditions the fares and freights may be fixed and the use of the vehicle restricted. To break a condition is an offence and to go outside the authority of the licence is to break a condition: Section 15 (3), Section 17 (1) and (2) and (5). A condition may be imposed in a licence that the licensee shall pay sums ascertainable in a manner to be determined. The determination may be according to mileage travelled or otherwise, but so that the amounts payable shall not exceed an amount calculated at threepence a ton per mile of the mileage travelled upon a weight consisting of the aggregate weight of the vehicle unladen and of the loading the vehicle is capable of carrying: Section 18 (5). Clause 3 in the licence fixes a rate consisting of the maximum allowed by this provision. 10

In dealing with an application for a licence the licensing authority is required to consider all such matters as it may think necessary or desirable and in particular it is to have regard to a number of specified matters. They include the suitability of the route, the extent to which the needs of the locality are served and to which the proposed service is necessary or desirable in the public interest, the elimination of unnecessary services and the co-ordination of all forms of transport including rail and tram, the conditions of the roads and their capacity without unreasonable damage to carry the proposed public vehicular traffic, the fitness of the applicant and the construction, suitability and fitness of his vehicle: Section 17 (3). 20 30 40

In the beginning a board of four commissioners was set up, which, subject to the control of the Minister, was to carry into effect the objects and purposes of the Act and discharge the duties powers and authorities the Act conferred or imposed: Section 4 (1). The Board was called the State Transport (Co-ordination) Board and it was the licensing authority. But this Board was superseded as long ago as 22nd March, 1932. Since then not a few statutory changes have taken place and now, after the field of transport

administration and control has undergone more than one division, the powers and authorities conferred by the Act with respect to road transport and probably aircraft have come to reside in an officer called the Director of Transport and Highways. He is constituted a corporation sole but in his natural capacity he is the chairman of a commission called the New South Wales Transport and Highways Commission, the functions of which seem to be rather to plan and recommend than to administer. As chairman moreover the Director has the privilege of submitting any decision of the Commission of which he disapproves to the Minister, who may then determine whether the decision is or is not to be carried into effect: see Act No. 10 of 1950, Sections 3, 4, 6 (4) and 8. In his corporate capacity the Director of Transport and Highways is the road transport authority of the State. But in the exercise and performance of the powers duties and functions conferred upon him as a result of the various statutes he is subject to the direction and control of the Minister: Act No. 15 of 1952, Section 3 (4). No purpose would be served by recounting the legislative steps by which the Director became the road transport authority. It is enough to mention the successive provisions from which the result ensues, which are:—No. 3 of 1932, Sections 9 (1) and 12 (2); No. 31 of 1932, Sections 5, 14 (1) and (2), and 20 (1) (b) and (2) (c); No. 10 of 1950, Sections 3, 6 and 8 (1) (g) and (2); No. 15 of 1952, Section 2, Section 3 considered with Section 4, Sections 5 (1), 11, 17 (1) (a) and (2) (a).

The duties and powers of the Directors of Transport and Highways do not extend in any way into the field of railway or tramway administration or transport by sea. Whatever “co-ordinating” he does must be effected by his control of carriage by road. From a practical point of view air transport may be put aside, assuming his authority extends to it.

The substantial question for decision is whether the inclusion of interstate transport in the prohibition of the carriage of goods by motor vehicle, unless licensed, and in the levy of the tonnage rate, involves any infringement upon the freedom of trade commerce and intercourse assured by the terms of Section 92.

My personal opinion has long been that, in the case of provisions of this description prohibiting transport unless licensed and authorizing the imposition of such a levy, the question must be answered that neither the prohibition nor the levy is consistent with Section 92.

Notwithstanding the failure of this conclusion to gain acceptance, the more immediate considerations which arise upon the very face of the statutory provisions, to say nothing of the levy and the conditions of the licence, still appear to me to make demands upon reason that are too insistent to admit of any other answer to the question whether trade commerce and intercourse is left absolutely free.

I take it as finally settled that the burdens and restrictions against which Section 92 protects interstate commerce are not only those which are imposed differentially upon interstate commerce or affect it in a special manner. Interstate commerce is protected also from restrictions and

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burdens which fall alike on commerce confined to a State and commerce crossing its borders. The carriage of merchandise from one State to another is not a thing incidental to interstate commerce but in the language used by Johnson, J., of navigation, in *Gibbons v. Ogden*, 1824, 22 U.S. 1, at p. 229 : 6 Law Ed. 23 at p. 78, is “ the very thing itself ; inseparable from it as vital motion is from vital existence.”

The carriage of goods by road, which forms a most important part of this very thing, is made the subject of heavy imposts and of a definite prohibition except in so far as a branch of the Executive Government of the State thinks fit to permit particular persons to carry goods by specified vehicles. No conditions are laid down by the fulfilment of which a man may become entitled to a licence. It lies entirely within the discretion of the Director of Transport and Highways acting under the direction of the Minister. The refusal of an application for a licence on grounds that are arbitrary or fanciful or that no man could regard as lying within the scope or policy of the legislation would not suffice, but the discretion otherwise is absolute and in no circumstances has anyone an enforceable title to a licence. To me these rather simple considerations appear decisive. In face of them I have not been able to see how it can be said that this branch of interstate trade is absolutely free. 10

It is not my purpose to enter upon an examination of the question either in principle or upon authority, excepting of course the authority of the decision in *McCarter v. Brodie*, 1950, 80 C.L.R. 432. But I should perhaps say that to my mind the distinction appears both clear and wide between, on the one hand, such levies and such provisions prohibiting transportation without licence as the foregoing and on the other hand the regulation and registrations of motor traffic using the roads and the imposition of registration fees. In the same way the distinction is wide between such provisions and the use of a system of licensing to ensure that motor vehicles used for the conveyance of passengers or goods for reward conform with specified conditions affecting the safety and efficiency of the service offered and do not injure the highways by excessive weight or immoderate use or interfere with the use of the highways by other traffic. The validity of such laws must depend upon the question whether they impose a real burden or restriction upon interstate traffic. 20

For myself I do not know why a uniform law for the organization and the regular conduct of motor traffic or a uniform law prescribing conditions for the business of carrying by road should be regarded as necessarily impairing the freedom of interstate trade commerce and intercourse. The provision which in *Willard v. Rawson*, 1933, 48 C.L.R. 316, all the judges but myself upheld as valid did not appear to me to be of this character. It was a special provision affecting only motor cars registered in other States if used in Victoria for the carriage of goods. Motor cars if registered in another State were exempt from registration in Victoria and from the payment of the registration fee annually payable in that State. But the provision impugned specially withdrew this exemption if the vehicle was 30



used to carry goods. Thus entry into Victoria of a New South Wales lorry carrying goods at once exposed it to the levy of what to a Victorian car would be an annual fee. This appeared to me to be a direct burden upon interstate trade. I am quite prepared to accept the view that my conclusion as to the character or characterisation of the provision was erroneous, but it has nothing to do either with the present case on the one hand or with a general regulation of transport on the other hand.

The decisions of this Court that the State Transport (Co-ordination) Act, 1931 (N.S.W.), and the legislation of other States *in pari materia* did not infringe Section 92 were based on grounds which, as it seemed to me, were no longer tenable in face of the reasons of the Privy Council in the *Banking* case, 1950, A.C. 235 ; 79 C.L.R. 497. In *McCarter v. Brodie*, 1950, 80 C.L.R. 432, however, a majority of the Court decided that notwithstanding the decision of the Privy Council the transport cases should be followed. In the present case the Plaintiff asks us to re-consider the question thus decided in *McCarter v. Brodie*, 1950, 80 C.L.R. 432.

The strength of the considerations against refusing to follow that decision is very great. It is a recent decision of the Court dealing with the very question of the authority of the transport cases. It was fully considered and, whether many of the reasons and the conclusion of those cases are, as I think, or are not, at variance with the principles expounded in the *Banking* case, 1950, A.C. 235, nothing has occurred since this Court decided *McCarter v. Brodie (supra)* adding to or altering the considerations then before the Court. These circumstances, in my opinion, make it right to decline to enter upon a reconsideration of *McCarter v. Brodie (supra)* unless independent reasons exist for overruling it which appear to be imperative.

I do not waver at all in my belief that the transport cases cannot be reconciled with principle or in the opinion that the grounds on which they were in fact decided have for the most part been expressly rejected in the judgment of the Privy Council in the *Banking* case, but I do not regard that as enough. I believe, however, that I would regard it as an imperative judicial necessity to overrule *McCarter v. Brodie* if it appeared inevitable that the consequences of the decision would extend beyond the subject of commercial transport by road and would make it necessary to hold that over the whole area of interstate trade commerce and intercourse a power existed in every legislature to impose a prohibition subject to a licence to be granted or refused at the discretion of the Executive. At first sight it may seem that these consequences ought logically to ensue, if the decision is allowed to stand. Nevertheless, after a full re-examination of the transport cases in the light of the reasons of the majority of the Court in *McCarter v. Brodie (supra)*, I have come to the conclusion that the application of these cases may be confined to the particular conditions or considerations which arise from the fact that the railways and the roads form facilities for the carriage of goods (and presumably of passengers) for the provision and maintenance of which the State is responsible. I do not mean to suggest that in these conditions or considerations a ground

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can be found which in my opinion would suffice to support the decisions in the transport cases as correct or upon which by itself the judges who decided those cases were, or would have been, content to place them. But I have ventured before to describe the conclusion that the transport legislation was valid as a “pragmatical solution which those cases gave “to a problem which they approach as a complex” (*Airway's* case, 71 C.L.R. at p. 90), and I think that these conditions or considerations formed part of the complex and were taken into account by the learned Judges, who gave different degrees of emphasis to them. I am fully alive to the very great legal and practical importance of the conclusion in favour of the validity of the transport legislation which the Court has upheld. But that is the very subject matter of *McCarter v. Brodie*, and I am not prepared to regard the importance of the subject matter as sufficient to overcome the weight of the circumstances I have enumerated as otherwise making it right to decline to reconsider the decision. If the transport cases have no future application except where the conditions or considerations exist that arise from the State providing facilities for the carriage of goods both in the form of railways and in the form of roads, the danger is removed of the decision operating generally over the whole area covered by Section 92 and on that footing I think that we ought not to reconsider it. I have been much encouraged to adopt such a view of the transport cases by the following passage in the reasons of Williams, J. in *McCarter v. Brodie*, 1950 80 C.L.R. 432 at p. 477. Referring to the transport cases his Honour says: “In my opinion they ought not to be “re-opened in this Court without the greatest hesitation. The Acts do “regulate competition between land transport by rail and road, both of “passengers and goods, but only so far as such competition arises out of “competing facilities provided by the States themselves. In this respect “the Acts differ fundamentally from the legislation held to be invalid in “the *Australian National Airways* case and the *Bank* case, for there the “effect of the legislation was simply to prohibit competition with the “government airlines in the one case and the government banks in the “other. The Transport Regulation Acts do not prevent individuals “carrying on the business of land transport among the States without “a licence. But they do prevent individuals plying their vehicles on the “public roads of the States without a licence. They proceed on the broad “principle that the interests of the State require the regulation of the “whole service of land transport wherever it is conducted upon the public “roads. I am of opinion that a State must have a wide power to regulate “the use of the facilities which it provides for trade and commerce, so “that the public funds invested in such facilities, in this case the railways, “shall not be jeopardised by undue competition brought about solely by “the provision of another facility by the State. It is a question of fact “whether such Acts are, as they profess to be, regulatory or something “more, and the solution of this question raises social and economic “problems. The competition could be destroyed, as *Evatt, J.* pointed “out in *Vizzard's* case (1933) 50 C.L.R. at p. 82, by the State adopting

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- “ the simple if drastic expedient of destroying the roads so as to compel  
 “ all traders and travellers to use the railways. The same result could be  
 “ achieved by allowing the roads to fall into a sufficient state of disrepair.  
 “ Another way would be for a State to stop the roads short of the boundary  
 “ and sell a strip of land along its frontiers with other States to private  
 “ individuals. It has not yet been suggested that the freedom guaranteed  
 “ by Section 92 is violated if a private individual refuses to allow an inter-  
 “ State trader or traveller to pass over his land. By building and  
 “ maintaining State Highways States provide means of competition with  
 10 “ their own railways, and I can find nothing in the judgment of the Privy  
 “ Council which leads me to alter the opinion expressed in the *Australian*  
 “ *National Airways* case (No. 1) (1945) 71 C.L.R. at p. 109, that ‘ it is  
 “ ‘ simply an exercise of the sovereign rights of the States to co-ordinate  
 “ ‘ traffic by rail or road, and to confine the use of roads to particular persons  
 “ ‘ and vehicles. If the choice of these persons and vehicles has no  
 “ ‘ relation to their passage across the border, but the legislation operates  
 “ ‘ without discrimination with respect to all persons and vehicles desirous  
 “ ‘ of using the roads, such legislation is not aimed or directed at inter-State  
 “ ‘ commerce but at regulating, maintaining and co-ordinating a number  
 20 “ ‘ of utilities for trade, commerce, and intercourse, State and inter-State,  
 “ ‘ provided by the State ’.”

It must be borne in mind that if his Honour had not acted on this view the Court would have been equally divided and the decision would not have been an effective precedent: c.f. *Tasmania v. Victoria*, 1935, 52 C.L.R. at pp. 184-5. Moreover there are passages in the judgments of the members forming the majority of the Court in *R. v. Vizzard ex parte Hill*, 1933, 50 C.L.R. at pp. 48 : 49 and 50 : 82 and 83 : 104-5 ; 106, which show the important part this element played in the decision.

- Gavan Duffy, C.J. said, “ Again, a distinction has been made between  
 30 “ interfering with trade, commerce and intercourse and interfering with the  
 “ methods by which they are carried on. No one would suggest that  
 “ the State must furnish such roads or other conveniences as the inter-State  
 “ traveller may desire, nor, I think, would any one suggest that the State  
 “ must leave unaltered all conveniences for travelling which are already  
 “ in existence. It has been said that the legislature is not necessarily  
 “ controlling or regulating inter-State trade when it prescribes the facilities  
 “ it will offer for carrying on trade generally, though if, on examination,  
 “ it appears that the object of the legislature is really to prejudice inter-State  
 “ trade, its enactment may be invalid.” Rich, J. said, “ It (the case)  
 40 “ arises as a new aspect of the legislation relating to the use of roads,  
 “ vehicles and railways—an aspect which could scarcely have struck the  
 “ minds of those who resorted to the emphatic but uncertain terms of  
 “ Section 92.” Then in the course of describing the legislation his Honour  
 said, “ It is directed to secure an ordered system of public transportation  
 “ in which the integers (not the least important of which are State railways)  
 “ do not engage in mutual slaughter by irrational competition. As part  
 “ of the means to this end it sets up a licensing system for motor vehicles

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“ which act as common carriers or which otherwise engage in the carriage  
“ of goods.” Finally the learned Judge propounds the question he regarded  
as critical as follows :—“ The question which I have to ask myself is whether,  
“ in a scheme which allows complete freedom to go or to send from one  
“ place to another but *in the process of co-ordinating the means and of*  
“ *rationalizing the facilities* denies a completely unregulated choice of  
“ means, a direct restraint upon or interference with trade commerce and  
“ intercourse is imposed.” In the course of the Judgment of Evatt, J.  
the following passage occurs : “ On the contrary, I think that a State does  
“ not infringe Section 92, if, having no concern, interest or object 10  
“ in restricting or prohibiting trade between States, it chooses to organize,  
“ regulate and co-ordinate those facilities and services which are provided  
“ and conducted within the State as instruments essential to all trade,  
“ commerce and intercourse, including inter-State trade, commerce  
“ and intercourse.” Then, after dealing with the financial and  
other responsibilities of States in relation to the provision and the  
maintenance of Government Railways, Evatt, J. said : “ Where the  
“ States have also expended large sums of money for the purpose of  
“ constructing and maintaining roads the problem of ‘ co-ordination ’ of  
“ the railway and road services becomes one of direct national concern.” 20

McTiernan, J. both in his description of the legislation and in the  
use his Honour made of citations from decisions of the United States  
Supreme Court, clearly showed that he considered that the provision by  
the State of both roads and railways was a very important factor. His  
Honour said : “ An examination of the provisions of the Act and the Acts  
“ constituting the various public bodies whose activities and services it  
“ was passed to co-ordinate and improve shows that the real object of  
“ arming the Board with the powers of granting or refusing licences to  
“ persons desiring to operate public motor vehicles on the roads of New  
“ South Wales was to protect the utility of the public facilities for transport, 30  
“ to save the publicly owned railways of the State from the destructive  
“ effect of the uncontrolled or unrestricted use of the facilities for travelling  
“ provided by the State out of public moneys and to protect the public  
“ finances and the credit of the State. It is, in my opinion, within the  
“ legislative power reserved to the States to enact the provisions which are  
“ now in question and such provisions are not affected by Section 92.”  
In the citation made by his Honour from the opinion of the Court delivered  
by Hughes, C.J. in *Sproles v. Binford*, 1932 286 U.S. 374, at p. 394 :  
76 L. Ed. 1167, at p. 1182, there occurs the statement, “ The State provides  
“ its highways and pays for their upkeep. Its people make railroad 40  
“ transportation possible by the payment of transportation charges. It  
“ cannot be said that the State is powerless to protect its highways from  
“ being subjected to excessive burdens when other means of transportation  
“ are available.” McTiernan, J. after completing the quotation said :  
“ This statement applies with equal force where the railways as well as the  
“ roads are built and maintained out of public funds and are owned and  
“ managed and controlled by the State.”

On the whole I think that it is now possible to regard the transport cases as confined in their application to the control by the States of the use of roads provided and maintained by the States as an alternative to the use of railways also provided and maintained by the States. I hope that I have already said enough to make it unnecessary for me to add that I must not be taken as agreeing that such a view of the use of a highway for interstate trade justifies an interference which otherwise Section 92 would not allow. In truth my personal opinion is entirely to the contrary. But that is nothing to the point. The point is that once the decisions are confined to such a situation they do not so govern the general operation of Section 92 as to cause an ever recurring difficulty in applying Section 92 according to the principles which otherwise would appear now to be established. On the footing that they are so confined I shall act on the authority of *McCarter v. Brodie*.

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The Plaintiff, however, contended that another reason existed for declining to apply the transport cases to the legislation as it stands. That reason lies first in the virtual disappearance of the powers which might have enabled the old State Transport (Co-ordination) Board to perform the function, of which so much is said in these cases, of co-ordinating rail and road transport, and second in the vesting in an officer, bound by ministerial direction, of the authority to licence and of the almost uncontrollable discretion that now exists. For the Plaintiff it was pointed out, indeed, that in *Vizzard's* case itself notwithstanding that the date of the offence from which it arose was 30th April, 1933, no account was taken of the important changes produced successively by the Ministry of Transport Act, 1932, as from 22nd March, 1932, and by the Transport (Division of Functions) Act, 1932, as from 29th December, 1932.

I am not prepared to distinguish the transport cases on these grounds. To do so would in my opinion involve an unreal refinement.

A further contention was advanced on behalf of the Plaintiff. It was that because the old tonnage rates per mile in New South Wales of one penny over three hundred miles, of twopence between two hundred and one hundred miles and threepence for the first one hundred miles were retained for journeys between the Sydney or Newcastle districts and Melbourne or Adelaide, the rate of threepence for journeys between Sydney and Brisbane became discriminatory. The result may perhaps be a discrimination in favour of trade with Adelaide and Melbourne as against trade with Brisbane, but it does not appear to be a discrimination against interstate trade as compared with the domestic trade of the State. In my opinion the difference forms no sufficient reason for distinguishing the transport cases.

Finally the point was taken that the levy of the tonnage rates amounted to an excise duty placed beyond the power of the State by Section 90 of the Constitution. In answer to this contention it is, I think, enough to say that the tonnage rate is not a tax directly affecting commodities. It is

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calculated on the combined weight of the vehicle and weight of the load it is capable of carrying and is payable in respect of the employment of the vehicle upon a journey independently of the weight or quantity of the commodities carried. It is a tax on the carrier because he carries goods by motor vehicle.

Having decided to treat *McCarter v. Brodie*, 1950, 80 C.L.R. 432, for the reasons I have given as not open to review in this proceeding, it follows in my opinion that my conclusion must be against the Plaintiff's demurrer to the defence.

I think the demurrer should be overruled.

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(b) McTIERNAN, J.

I agree with the conclusion of the learned Chief Justice that the demurrer should be overruled. Special matters are raised by the pleadings and by the argument regarding the amendments made to the State Transport (Co-ordination) Act, 1931. I do not wish to add anything about those matters. My observations represent my views on questions raised by the Plaintiff's claim for a declaration that the Act is invalid.

The principle of *stare decisis* cannot be eliminated from constitutional cases without danger to the stability of law, for important economic and social legislation rests upon the decisions of this Court. The transport cases confirm the Transport Acts of all the States. These cases could not be reversed without danger to the good order and government of the States, or without casting doubts upon the validity of Commonwealth Acts regulating interstate commerce and communications, and State Acts besides the Transport Acts. The principle of *stare decisis*, of course, is not rigid and decisions upon the Constitution are not irreversible by this Court. If such decisions were not open to review by the Court the Constitution might become obsolete as an instrument of government. Fresh interpretations of grants of legislative power and of constitutional guarantees may be needed to adapt them to new or changed conditions. It is also right for the Court to depart from a decision which is manifestly wrong, whether it involves the interpretation of a grant of power or a guarantee against certain exertions of power.

I am unable to agree that the decision in *Vizzard's* case is wrong. It was affirmed in *McCarter v. Brodie* upon the propositions which the Judicial Committee in the *Bank* case laid down with respect to Section 92. The judicial Committee refused a petition for special leave to appeal against the decision in *McCarter v. Brodie*. That was not the first occasion upon which the Privy Council refused to intervene in a case involving the question whether *Vizzard's* case was correctly decided. The case was in the foreground in *James v. The Commonwealth*. Latham, C.J., and Williams, J., have said in the course of judgments upon Section 92 that the Judicial Committee in *James v. The Commonwealth* approved of the decision in

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- Vizzard's* case. Their Honours were not members of the Court which decided *Vizzard's* case. I have always been of the same opinion. It seems to me that unless the Judicial Committee in *James v. The Commonwealth* were of the opinion that the State Transport (Co-ordination) Act was in harmony with Section 92 the references to *Vizzard's* case are pointless. In *McCarter v. Brodie* we were asked to overrule the decision in *Vizzard's* case and the transport cases which followed it. *Willard v. Rawson* which preceded *Vizzard's* case escaped attack. The Court in *McCarter v. Brodie* affirmed the decision in *Vizzard's* case. Now, we are asked to overrule
- 10 *McCarter v. Brodie* and *Vizzard's* case. The Court in the former case reaffirmed that the Transport Regulation Acts of Victoria are in harmony with Section 92. This legislation is akin to the State Transport (Co-ordination) Act of New South Wales. I adhere to what I said in *McCarter v. Brodie* about the observations made by the Judicial Committee in the *Bank* case in reference to the decision in *Vizzard's* case. These observations support the authority of the decision in the latter case. It is argued for the Plaintiff that the decision in *McCarter v. Brodie* is repugnant to the reasons and decision upon Section 92 in the *Bank* case. This argument in my opinion is wrong. Surely it is a telling reason against reviewing
- 20 *McCarter v. Brodie* and reversing it, that the Judicial Committee declined to intervene.

- Vizzard's* case was decided under a doctrine, laid down in *McArthur's* case, which extended Section 92 so widely that in effect it contradicted Section 51 (1), but as the doctrine included the theory that only the States were bound by Section 92, it did not render the Constitution unworkable. According to the doctrine, a State legislature was prohibited from regulating interstate trade or commerce as such; but *James v. The Commonwealth* impinged upon this doctrine and demolished the theory that Section 92 is addressed only to the States. The *Bank* case removed what remained of the
- 30 doctrine that regulation of trade commerce or intercourse among the States is incompatible with the freedom guaranteed by Section 92. Between *McArthur's* case and *Vizzard's* case, notwithstanding the former case, this Court decided that Section 92 did not prohibit a State legislature from passing non-discriminatory laws with a primary object directed to matters, within the legislative powers of the State, affecting its economy or the common good, even though the freedom of interstate trade commerce or intercourse was incidentally affected by the laws. I endeavoured to decide *Vizzard's* case upon that basis. I proceeded upon the American view that the transportation of goods by vehicles, which the Act requires to be
- 40 licensed, is commerce.

The difficulty that Section 92 prohibited regulation, met with in *Vizzard's* case, was not so pressing in *McCarter v. Brodie*, because the *Bank* case establishes that the regulation of commerce is compatible with its freedom. The majority in *McCarter v. Brodie* arrived at their conclusion by applying the principles and rules which the Judicial Committee worked out in the *Bank* case to test a law for invalidity under Section 92.

Rich, J., said in *Vizzard's* case that any restriction which may result from the State Transport (Co-ordination) Act to interstate trade or commerce

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would not be sufficiently direct to invalidate the Act. The refusal of a licence would, of course, result in interference with interstate commerce if the applicant for the licence were an interstate carrier; for the Act would prohibit him from operating the vehicle, for which the licence was sought, in New South Wales. But it would be a purely accidental circumstance that the carrier's activities were of an interstate character. The Judicial Committee said in the *Bank* case, that they would not attempt to define the boundary between a restriction which is direct and one which is too remote. My conclusion in *McCarter v. Brodie*, in which I endeavoured to apply the criteria laid down in the *Bank* case, was that the Transport Regulation Acts of Victoria are essentially regulatory of transport within the State, and any restriction upon interstate commerce that may arise from the operation of the Acts would not be direct and immediate but indirect and consequential. 10

I have read a copy of the petition in *McCarter v. Brodie* for special leave to appeal and of the transcript of the argument at the hearing of the petition. The reading of these documents has fortified me in the conclusion that the decision in *McCarter v. Brodie* should not be reviewed. It appears from the documents that the decision of the majority was attacked and the decision of the minority was supported with all the arguments that were addressed to us on behalf of the Plaintiff in the present case. 20 The refusal of the petition is not at all helpful to the argument, advanced for the Plaintiff in this case, that it is inconsistent with the decisions of the Judicial Committee in the *James* cases, and with the decision and reasons of the Judicial Committee in the *Bank* case, to decide that either the Transport Regulation legislation of Victoria or the State Transport (Co-ordination) Act of New South Wales, is in harmony with Section 92. The argument is founded upon the wide discretion conferred by each Act to grant or refuse licences. Notwithstanding this feature of the latter Act, the Judicial Committee said of the decision in *Vizzard's* case that it may be reconciled with the decision in *James v. Cowan*. That observation 30 should be noticed in connection with the contention, made for the Plaintiff, that the effect of the State Transport (Co-ordination) Act is to authorise the prohibition of interstate commerce at the mere will of the Executive and to put direct and immediate restrictions upon such commerce. The contention, in my opinion, is based upon a misunderstanding of the Act. I venture to say that the Judicial Committee could not have thought either in *James v. The Commonwealth*, the *Bank* case, or at the hearing of the petition in *McCarter v. Brodie*, that the contention does justice to the legislative scheme of this transport legislation. The discretion conferred to grant or refuse licences is wide but not unlimited. Authority is not 40 granted to refuse a licence merely because the applicant wants to use the vehicle, for which a licence is sought, in interstate transportation across New South Wales, nor is any authority given to refuse a licence to any applicant out of bias, prejudice or for a reason irrelevant to the purposes of the Act. It is plain from the reasons of the Judicial Committee in the *Bank* case that Section 92 does not strike at every regulatory law under which interstate commerce is not kept open to all comers. It was argued



for the Plaintiff that in a licensing scheme truly regulatory of motor transport and consistent with Section 92 the question of the facilities provided by the railways can play no part. This argument was advanced upon the hearing of the petition in *McCarter v. Brodie* for special leave. The reason why that question is out of place, so the argument runs, is that in order to maintain harmony with Section 92 it is necessary to specify the conditions with which an interstate carrier must comply. It was said that conditions directed to the safety of the public would be permissible, but subject to the proviso that the conditions impose no undue burden upon the commerce.

The scheme leaves very uncertain room for such burdens as premiums for third party insurance, workers' compensation, awards prescribing minimum wages and maximum hours of work and other burdens like pay-roll tax upon the wages of the interstate carriers' employees.

Another instance which was put of the impact of Section 92 upon State law is that an interstate carrier could complain that a toll on a bridge is an undue burden on interstate commerce unless it is "reasonable." I agree with the criticism made by Latham, C.J. in *McCarter v. Brodie* of the suggestion that an interstate carrier is entitled under Section 92 to have such a complaint investigated by a Court. If interstate carriers and passengers are entitled to make such a complaint about a toll, other charges, made by the State and the Commonwealth, in connection with interstate journeys would be exposed to challenge. In the case of the Sydney Harbour Bridge, in respect of which the suggestion was specifically made, the pursuit of the complaint, might involve an examination of the public finances of the State, and perhaps of the Commonwealth, because of the connection between them, also technical questions of depreciation and obsolescence, and political, social and economic issues. I do not agree that interstate carriers or passengers are entitled by Section 92 to object to tolls or charges which fall equally upon them and intrastate carriers and passengers and as to which there is no question of discrimination.

It is perhaps useful to observe that in New South Wales early legislation dealing with the provision of roads authorised the collection of tolls on roads. These tolls were abolished about 1890. In 1907 tolls on road ferries were abolished and local governing bodies took over the control of the ferries from the Government and it undertook to pay subsidies in respect of the running of the ferries. Ordinance 33 made under the Local Government Act provides for the payment of charges in respect of certain ferries mentioned in Clause 3 and Clause 20c. Further, certain Acts provided for the charging of tolls on particular bridges. These are the George's River Bridge, the Spit Bridge and the Parramatta River Bridge (Ryde to Concord). The Acts are Nos. 23 of 1923, 24 of 1923 and 9 of 1931. These tolls are only chargeable until the capital cost of the bridge has been repaid. Upon this event, the plan is for the Main Roads Board to take over the bridge as part of the main road to which it is attached. Section 60 of the Main Roads Act, 1924, inserted in the Act in 1929, made provision for the levying of tolls and charges generally upon any bridge or ferry upon any metropolitan main road or a country State Highway. Local

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Government Ordinance No. 30 makes provision for charging tolls on the Peat's Ferry Bridge. It appears that this bridge and the Sydney Harbour Bridge are the only toll bridges at present in New South Wales.

From the complaint made by the Plaintiff about the limiting effect of the conditions of the licences and the permits upon its freedom to choose the roads on which to operate its vehicle, it seems to me that the Plaintiff is asserting in respect of the roads and bridges of the State a right as general as that which Evatt, J. described in the passage quoted by Lord Wright in *James v. The Commonwealth*.

The Municipal and Shire Councils are empowered under Part IX of the Local Government Act, 1919, to provide and construct public roads. The provision of public roads was an original function of local government. Roads which were left in the sub-division of Crown lands were taken over by the Councils under the Local Government (Amendment) Act, 1908. The Public Roads Act, 1902, provides for roads to be declared public roads. The construction of roads, of course, was dealt with by earlier Acts. Since the passing of the Main Roads Act, 1924, roads may be proclaimed as main roads; the construction of main roads is governed by that Act, Sections 8, 14, 15, 21B, 21C, 25 and 32. A public road is defined under Section 4 of the Local Government Act, 1919, and by this Act the fee simple of every public road is vested in the Council subject to any express or implied dedication to the public. Section 249 of the Local Government Act, 1919, confers the care, control and management of every public road upon the Council in whose area it lies and permits the Council, among other things, to regulate the use of the road by the public. This section confers other specific powers on the Council in relation to public roads. Section 269 empowers Councils to regulate traffic in public places and Section 277 permits ordinances to be made in relation to particular matters concerning roads. Ordinances Nos. 30, 30C, 30D, 33 and 34 have been made in relation to road matters generally, including the weight of loads on vehicles on main roads, other roads and ferries. The powers of Councils in relation to the care, control and management of main roads are subject to Section 39 of the Main Roads Act, 1924. This Act by Section 51 also empowers ordinances to be made under the Local Government Act in relation to main roads.

It is a matter of public knowledge that roads are constructed for the convenience of all classes of traffic which can be accommodated upon the roads, as feeders for the railways, for the development of the State and often with an eye to defence. Without roads, bridges and ferries the business of motor transport could not exist but it must not be imagined that these facilities are provided under these statutory provisions primarily as aids to the business. Section 92 does not operate as a dedication of the public roads and bridges of the State to interstate transport. I cannot agree that by reason of the section, the right of the State to control its roads and bridges is so subordinate to the freedom of interstate transportation, that the State Parliament is unable to regulate motor transport with the object of preventing such conditions as Rich, J. described in *Vizzard's* case or to avoid damage to the economy of the railways and the State itself.

(c) WILLIAMS, J.

So far as the Plaintiff relies on Section 92 of the Constitution to invalidate the State Transport (Co-ordination) Act, 1931-1950 (N.S.W.), or certain sections thereof, it is common ground that unless *McCarter v. Brodie* (80 C.L.R. 432) is overruled, the Plaintiff must fail because the essential provisions of this Act are similar to those of the Transport Regulation Act, 1933-1947 (Vic.) and the latter Act was held in this Court by a majority of four to two not to infringe Section 92. The present action has been brought in the hope that changes in the constitution of the Court might result in that case being overruled. I think that case was rightly decided and I did not intend to say more than that, in my opinion, it should be followed, with the consequence that the Plaintiffs' case so far as it rests on Section 92 should fail. But the views of the majority (particularly my own) in that case are under attack and in particular it has been said that they are inconsistent with the three decisions upon the meaning of Section 92 given by the Privy Council and this moves me to add a few remarks to what I have already said. My brother Kitto has said of the transport cases that the Judgment in the *Banking* case wrote their epitaph in characters too plain to be missed or to be mistaken. Yet, of *Vizzard's* case, the principal case, what the Privy Council actually said in the *Banking* case was that "The decisions in *James v. Cowan* and in "*Vizzard's* case may be reconciled; it would not be easy to reconcile all that was said by Evatt, J. in the one case with all that was said "by Isaacs, J. in the other." This is, with respect, a somewhat obscure epitaph for a long line of cases acted upon in the States which I venture to repeat should not be reopened without the greatest hesitation. Then there is the fact that in *McCarter v. Brodie*, after a very full argument, special leave to appeal was refused by the Privy Council presided over by Lord Porter, who also presided in the *Banking* case. Their Lordships gave no reasons and too much significance should not be attached to this refusal. But one of the reasons which their Lordships gave in the *Banking* case for taking the unusual course of stating their views on the meaning of Section 92 in a case in which they held they had no jurisdiction to entertain the appeal was that it appeared to them that a large part of the Appellant's argument was based on a misapprehension of the two previous cases decided by the Board. One might therefore have expected that their Lordships would have again intervened, if it appeared to them that this Court in *McCarter v. Brodie*, consistently with what they had said, could not have upheld the Victorian Act.

Does not the correctness of the decision in *McCarter v. Brodie* really depend on what their Lordships meant when they said that regulation of trade commerce and intercourse among the States is incompatible with its absolute freedom? If by regulation they meant regulation that went no further than prescribing rules of conduct reasonably required for the orderly carrying on of some form of trade and commerce with which it should be possible for everyone to comply and subject to which everyone would have the right to engage therein, it may be that the Transport Acts

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go too far. But is the regulation their Lordships contemplated as narrow as this? The general tenour of their remarks appears to me to be to the contrary. They say: "The problem to be solved will often be not so much legal as political, social, or economic, yet it must be solved by a court of law." They contemplate that in certain circumstances, no doubt very exceptional, "It might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation, and that inter-State trade, commerce, and intercourse thus prohibited and thus monopolised remained absolutely free." They cite a passage from the Judgment of Latham, C.J. in the *Milk* case, reproduced in his Judgment in the *Airways* case, which reads as follows: 10

"One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further, a law which is 'directed against' interstate trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade, notwithstanding Section 92." Their Lordships added, "With this statement, which both repeats the general proposition and precisely states that simple prohibition is not regulation, their Lordships agree." 20

A glance at the *Milk* case will make it clear that the rules to which Latham, C.J. was referring were certainly not confined to rules which left it open to everyone to compete in the industry, because the Act there in question provided for the expropriation of all the owners and the vesting of their milk in a board, the justification being that the expropriation was directed towards fixing the price for the sale of the milk in the metropolitan district of Sydney and its hygienic treatment and distribution so as to safeguard the health of the inhabitants of that district. The Privy Council has twice, at least, referred to the meaning of "regulation." In *A.-G. for Ontario v. A.-G. for the Dominion* (1896 A.C. 348 at p. 363), their Lordships said that they saw no reason to modify the opinion which was recently expressed on their behalf by Lord Davey in *Municipal Corporation of the City of Toronto v. Virgo* (1896 A.C. 88, at p. 93) in these terms: "Their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed." There is no suggestion in this definition that the regulation of some form of trade and commerce cannot in appropriate circumstances restrict the number of persons authorised to engage in it. The thing which is to continue to exist is the trade itself and not the right of every individual to engage in it. 40

I have never doubted that the freedom to engage in trade and commerce among the States guaranteed by Section 92 attaches to the individual and not to the goods. But their Lordships have said in the *Banking* case that regulation of trade and commerce among the States is compatible with its absolute freedom and, if I understand them aright, that there may

be instances in which such regulations will not infringe this freedom, although it extends to excluding some individuals from engaging in it. One instance might be where the particular form of trade and commerce, possibly banking or life insurance, involves requirements, such as great financial stability and permanence, which make it proper to provide that only corporations should be authorised to take part therein. This would have the effect of excluding all individuals from directly engaging in these activities and would only allow them to do so indirectly as shareholders in or executives of a corporation. Provided regulation can, where there are

10 exceptional circumstances, go beyond the limited conception of regulation under discussion, there is every reason for upholding the transport cases. Australia is a land of great distances inhabited by a comparatively small but growing population. The maintenance and extension of its railways and roads to keep pace with the growth of its population and the development of the country present an acute economic problem. It is obviously for the benefit of the country that it should possess first-class roads, especially main roads, but it is equally obvious that the States by constructing and maintaining such roads can injure their railways, unless they are entitled to control such competition and give carriage by rail

20 priority where carriage by rail and road come into competition.

Their Lordships have said that the problem to be solved, whether an enactment is regulatory or something more, is one of fact as to which there cannot fail to be differences of opinion. That is exactly what has happened in the transport cases. There are now, and have always been, differences of opinion on this Court. But that is not a ground for upsetting a long line of previous decisions, even on a constitutional issue, especially where those decisions are open to review in the Privy Council if special leave is granted without the necessity of obtaining a certificate from this Court under Section 74 of the Constitution. Section 92 does not say that anyone either

30 the Commonwealth or a State or a private individual must provide anyone else with any facilities for carrying on trade and commerce among the States. A person who wishes to carry goods by road interstate requires the necessary vehicles in which to carry the goods as well as the necessary roads on which to carry them. He may not be able to obtain the vehicles he requires in Australia and may have to import them from overseas. But it has never been contended that import laws which prevent him from doing so are a breach of Section 92. The problem of controlling and co-ordinating modern fast moving transport by rail and road is world-wide. Many of the provisions of Section 17 of the New South Wales Act are taken from

40 Section 72 of the English Road Traffic Act, 1930, relating to passenger transport. In this Act the expression occurs "the co-ordination of all forms of "passenger transport, including transport by rail." The same problem exists in the United States of America and is discussed in many cases, examples of which are *Buck v. Kuykendall* (69 L. Ed. 623); *Bush v. Maloy* (69 L. Ed. 627) and *Fry Roofing Company v. Wood* (97 Advance Reports 145.) The power of Congress to make laws under the Constitution of the United States to regulate commerce among the States is, unlike the power to make laws with

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respect to that subject matter under Section 51 (1) of the Australian Constitution, an exclusive power and it has therefore been held in the United States that laws similar to the transport acts are beyond the legislative powers of the States. But it is clear from the judgments in these cases that the power of Congress to regulate commerce is wide enough to authorise laws regulating competition between rail and road. The purpose of the New South Wales Act is to improve and co-ordinate the means of and facilities for locomotion and transport, the official charged with its administration now being a corporation sole, the Director of Road Transport. The principal section is Section 17. The discretion conferred upon him by this section is extremely wide but it is not unlimited. It must be exercised *bona fide* and so as to carry into effect the purposes of the Act. Otherwise the duty to exercise the discretion according to law could be enforced by mandamus. It is wrong to say that the Act is in no way concerned with roads or the use of roads as such. Section 17 provides that one of the considerations the Director must have regard to is the condition of the roads to be traversed with regard to their capacity to carry the proposed vehicular traffic without unreasonable damage to such roads. Apart from the competitive angle, a State must have, I should think, wide powers of regulating the use of its roads in the interests of public safety and their maintenance. It must have the power within reason to decide for what kinds of vehicles the roads are suitable. It must have power to limit their length, width, height and weight. It must have power to prevent overcrowding though this would have the effect of limiting the number of vehicles. 10

The problems dealt with in the transport cases are altogether different from the problem that arose in the *James* cases. Their Lordships have said so in the *Banking* case. They said of these cases and *Vizzard's* case: "The facts in relation both to subject-matter and to manner of restriction or interference are so widely different in the two cases that it is difficult to apply to one case all that was said in the other." The effect of the State and the Commonwealth legislation impeached in the *James* cases was to prevent growers of dried fruit disposing of their product interstate unless they could get a licence to do so and, if they got a licence, only to the extent authorised by the licence. The Transport Acts do not prevent anyone carrying on the business of an interstate carrier. What they do is to compel carriers to rely on such vehicles, whether publicly or privately owned, as the States authorise to use the railways or the roads which the States themselves provide. In this connection it should be noted that the passage from the judgment of Evatt, J., which received the approval of the Privy Council in *James v. The Commonwealth* stated that Section 92 does not give to the owner of goods which are to be carried interstate or to the contractor who carries them the right to choose "how" each of them will transport the commodities. 30

It was also contended for the Plaintiff that the road charges are an excise duty and therefore beyond the constitutional power of the States. Section 90 of the Constitution. In my opinion this contention fails. On this point I agree with the reasons for judgment of the Chief Justice. 40

I would overrule the demurrer.

(d) WEBB, J.

I would overrule the demurrer.

There has not been any change in this New South Wales transport legislation which renders inapplicable to the legislation as to how stands the decision of this Court in *R. v. Vizzard ex parte Hill* (50 C.L.R. 30), Sections 17 and 18 are in the same terms as they were when that case was decided : they still empower the licensing authority to grant or refuse a licence, and to amend the conditions of a licence, and to do so in the uncontrolled discretion of the authority as I read them. They could hardly be made  
 10 more open to attack under Section 92, short of being expressly directed against interstate transport.

In *McCarter v. Brodie* (80 C.L.R. 432 at 478) I was one of the majority of the Court that held that *Vizzard's* case should be regarded as having been rightly decided. It appeared to me that the reasoning of Evatt, J., in that case had received the imprimatur of the Privy Council in *James v. Commonwealth* (1936 A.C. 578 at 622) and that this had not been withdrawn by their Lordships in the *Banking* case (1950 A.C. 235). On the contrary their Lordships in suggesting how far regulations might go without infringing Section 92 said in the *Banking* case, *supra* (at p. 311) :—

20 “ For their Lordships do not intend to lay it down that in  
 “ no circumstances could the exclusion of competition so as to  
 “ create a monopoly either in a State or Commonwealth agency  
 “ or in some other body be justified. Every case must be judged  
 “ on its own facts and in its own setting of time and circumstance,  
 “ and it may be that in regard to some economic activities and  
 “ at some stage of social development it might be maintained  
 “ that prohibition with a view to State monopoly was the only  
 “ practical and reasonable manner of regulation, and that inter-  
 “ State trade, commerce and intercourse thus prohibited and thus  
 30 “ monopolized remained absolutely free.”

I have no reason for thinking that in making those observations their Lordships had in mind nothing more than the possibility that Socialism or State Capitalism might some day be adopted in Australia : the stage of social development that they appear to have contemplated was one at which some, but not necessarily all, economic activities might be made the subject of a State monopoly. As regards postal, telegraphic, telephonic and the like services, Australia appears to have long since reached the stage when those services can be made the subject of a State monopoly without infringing Section 92. Yet the power to legislate in respect of  
 40 those services is subject to the Constitution, including Section 92. See Section 51 (v) of the Commonwealth Constitution. It is not an answer to say that the postal monopoly existed before Federation. So did other things that Section 92 rendered invalid.

However, their Lordships in the *Banking* case, *supra*, did not think that a stage had yet been reached when the activities of banking could

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be made the subject of a State monopoly without a breach of Section 92. But I do not think it follows that they necessarily entertained the same view about road transport. The banking situation and the road transport situation are constituted of entirely different sets of fact, and questions that arise under Section 92 are always questions of fact, as has been pointed out by the Privy Council in *James v. Commonwealth, supra*, in a passage at p. 631 referred to in the *Banking* case, *supra*, at p. 309. As their Lordships pointed out in the *Banking* case (at p. 309)—“The facts in “relation both to subject matter and to manner of restriction or interference “are so widely different in the two cases that it is difficult to apply to one “case all that was said in the other.” Their Lordships had already pointed out (at p. 308) that every word of every judgment must be read *secundum subjectam materiam*. 10

If their Lordships reviewed the Australian road transport situation as it now exists I do not feel warranted in concluding from their observations in the *Banking* case, *supra*, that they would necessarily hold invalid this New South Wales transport legislation, or any other State’s transport legislation which has come under review in this Court. After all in no case does such legislation go to the length of authorising a State or other monopoly ; and it may well be that in no case can it be shown that it is not called for by the factual situation with which it deals, apart from the necessity to obey Section 92. I repeat here what I said in my reasons for judgment in *McCarter v. Brodie, supra* (at p. 481) : “If economic activities “at some stage of social development could justify legislation giving a “monopoly as being essentially regulatory, legislation short of that might “be essentially regulatory in circumstances not so exceptional, e.g., “legislation to co-ordinate and nationalise motor transport to protect “State railways against competition.” 20

Nothing has occurred to cause me to change the opinion I formed in *McCarter v. Brodie, supra*, in the light of their Lordships’ observations in *James v. Commonwealth, supra*, and the *Banking* case, *supra*, although without the guidance afforded by those observations as I understand them I would have come to a different conclusion, as appears plainly enough in what I said in *McCarter v. Brodie* (at p. 482), and which is now recalled by Fullagar and Kitto, JJ. The Privy Council refused special leave to appeal against the decision in *McCarter v. Brodie, supra*, but it by no means follows that in refusing special leave their Lordships approved of that decision. It may be that their Lordships merely took the view that for the time being at all events they had given sufficient guidance, more particularly in the *Banking* case, for the determination of Section 92 40 problems, seeing that they had indicated that those problems will often be not so much legal as political, social or economic, and that it is possible that valid solutions might cover a range so wide according to time and circumstances as to comprise even a State monopoly. Here it is to be noted that Evatt, J. in *Vizzard’s* case, *supra* (at pp. 81 and 82) referred to



partial and even complete monopolies of land transport as being already within the power of a State. To say the least this has not yet been expressly denied by their Lordships.

I desire to add my respectful concurrence in the reasons of Williams, J. in *McCarter v. Brodie*, *supra* (at p. 477), for not re-opening these transport cases without the greatest hesitation.

I should also add that in my opinion charges imposed by this legislation do not infringe Section 90 of the Commonwealth Constitution. *O. Gilpin Limited v. Commissioner of Road Transport and Tramways (N.S.W.)* (52 C.L.R. 187 at 214).

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(e) FULLAGAR, J.

After a careful consideration of this case, I have not been able to see the slightest reason for changing, or modifying in any way, the opinion which I expressed in *McCarter v. Brodie* (1950) 80 C.L.R. 432. But, although I found myself in agreement with the present Chief Justice, and although my brother Webb (80 C.L.R. at p. 482) found it "difficult to see" how the legislation in question in that case could be regarded otherwise than as "prohibitive or restrictive," the view of the learned Chief Justice and myself did not prevail. The consequence of these two facts is that I seem now to be faced with a choice between two evils—saying that the majority decision in *McCarter v. Brodie* ought not to be followed, or accepting a view which appears to me to strike at the roots of interstate freedom of trade. I do not think that I shall be repeating anything that I said in *McCarter v. Brodie* if I begin by stating, as briefly as I can, the foundation of the position as I see it.

The difficulties and differences of opinion to which Section 92 has given rise have seemed to me to derive not so much from any supposed ellipsis (the supposition of an ellipsis is indeed apt to be misleading) as from the fact that the section is expressed in abstract terms but has to be applied in relation to concrete facts and situations. One might almost say that we have to deduce a denotation from a loosely expressed connotation. Because of this it was inevitable—and it was by no means unforeseen among those who were responsible for the section—that attempts should be made to apply Section 92 to cases remote from the imagination of those who framed, those who adopted, and those who enacted, the Constitution. It may be that the section, as interpreted, has not only left undone things which it ought to have done but has done things which it ought not to have done. But it has always seemed to me that legislation of the nature of that with which the present case is concerned, and with which *McCarter v. Brodie* was concerned, is just *the very kind of thing* which Section 92 was designed to prevent.

It has often been observed that interstate free trade is probably a fundamental necessity of any federal system. In the case of Australia it

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was a primary object of Federation. When the Constitution was framed, the most prominent consideration which led to the adoption of Section 92 lay doubtless in the existence of customs duties, which were, before Federation, imposed by the States (then called Colonies) upon a great variety of goods not only when imported from overseas but also when imported from another State. But I do not think the idea has ever been seriously entertained that Section 92 was concerned only with these inter-state customs duties as such. One of several answers to any such view is found in the fact that Section 90 has already provided that the power to impose duties of customs and excise, and (subject to the exception prescribed by Section 91) the power to grant bounties on the production or export of goods, shall be exclusive powers of the Commonwealth. At the same time, as was observed in *James v. The Commonwealth* (1936), A.C. 578, 55 C.L.R. 1, it cannot be doubted that the fundamental conception behind Section 92 was that of a "free border": every person was to be at liberty to take or send goods from State to State (trade and commerce) and to pass from State to State upon his lawful occasions (intercourse) without let or hindrance. There is a passage in the judgment of Higgins, J., in *McArthur v. Queensland* (1920) 28 C.L.R. 530, at p. 561, which is worthy of remembrance in this connection. As to the most important point which it decided, *McArthur's* case has been overruled by *James v. The Commonwealth* (1936) A.C. 578, 55 C.L.R. 1, and as to other points its authority is perhaps dubious to-day: even the examples taken by Higgins, J., himself of invalid State legislation must be regarded as open to question. But I know of nothing which better captures the spirit of Section 92 than the short passage which I have in mind. His Honour says: "Section 91 is really an exception to the provision of Section 90 as to bounties, and, when Section 91 is seen in this aspect, Section 92 appears in its true character, as extending the application of the principle contained in Section 90—no more State imposts (Section 90)—no more State restrictions of any kind, present or future, on interstate trade or intercourse (Section 92)." It is now settled, of course, that the Commonwealth is bound by Section 92 equally with the States, so that for the words "State restrictions" we should, for general purposes, substitute the words "border restrictions." But, for the purposes of the present case, in which it is State legislation that is involved, the passage may be read as it stands.

Now, an import or export duty does not necessarily operate to restrict seriously or at all the trade of an importer or exporter. We are accustomed in this country to heavy protective duties, designed to an extent to deter and restrict. But a small duty, imposed for revenue purposes and readily "passed on" may not really restrict the importation or exportation of goods by any individual importer or exporter to any appreciable extent. Nevertheless, one would suppose it quite beyond argument that the imposition of any duty on interstate imports or exports would infringe Section 92. If it were imposed by a State, the matter would be covered by Section 90: if it were imposed by the Commonwealth, it would be covered by Section 92. There would be a burden imposed, real though light. But there are other

familiar methods of controlling the passage of goods across frontiers, which are in their nature necessarily restrictive. At least two of these, be it noted, are quite commonly found in customs legislation: they are to be found in the existing Customs Act of the Commonwealth and Regulations made under Sections 56 and 112: see *Reg. v. McLennan: ex parte Carr* (1952) A.L.R. 704. These methods include total prohibitions, prohibitions subject to discretionary licences or exemptions, and the imposition of quotas. Each of these methods is obviously and necessarily restrictive of the trade of every person affected by it. In the first case the restriction affects every person who is capable and desirous of engaging in the trade. In the second case, the restriction affects every such person who cannot obtain a licence. In the third case the restriction affects every such person when once the quota is exhausted. Every such person so affected is simply prohibited from engaging in the trade. No valid distinction for the purposes of Section 92 can be drawn among the three methods. A famous example of a quota system—held to infringe Section 92 because it prohibited interstate (as well as intrastate) sales in excess of the quota—is *James v. South Australia* (1927) 40 C.L.R. 1. The correctness of the decision of this Court in that case was strongly challenged in *James v. Cowan* (1932) A.C. 542, 47 C.L.R. 386, and the emphatic approval of the decision ( (1932) A.C. at p. 555) is not the least important feature of that vitally important case. It was in relation to this “quota system” that Lord Atkin used the words: “If this leaves interstate trade ‘absolutely free,’ the constitutional charter might as well be torn up.”

It may be mentioned here that another point strongly argued for the Respondents in *James v. Cowan* was that a law could not infringe Section 92 unless it dealt solely with interstate trade as distinct from intrastate trade or dealt differentially with interstate trade and intrastate trade: “discrimination,” it was said, was the test. This argument also was unequivocally rejected. The same view had been previously taken in this Court. Since *James v. Cowan* it has never been doubted that a law which is restrictive or burdensome of trade generally will be struck by Section 92 in so far as (though, of course, only in so far as) it operates on interstate trade.

The three examples of restrictions on trade and commerce which I have taken above by no means exhaust the category of what may be held to be restrictive or burdensome for the purposes of Section 92. To illustrate this, it is necessary only to refer to *Fox v. Robbins* (1908) 8 C.L.R. 415 and *Vacuum Oil Coy. v. Queensland* (1934) 51 C.L.R. 108, 677. I have taken those three examples only because they appear to be particularly clear, to be within the narrowest possible view of the scope and intentment of Section 92, and to be entirely apposite to the present case. Each represents a *kind* of restriction which is inconsistent with any conception of freedom of trade.

The Act in question in *McCarter v. Brodie* (1950) 80 C.L.R. 432, and the Act in question in this case, impose restrictions of *that kind* on the trading or commercial activities of persons who transport goods from one State to another. It was once disputed that the transportation of goods from State

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to State constituted interstate commerce. It was said that such transportation was an instrument whereby commerce was carried on but was not itself commerce. This view undoubtedly played a part in the earlier “Transport Cases.” One would have thought such a view untenable. In the United States the transportation of goods has been regarded as commerce—one might say commerce *par excellence*—ever since *Gibbons v. Ogden* (1824) 9 Wheat. 1. So has the transportation of passengers ever since *New York v. Miln* (1837) 11 Pet. 102. The contrary view was rejected by this Court in *Australian National Airways v. The Commonwealth* (1945) 71 C.L.R. 29, and the accepted view is now that expressed by Dixon, J., in *R. v. Vizzard : ex parte Hill* (1933) 50 C.L.R. 30, at p. 59. His Honor there said : “ There is, I think, no act or transaction which better answers the “ description of trade commerce and intercourse between the States than the “ carriage of merchandise from a place in one State across the border to a “ place in a neighbouring State.”

When these things have been said, it should not be necessary to say anything more. The legislation in question stands forth as a conspicuous breach of Section 92 in its plainest and most elementary aspect. Why, then, is it that, whereas the famous Mr. James successfully claimed the protection of Section 92 in three leading cases, persons engaged in interstate transport by land have claimed that protection in vain? Mr. James wanted to deliver dried fruits grown by him in South Australia to buyers in other States. He was told that, after he had sold a certain proportion of his crop, he could not do this. Mr. McCarter wanted to carry beer manufactured in South Australia to a buyer in New South Wales. He was told that, unless he obtained a licence, he could not do this, and, when he applied for a licence, it was refused. What is the difference between the two cases? Why was the same legal privilege conceded to James but denied to McCarter? The difficulty of answering this question is, of course, enormously increased by the fact (which I pointed out in *McCarter v. Brodie*) that an Act having precisely the same effect as the transport legislation was held invalid by the Privy Council in *James v. The Commonwealth*. It is not susceptible, in my opinion, of any real answer.

I do not intend to repeat what I said in *McCarter v. Brodie* (1950) 80 C.L.R. 432, and it would be idle to review the cases again. I wish, however, to refer very briefly to the general development, and to mention particularly one case which I only mentioned in passing in *McCarter v. Brodie*.

I do not repent of referring to *R. v. Vizzard : ex parte Hill* (1933) 50 C.L.R. 30 as “*fons et origo malorum*.” The Court which heard that case consisted of six justices. Starke, J. and Dixon, J. dissented. In all later cases in which he sat, Starke, J. refused to abandon the view which he had expressed in *R. v. Vizzard*. In *Gilpin's case* (1935) 52 C.L.R. 189 the doctrine of *R. v. Vizzard* was very seriously extended, because there the Plaintiff Company was transporting its own goods in its own vehicle from its business establishment in one State to its business establishment in another State. Yet Section 92 did not protect it from a State enactment which

prohibited it from so doing. In this case Dixon, J. again dissented in a judgment with the whole of which I would most respectfully agree. Though again refuting the decision in *R. v. Vizzard*, however, his Honor was of opinion that *Gilpin's* case was distinguishable from that case. In *Bessell v. Dayman* (1935) 52 C.L.R. 215 (in which the judgment was delivered on the same day as that in *Gilpin's* case) Dixon, J. again dissented. In *Duncan & Green Star Trading Coy. v. Vizzard* (1936) 53 C.L.R. 493, however, he said simply that he regarded the case as "completely covered" by the decisions of the majority in the earlier cases, and he adopted the same attitude under strong protest in the *Riverina* case (1937) 57 C.L.R. 327.

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In the *Airways* case (1945) 71 C.L.R. 29 provisions in a Commonwealth Act relating to the transport of goods and passengers by air, which were (to say the least) not readily distinguishable from the provisions of State Acts attacked in earlier cases, were held by a unanimous Court to be invalidated by Section 92. Interstate carriers by air thus escaped the fate which had befallen interstate carriers by land. I cannot myself see any sound distinction between transport by land and transport by air or between either of these and transport by sea. I hasten to add, however, that Dixon, J. (71 C.L.R. at p. 90) based a distinction largely—in the last analysis, I think, entirely—on the fact that in the earlier cases the question had been treated as being whether the legislation attacked "obstructed, restricted, retarded or impaired, not some operations of commerce considered separately or in isolation, but the commerce between Victoria and New South Wales considered as a whole." This was, of course, at that time, a legitimate ground of distinction. The point so put had been of the very essence of the argument presented by the Counsel who were successful in *R. v. Vizzard* (1933) 50 C.L.R. 30.

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A word should be said at this point about the *Riverina* case (1937) 57 C.L.R. 227, because it well illustrates the dangerous potentialities of the doctrine of *R. v. Vizzard*. The Victorian Transport Regulation Board, acting on a direction from the Governor-in-Council, had granted licences to carry goods on routes within Victoria to all persons who had been providing satisfactory services before the Act of 1933 came into force. But, apart from an immaterial exception, every application for a licence which would have permitted the carrying of goods across either of Victoria's State borders was refused. The position is explained fully in the judgment of Dixon, J. (57 C.L.R. at pp. 360-2). I will quote one passage: "The practical result was that up to the border of New South Wales and South Australia the carriage of goods by motor vehicles, both in competition with the railways and otherwise, was licensed wherever before 29th August 1933 it had been carried on and the service or trade, or a succession therein, had been maintained. But, apart from carriers licensed for a twenty-mile radius, no through journey was permitted over either border. Thus, for the carriage of goods exclusively within the State a facility is widely allowed which is denied if the border is crossed." The powers given by the Act were thus used to stop an existing class of inter-

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state commerce while permitting the same class of intrastate commerce to continue in existence. If the Act was valid, the interstate operator was, of course, without redress. He had no means of compelling the issue of a licence, and, if he operated without a licence, he was guilty of an offence. The case shows that (as I pointed out in *McCarter v. Brodie* 80 C.L.R. at p. 499) such legislation can be used to implement any kind of Government policy, however at variance with Section 92. One is tempted to say that the *Riverina* case represents the *reductio ad absurdum* of Section 92.

If *McCarter v. Brodie* had come before the Court in this state of authority, I should certainly have recorded a protest, but I might have accepted the "Transport Cases" which preceded the *Airways* case, if only as an *auto-da-fe*. In the meantime, however, the *Banking* case (1950) A.C. 227, 79 C.L.R. 497, had been decided by the Privy Council. What was said by Lord Porter for their Lordships in that case appeared to me, as I have no doubt it appeared to Dixon, J. (as he then still was), to vindicate, completely and indisputably, the view of Section 92 which had been taken throughout by Starke, J. and Dixon, J.—and, one may add, by many other Australian lawyers. The same view had been clearly implicit in the dissenting judgment of Isaacs, J. in *James v. Cowan* (1930) 43 C.L.R. 386, which received the approval of the Privy Council ( (1932) 20 A.C. at p. 561). A controversy of great importance had at last been settled. I gave my decision in *McCarter v. Brodie* accordingly.

It is of some importance to remember that the view of Section 92 which formed the basis of the transport cases before *McCarter v. Brodie* was of the very essence of the argument against the banks in the *Banking* case. When once it was held that the banks were engaged in interstate commerce within the meaning of Section 92, no way of escape from Section 92 appeared except by means of that view. The refutation of the propositions which Lord Porter ( (1950) A.C. at pp. 305–6 ; 79 C.L.R. at pp. 635–6) refuted was taken as leading automatically to the conclusion that interstate banking was protected by Section 92. When once it is held (as it must be held) that those who carry goods from State to State are engaged in interstate commerce, the same refutation must inevitably lead to the same conclusion.

In *McCarter v. Brodie* (1950) 80 C.L.R. 432, however, the ground of the transport cases was shifted. The idea that the carrying of goods was a means whereby commerce was carried on, but was not itself commerce, was abandoned. The "volume of trade" theory of Section 92, and the theory that Section 92 did not protect individual persons, were abandoned, or perhaps it would be more correct to say that they concealed themselves in a silent background. At the same time, no generally accepted basis on which the legislation could be held valid was arrived at. Practically speaking, two new grounds for so deciding emerged. These were in substance (1) that the legislation in question was merely "regulatory," and (2) that the States, because they provided facilities for transport, must have power to control the use of facilities for transport in any manner

thought fit. The second ground had been foreshadowed in the judgment of Williams, J. in the *Airways* case (1945) 71 C.L.R. 29.

With regard to the first ground, I simply refer to what I said in *McCarter v. Brodie* 80 C.L.R. at pp. 495-9, adding a reference to the important case of *Barry v. City of Melbourne* (1932) 31 C.L.R. 174. I gave a number of examples of "regulation." Section 92 protects individuals (like Mr. James), and any individual who finds himself prohibited from crossing a State border is entitled to invoke its protection.

10 With regard to the second ground, I speak with all respect, but it is, to my mind, not really a ground at all. In the last resort I can find no real foundation for it except expediency. The question of expediency is itself one of a highly controversial character, and I am not able to regard the reference to political and economic problems in the Judgment of their Lordships in the *Banking* case (1950) A.C. at p. 310 ; 79 C.L.R. at p. 639 as an invitation to treat questions of expediency as decisive or even important in such a case as the present. I would not, of course, deny that a constitution must be interpreted against a political, social and economic, background, but this cannot mean that it is proper to give to a particular provision one meaning where bankers and air-line operators are concerned and another meaning where carriers by land are concerned. The two questions which always arise when Section 92 is invoked are (1) whether the acts for which immunity is claimed possess the character of interstate trade, commerce or intercourse, and (2) whether the law from which immunity is claimed possesses, so far as it affects those acts, the character of an interference with freedom. The policies or interests of States, considered as separate political units, cannot assist in providing an answer to either question. Section 92 embodies an Australian policy which is paramount.

30 When Section 92 spoke in 1900 of commerce and intercourse "by internal carriage," it meant, of course, *inter alia*, commerce and intercourse by means of public highways. At the same time, nobody has ever doubted that State legislation may, consistently with Section 92, control the use of its highways in a variety of ways, even though those highways are used for interstate commerce and intercourse. A State Parliament may make a law providing for a maximum width of tyres, for a maximum weight to be carried by any vehicle, and for all sorts of purposes of the kind which I described in *McCarter v. Brodie*, 80 C.L.R. at pp. 495-6. But the Act in question here cannot be justified as an exercise of any such power. It is in no way concerned with roads or the use of roads as such. Its object and character are even clearer than those of the Victorian Act considered in *McCarter v. Brodie*. It is aimed at journeys which are "competitive with the railways." Graduated charges are imposed based on the mileage over which a vehicle is competitive with the railways. The Act deals with transport by air as well as transport by road. The State is conceived as a person having an interest in a large industry, in which it should be able to protect itself against competition, including interstate competition and competition in interstate trade. Therein is the whole substance of the

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In the High Court of Australia. legislation. It is no way conditioned by the fact that the State maintains, or has the function of maintaining, public highways.

New South Wales Registry. I am well aware that the fact that the State is protecting, or trying to protect, its railways against competition is put as an argument in favour of the validity of the legislation. It is said that "it is simply an exercise of the sovereign rights of the States to co-ordinate traffic by rail or road, and to confine the use of the roads to particular persons and vehicles."

No. 2. Judgment. 16th April 1953. But it is not a matter of right but of power, and the legislative powers of the States are subject to Section 92. A State may prohibit, wholly or to any extent it pleases, the intrastate carrying of goods or passengers. But it must leave free the carrying of goods or passengers from another State

(e) Fullagar, J. —continued. into its own territory and from its own territory into another State. The sentence quoted has no bearing on the question whether Section 92 is being infringed. The use of the word "co-ordinate" is merely a reversion to the discredited volume theory of Section 92. It seems indeed to me to be a most extraordinary thing to say that the fact that the legislation is protective, or intended to be protective, of the railways takes it outside Section 92. To begin with, "the matter depends upon the effect of the legislation, not upon its purpose" (per Lord Sumner in *A.G. for Manitoba v. A.G. for Canada* (1929) A.C. 260, at p. 268, quoted by Isaacs, J., in *James v. Cowan* (1930) 43 C.L.R. 386, at p. 421). And, when the effect of the legislation is seen to be restrictive of the interstate commerce of individuals (like Mr. James), to say: "Yes, but we wanted to protect a State industry, and the protection would only be about seventy-five per cent. effective if we did not restrict interstate commerce" is surely not to meet the argument based on Section 92 but to drive it home and clinch it. No legislation could have been more "well-intentioned" than the Dried Fruits Act 1924–1925 of the State of South Australia.

In the light of this survey (which has been longer than I had hoped) this case must be decided. It is, of course, in general, a very bad thing that decided cases should not be followed. That proposition can hardly be over-emphasised. But the position in this case is very exceptional. One cannot ignore the grave potentialities of the views which prevailed in *McCarter v. Brodie*, and it is difficult to put on one side one's conviction that those views are inconsistent with three decisions of a superior tribunal.

I have already observed that the ground of the Transport Cases was shifted in *McCarter v. Brodie*. But no true *ratio decidendi* emerged as the view of the majority. Two views emerged. The first was that the legislation in question was merely "regulatory" and therefore permitted by Section 92. That it was "regulatory" of the volume of commerce I would concede. But it was prohibitive of the commerce of every individual who was not allowed to engage in the commerce. It should not be forgotten that Lord Atkin (1932) A.C. at p. 558, 47 C.L.R. at p. 396 said: "The Constitution is not to be mocked by substituting executive for legislative interference with freedom." At this point, however, I am not so much concerned with the correctness of the view in question as with its far-reaching character. Absolute prohibition is said to be contrary to Section 92. But,



if prohibition subject to discretionary exemption or licensing is "Regulation," that seems to me to deprive Section 92 of most of its practical effect. Anything that is desired can be achieved by simply setting up a Board with power to grant licences to do something either absolutely or subject to conditions, and making it an offence to do that thing without a licence or in breach of a condition imposed.

The second view was that the States, because they provided facilities for transport, must have power to control the use of those facilities in any manner thought fit. This view is possibly even more far-reaching. The argument cannot really be made to depend on the fact that the States own the railways. The supposed practical exigencies of the situation might be precisely the same if the railways were owned by a private corporation. If that were so, the argument would not be less open or be more or less cogent. Further, the argument cannot really be made to depend on the fact that it is railways that are in question. If State legislation protective of State-owned railways falls outside Section 92, why should State legislation protective of any other State-owned industry fall within it? Or, for that matter, legislation protective of any other privately owned industry? For it may be just as much in the interests of a State, considered as a separate body politic, to protect a privately owned industry within its borders. The argument can hardly stop short of saying that, wherever a real State interest is involved, there is immunity from Section 92. I find it impossible to foresee where it will lead, and I would repeat what I said in *McCarter v. Brodie*, 80 C.L.R. at p. 499. If it all comes back to "co-ordination," well and good. But that depends, as I have said on the discredited "volume" theory.

I must weigh in the scale in addition my opinion that the majority decision in *McCarter v. Brodie* is inconsistent with *James v. South Australia*, which was approved in *James v. Cowan*, with *James v. Cowan* itself, with the decision on the Commonwealth Act in *James v. The Commonwealth* and with the conclusion and the reasons for the conclusion in the *Banking* case.

Having regard to all these matters, and to what I regard as the altogether exceptional nature of the position with which I am faced, I feel, albeit with reluctance, that my proper course, for better or worse, is to adhere in this case to the view which has seemed, and still seems, to me to be the right and sound view. I find a degree of reassurance in the fact that Starke, J., followed throughout the course which I now follow.

In my opinion, the demurrer should be allowed.

40 (f) KITTO, J.

In *McCarter v. Brodie*, 1950, 80 C.L.R. 432, the Court held, by a majority, that certain provisions of the Transport Regulation Acts, 1933-1947, of the State of Victoria were not in conflict with Section 92 of the Commonwealth Constitution. The present case is concerned with provisions of the State Transport (Co-ordination) Act, 1931-1950, of the State of New

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South Wales, which so nearly resemble the Victorian provisions considered in *McCarter v. Brodie* that if that case is to be accepted as rightly decided a similar decision must be given now. We have therefore to decide whether we ought to apply *McCarter v. Brodie* either because we agree with it, or because we consider that its authority should be accepted whether we agree with it or not.

The question which confronted the Court in *McCarter v. Brodie* was, in essence, whether there is a conflict between, on the one hand, the insistence of Section 92 of the Commonwealth Constitution that trade commerce and intercourse among the States shall be absolutely free, and, on the other hand, a statutory denial of the right of a person to operate a commercial goods vehicle on the public highways of a State in the absence of a licence issued by a State authority having power to grant or refuse a licence at discretion. It is a similar question which confronts the Court now. If *McCarter v. Brodie* had not been decided I have no doubt what my opinion would have been. I should have thought that the Privy Council's exposition of Section 92 in the *Banking* case, 1950 A.C. 235 ; 79 C.L.R. 497, made the conclusion logically inevitable that such a statutory denial, to the extent to which it applied in respect of operating a vehicle in the course or for the purposes of interstate trade commerce or intercourse, was in flat contradiction of Section 92 and for that reason inoperative. I have read and re-read the judgments delivered in *McCarter v. Brodie*, and I am bound to say, with the most sincere respect for the learned judges who formed the majority of the Court in that case, that I cannot see any answer to the reasoning contained in the dissenting judgments of Dixon and Fullagar, JJ. To those judgments must now be added the judgment which my brother Fullagar has just delivered in this case, a judgment with which I desire to express my respectful agreement. I shall have to refer in a moment to the views expressed in the majority judgments in *McCarter v. Brodie*, but for the present it is enough to say that if I am to follow *McCarter v. Brodie*, it must be for the reason most strongly pressed upon us in argument, that the case is one for the application of the maxim *stare decisis*.

I fully appreciate the wisdom of the view which Latham, C.J., speaking for the Court, expressed in *Thomas' case*, 1948, 77 C.L.R. 493, at 496, when he said that continuity and coherence in the law demand that, particularly in this Court, which is the highest court of appeal in Australia, the principle of *stare decisis* should be applied, save in very exceptional cases. This was said without reference to constitutional cases, the Chief Justice remarking that it may be that considerations are present in those cases, where Parliament is not in a position to change the law, which do not arise in other cases. Even in constitutional cases, however, it is obviously undesirable that a question decided by the Court after full consideration should be re-opened without grave reason.

I must turn therefore to enquire whether the decision in *McCarter v. Brodie* is one which we should regard as open to review. By the decision I mean the actual decision in the case, that the Victorian statutory provisions there in question did not conflict with Section 92 of the Constitution. Of

- course, if in reaching that conclusion a majority of the Court had laid down a principle the application of which would produce a reconciliation between Section 92 and the application to interstate transport of the provisions attacked in the present case, it would be necessary to consider whether there was any justification for re-examining not only the actual decision but also the principle so laid down. However, I do not find that in *McCarter v. Brodie* there was a majority of the Court in favour of any such principle. Again, if a majority of the Court in that case had construed the Privy Council's judgment in the *Banking* case as intended to indicate approval
- 10 either of the reasoning or of the actual decision in the transport cases, it would be necessary to consider whether there was any justification for questioning the reading so given to their Lordships' language ; but I do not find that a majority of the Court did understand their Lordships to have intended any such approval. (In my references to the transport cases I do not include *Willard v. Rawson*, 1933, 48 C.L.R. 316, for I agree with what Fullagar, J., said concerning that case in *McCarter v. Brodie*, at pp. 499-500). It may be as well to elaborate these points a little before going further.
- The judgment of Latham, C.J., contains much with which the Plaintiffs in the present case would not wish to quarrel, and it demolishes some
- 20 contentions which they do not need to advance and do not in fact advance. His Honour did not treat the case as one in which the transport cases should simply be followed, either because of their inherent authority or because of any approval of them by the Privy Council ; on the contrary, he treated the case before the Court as depending upon a consideration of the question, apart from the authority of the transport cases, whether the challenged Victorian provisions were regulatory or prohibitive. The answer given, like the question related to the Acts in their entirety ; and the conclusion reached was that the Acts were truly described as Regulation Acts. His Honour recognised that the provisions chiefly complained of required a
- 30 person to hold a licence before he could operate a commercial goods vehicle upon the highways of the State ; that they applied to such a person even though he was engaged in inter-State trade and commerce ; that no person had a right to obtain a licence ; and that a licence could be granted or refused at discretion, though the discretion was not unlimited or arbitrary. But His Honour considered that a licensing system, even one possessing these characteristics, must be regarded as a system of regulation. " Perhaps the most common method of regulating trade," his Honour said at p. 461, " is by a licensing system, e.g. in the case of intoxicating liquor, drugs, slaughtering of stock, dealing in marine stores, etc. In each case some
- 40 " authority has the duty of determining whether an application for a licence " shall be granted or refused. Such licences are generally subject to conditions " relating to the manner of carrying on the trade and these conditions " frequently involve the payment of a fee. It is such a system which the " Transport Regulation Act applies. The Act has all the characteristics of a " system of regulation." I understand his Honour's judgment to mean that a prohibition applying to interstate trade and commerce (or at least to the interstate transportation of goods), if it is subject to a discretionary power

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to grant exemption as part of a licensing system, is to be regarded as no more than regulation and as therefore leaving interstate trade commerce and intercourse absolutely free; and that it is nothing to the point that the discretion to grant or refuse licences is absolute within the ambit provided by the general scope and object of the Act. McTiernan, J., concurred, but Williams and Webb, JJ., gave no support to this far-reaching doctrine.

In addition to agreeing with the Chief Justice, McTiernan, J., thought that *Vizzard's* case, 1933, 50 C.L.R. 30, received some support from the *Banking* case, and was right in its result. Webb, J., on the other hand, thought that *Vizzard's* case might have been weakened by the *Banking* case, but he considered that it had not been disposed of as an authority. Although he thought it difficult to see how the legislation under discussion could be regarded as essentially regulatory and not prohibitive or restrictive of interstate trade, he decided in favour of upholding the legislation because of *Vizzard's* case, and the *Riverina* case, 1935, 57 C.L.R., 327, which followed it. 10

Williams, J., was not satisfied that the transport cases were wrongly decided, and he was not prepared to overrule them. But he did not treat them as authorities to be automatically followed. He considered the legislation in question for himself, and reached the conclusion that it was regulatory because it did not prevent individuals carrying on the business of land transport among the States without a licence, but only prevented individuals plying their vehicles on the public roads of the States without a licence. The fact that the roads are, in a broad sense, State-provided was the crucial factor in his Honour's view. "I am of opinion," he said at p. 477, "that a State must have a wide power to regulate the use of the facilities which it provides for trade and commerce, so that the public funds invested in such facilities, in this case the railways, shall not be jeopardised by undue competition brought about solely by the provision of another facility by the State." ; and he repeated at p. 478 what he had said in the *Australian National Airways* case, 1945, 71 C.L.R. at 109: "it is simply an exercise of the sovereign rights of the States to co-ordinate traffic by rail or road, and to confine the use of roads to particular persons and vehicles. If the choice of these persons and vehicles has no relation to their passage across the border, but the legislation operates without discrimination with respect to all persons and vehicles desirous of using the roads, such legislation is not aimed or directed at interstate commerce but at regulating, maintaining and co-ordinating a number of utilities for trade, commerce, and intercourse, State and inter-State, provided by the State." No other member of the Court espoused this view. Webb, J. expressly declined to accept it, and Latham, C.J., and McTiernan, J., made no comment upon it. 20 30 40

It will be seen that the four learned Judges who formed the majority of the Court in *McCarter v. Brodie* were not unanimous, in the view that *Vizzard's* case or any other of the transport cases had received the approval of the Privy Council; nor were they unanimous in thinking that the transport cases were correctly decided, that is to say that discretionary

licensing legislation of the kind in question is in truth only regulatory ; and those who considered that such legislation is regulatory were not agreed upon any one reason for that conclusion. Hence it appears to me that there is no proposition which can be regarded as the *ratio decidendi* of *McCarter v. Brodie* (see *Long v. Chubbs Australian Co. Ltd.*, 1935, 53 C.L.R. 142 at 151-2), and the case stands, as does *Vizzard's* case, and the *Riverina* case also, as a bare decision that statutory provisions such as were there in question do not infringe Section 92. It will also be noticed that in respect of every reason given for holding the legislation to be consistent with Section 92 there was a majority of the Court consisting of judges who either

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It would be difficult, I should think, to find a case in relation to which the cry *stare decisis* would sound more hollow. But there is a much more serious comment to be made. As I see the matter, the appeal to the maxim in support of *McCarter v. Brodie* is neither more nor less than an invitation to refuse to be bound by repeated pronouncements of the Privy Council. Three times their Lordships have spoken on Section 92, and it seems to me that we are thrice bound to overrule *McCarter v. Brodie*. I accept it as conclusively demonstrated by the Judgments of Dixon and Fullagar, JJ., in *McCarter v. Brodie* and the Judgment of Fullagar, J., in this case that it was never possible to reconcile the transport cases with *James v. Cowan*, 1932, A.C. 542, or with the actual decision in *James v. The Commonwealth*, 1936, A.C. 578, except upon grounds which, since the *Banking* case, must be admitted to be untenable ; and, although the Judgment in the *Banking* case did not in terms overrule the transport cases, I should have thought, with all respect to those who take a different view, that it wrote their epitaph in characters too plain to be missed or to be mistaken.

(f) Kitto, J.  
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I take it to be self-evident that statutory provisions such as we have here to consider operate directly and immediately to restrict trade and commerce among the States, and that they must be held incompatible with Section 92 unless it is true to say that their character is that of regulation. The sole problem therefore is whether these provisions are in truth no more than regulatory. If the Privy Council had made no pronouncement as to what is not included in the conception expressed by the word regulatory as used in this connection, it might have been possible (though I do not say it should have been done) to treat the actual decision in *McCarter v. Brodie* as a precedent for assigning such legislation to the category of regulation, without embarrassing the whole subject by committing the Court to any particular reason, or even with a protestation that this type of case is anomalous. But since the *Banking* case the proposition that simple prohibition is not regulation, long treated as unquestionable, is binding in law as well as in logic upon the courts of this country in their deliberations upon Section 92. I have looked in vain in the Judgments on this matter for any ground upon which an acknowledgment that simple prohibition is not regulation can be reconciled with a decision that a simple prohibition subject to a discretionary power to grant exemptions can be regarded as regulation. And it is surely beyond argument that a prohibition is none

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the less simple because someone has a power, which he may exercise or refuse to exercise at discretion, to restore the freedom which that prohibition denies. If, as I am convinced, this is not open to judicial doubt, neither is it open to judicial exception. Yet in truth we are asked in this case to do none other than to say that an exception has been made in favour of transport legislation by the decision in *McCarter v. Brodie*. It may be, for all I know, that such an exception would be expedient; but if so it should be made by amendment of Section 92 by constitutional means. The section cannot be amended by the Court, and I am not prepared to hold that it has been amended by *McCarter v. Brodie*.

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In my opinion the only decision we can give in this case consistently with acceptance of the Privy Council's authority is that the licensing provisions of the State Transport (Co-ordination) Act, 1931–1950 (N.S.W.), in their application to trade commerce and intercourse among the States, are repugnant to Section 92 of the Constitution and inoperative.

I should therefore allow the demurrer.

(g) Taylor, J.—  
(g) TAYLOR, J.

This suit raises questions concerning the validity of the State Transport (Co-ordination) Act, 1931–1950 (New South Wales), and of certain charges imposed upon the Plaintiff as a licensee of public motor vehicles within the meaning of that Act. For the purposes of the demurrer, it is admitted that the Plaintiff carries on business as a carrier of general merchandise and operates between Sydney in the State of New South Wales and Brisbane in the State of Queensland, and that it is the owner of a number of motor vehicles in respect of which it holds licences under Section 12 of the Act to operate those vehicles as public motor vehicles within the meaning of the Act. These licences are issued subject to special conditions, and, whilst operations of a limited nature are authorised thereby, the conditions require *inter alia* that in respect of any journey which is wholly or partly competitive with the railways or tramways the licensee shall pay to the Commissioner for Road Transport and Tramways for the full competitive distance three pence per ton or part thereof of the aggregate of the weight of the vehicle unladen and of the weight of loading the vehicle is capable of carrying for each and every mile or part thereof travelled by the vehicle along a public street. The effect of a licence containing a similar condition with respect to operations extending beyond those primarily authorised by the licence was considered in *Duncan and Green Star Trading Company Pty. Limited v. Vizzard* (53 C.L.R. 493). With respect to operations not authorised by the Plaintiff's licences it has been the practice of the Defendant Director of Transport and Highways and his predecessors to issue permits for particular approved journeys upon payment of charges at the rates referred to above. Some point was made that no authority for the issue of permits for the carriage of goods is conferred by the Act, but it is, I think, unnecessary in this case to deal with this submission.

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The Act in the form in which it has existed from time to time and other comparative legislation has been the subject of consideration many times in this Court. On the most recent occasion in *McCarter v. Brodie* (80 C.L.R. 432), it was conceded by the Appellant, who challenged the validity of the (Victorian) Transport Regulation Act, 1933-1947, that the decision in *The King v. Vizzard ex parte Hill* (50 C.L.R. 30) and other cases which followed it were decisive against the appeal. But it was argued that since the decision of the Judicial Committee of the Privy Council in *The Commonwealth v. Bank of New South Wales and Others* (79 C.L.R. 497), those decisions were no longer supportable. In the result the legislation, which in many respects was similar to the legislation in question in this case, was held to be valid.

In the present case the Court is, in effect, asked to reconsider the decision in *McCarter v. Brodie* (*supra*) and the general effect of the decision of the Judicial Committee upon the decisions in the earlier transport cases. This is a course which I am most reluctant to pursue and if the views expressed in *McCarter v. Brodie* had established some common principle, I would hesitatingly regard myself as bound to apply it. But the Court was divided and the reasons of the majority do not appear to me to establish any clear or common principle concerning the proposition which, in this case, has given me the most concern.

The Act contemplates that the co-ordination of transport, which is its avowed object, shall be accomplished through the medium of a licensing system. Section 17 in its present form is in the following terms:

“ 17 (1) Every license under this Act shall be subject to the performance and observance by the licensee of the provisions of this Act and the regulations that may relate to the license or to the public motor vehicle in respect of which it is issued, and of the provisions contained in or attaching to the license, and all such provisions shall be conditions of the license.

“ (2) The regulations may prescribe, or the board may determine in respect of any particular license, or of any class of licenses relating to any area, route, road or district, or of any other class of licenses whatsoever, or generally what terms and conditions shall be applicable to or with respect to a license, including (but without in any way limiting the generality of the foregoing)

“ (a) the fares, freights, or charges, or the maximum or minimum fares, freights, or charges to be made in respect of any services to be provided by means of the public motor vehicle referred to in the license ;

“ (b) the use of such public motor vehicle as to whether passengers only or goods only or goods of a specified class or description only shall be thereby conveyed, and as to the circumstances in which such conveyance may be made or may not be made (including the limiting

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“ of the number of the passengers or the quantity,  
“ weight, or bulk of the goods that may be carried on  
“ the vehicle).

“ (3) In dealing with an application for a license the board  
“ shall consider all such matters as they may think necessary  
“ or desirable, and in particular (where applicable) shall have  
“ regard to—

“ (a) the suitability of the route or road on which a service  
“ may be provided under the license ;

“ (b) the extent, if any, to which the needs of the proposed  
“ areas or districts, or any of them, are already 10  
“ adequately served ;

“ (c) the extent to which the proposed service is necessary or  
“ desirable in the public interest ;

“ (d) the needs of the district, area, or locality as a whole in  
“ relation to traffic, the elimination of unnecessary  
“ services, and the co-ordination of all forms of transport,  
“ including transport by rail or tram ;

“ (e) the condition of the roads to be traversed with regard to  
“ their capacity to carry proposed public vehicular 20  
“ traffic without unreasonable damage to such roads ;

“ (f) the suitability and fitness of applicant to hold the  
“ license applied for ;

“ (g) the construction and equipment of the vehicle and  
“ its fitness and suitability for a license ; Provided  
“ that the certificate of registration and the certificate  
“ of airworthiness of an aircraft issued under the Air  
“ Navigation Regulations or a registration of any motor  
“ vehicle other than aircraft under any other Act of the  
“ State may be accepted as sufficient evidence of 30  
“ suitability and fitness of the vehicle.

“ (4) The board shall have power to grant or refuse any  
“ application of any person for a license or in respect of any  
“ vehicle or of any area, route, road or district.

“ (5) If the holder of a license of a public motor vehicle  
“ under this Act, or the owner of any public motor vehicle so  
“ licensed, fails to comply with or observe any of the terms or  
“ conditions of or attaching to such license he shall be guilty of an  
“ offence against this Act.”

No person is permitted to operate a motor vehicle unless the vehicle 40  
is licensed under the Act (Section 12) unless it is being operated under and  
in accordance with an exemption from the requirement of being licensed  
granted under Section 19 or a permit granted under Section 22 of the Act.



The power to grant exemptions and the power to issue permits are in the complete discretion of the board. I should add that the powers conferred by these sections upon the board—which is the State Transport (Co-ordination) Board—are now, by Statute, exercisable by the Defendant Director of Road Transport and Highways.

In view of the decision of the Judicial Committee in *The Commonwealth v. The Bank of New South Wales and Others (supra)* these outstanding sections of the Act have caused me considerable concern. I regard the decision in that case as establishing beyond question that any direct, as  
 10 distinct from remote or merely consequential, interference with or restriction upon interstate trade, *which is not justifiable as regulation of such trade*, is a violation of Section 92. It is not to the point that any such interference or restriction may leave unimpaired the total volume of trade from State to State or, that it is not the purpose of the legislation to create interference with or impose restrictions, upon interstate trade as such, or that the legislation is not “ directed against ” or not “ aimed at ” interstate trade. As the Judicial Committee pointed out “ in whatever sense the word “ ‘ object ’ or ‘ intention ’ may be used in reference to a Minister exercising  
 20 “ a statutory power, in relation to an Act of Parliament, it can be ascertained “ in one way only, which can best be stated in the words of *Lord Watson* “ in *Aron Saloman v. A. Saloman and Company Limited* ‘ in a Court of “ ‘ Law or equity what the legislature intended to be done or not to be “ ‘ done can only be legitimately ascertained from that which it has chosen “ ‘ to indicate, either in express words or by reasonable and necessary “ ‘ implication.’ The same idea is felicitously expressed in an opinion “ of the English law officers, *Sir Roundell Palmer* and *Sir Robert Collier*, “ cited by *Isaacs, J.* in *James v. Cowan* : ‘ It must be presumed that a “ ‘ legislative body intends that which is the necessary effect of its “ ‘ enactments : the object, the purpose, and the intention of the enactment,  
 30 “ ‘ is the same.’ The same learned Judge adds ‘ by the necessary effect,’ “ it need scarcely be said, these learned jurists meant the necessary legal “ effect, not the ulterior effect, economically or socially. It was because “ Section 20 of the Dried Fruits Act of South Australia operated according “ to the natural meaning of its words to authorise a direct restriction upon “ the manner in which *James* could dispose of his product by an inter-State “ transaction that it offended Section 92, not because some other extraneous “ purpose, object or intention was ascribable to the South Australian “ legislature.” These views of the Judicial Committee led, immediately to the conclusion that Section 46 (1) of the Banking Act 1947, which provided  
 40 that a private bank should not after the commencement of the Act carry on banking business in Australia, except as thereafter required by the Section, was invalid. Nor can I see that the decision would have been otherwise if the section had in substance provided that a private bank should not carry on banking business in Australia unless it was the holder of a licence which might be granted or withheld at the absolute discretion of a licensing authority. For if the legislature itself may not, without infringing Section 92, assert a right, at its absolute discretion, to permit

In the High Court of Australia.

New South Wales Registry.

No. 2. Judgment. 16th April 1953.

(g) Taylor, J.—  
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In the High  
Court of  
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New South  
Wales  
Registry.

No. 2.  
Judgment.  
16th April  
1953.

(g) Taylor,  
J.—  
*continued.*

or prohibit banking, it is, to me, inconceivable that it may, without infringing Section 92, confer such a right upon a subordinate body. This, of course, is very far from saying that trade and commerce may not be made the subject of regulation either through the medium of a licensing system or otherwise; nor does it deny the proposition that regulation may include partial prohibition or prohibition *sub modo*.

In the view of the majority in *The King v. Vizzard: ex parte Hill* (*supra*) the difficulties which have on many occasions arisen with respect to licensing systems did not, in that case, unduly obtrude themselves. The establishment of a licensing authority with arbitrary powers is an irrelevant consideration if the test to determine whether legislation infringes Section 92 is whether the "real intention" (in the sense in which that expression has been used) is to interfere with freedom of trade, commerce and intercourse between the States (per Gavan Duffy, C.J. at p. 47): or whether "on the whole" inter-State trade is benefited or burdened; or whether the legislation is "designed for the purpose of preventing, hindering, limiting or obstructing trade, commerce or intercourse among the States" (per Evatt, J. p. 77): or whether it is "designed for the express purpose of restricting or prohibiting" such trade, commerce or intercourse. These and similar tests make the existence or non-existence of a collateral fact, and not a consideration of the legislation and its legal effect, the criterion for determining questions of validity.

Dissenting members of the Court in *Vizzard's* case and like cases, expressed the view that a legislative prohibition against trading, including inter-State trading, except pursuant to a licence which might be arbitrarily refused, constitutes an infringement of Section 92. Upon a consideration of the observations of the Judicial Committee, not only in relation to the legislation under consideration in *The Commonwealth v. The Bank of New South Wales and Others* (*supra*), but also with respect to the decisions in *James v. South Australia* (40 C.L.R. 1), and *James v. The Commonwealth* (55 C.L.R. 1) this conclusion is, I think irresistible and should be adopted by this Court. It was, of course, of the very essence of the decision in *Gratwick v. Johnston* (70 C.L.R. 1) and appears to me to have been a substantial basis for the decision in *Australian National Airways Pty. Ltd. v. The Commonwealth* (71 C.L.R. 29). Further, it seems to me that this was the opinion entertained by a majority of the Court in *McCarter v. Brodie* (*supra*). It was clearly the view of the dissenting members of the Court and Latham, C.J., with whose reasons McTiernan, J. expressed his agreement, took the view that the licensing authority under the Victorian Act did not have an unlimited and arbitrary discretion to grant or refuse licences. His Honour referred to *Victorian Railways Commissioners v. McCartney* (52 C.L.R. 383) and said: "The Court has already expressly held with respect to this Transport Regulation Act, that the ambit of the discretion of the board is governed by the general scope and object of the enactment." I understand from these and other relevant observations of his Honour that if the licensing authority had been invested with an unlimited and arbitrary discretion, a conclusion that the legislation infringed

Section 92 would have been inevitable, for such legislation could not be regarded as regulatory. If this be so, legislation of this character must infringe Section 92 unless the discretion to refuse a licence is limited to or confined within the ambit constituted by those matters which should properly be regarded as regulatory of the trade or commerce concerned. For, I can see no relevant distinction between an arbitrary discretion and one, which though not capable of being exercised on any grounds at all, authorises the licensing authority to travel outside the field of regulation. This is the very activity which is denied to the legislature itself and that being so, any enactment purporting to authorise a subordinate authority to do so must be invalid.

In my opinion, Section 17 of the Act under review in this case, even if it does not confer a complete and arbitrary authority to grant or refuse licences, does confer an arbitrary authority to refuse licences on grounds other than those which may properly be regarded as regulatory of the trade or commerce concerned. The licensing section under review in *McCarter v. Brodie* (*supra*) was, in some minor respects, different and its history had led the High Court in *Victorian Railways Commissioners v. McCartney* (*supra*) to express the view that the Transport Regulation Board had taken into consideration matters which were not proper for it to consider in relation to applications for licences. Though it was held that the Board's discretion was not complete and arbitrary, it does not follow that the limits to the discretion, discoverable upon an examination of the general scope and object of the enactment would, of necessity, prevent a collision with Section 92. In this case, however, we are concerned with the State Transport (Co-ordination) Act of New South Wales and, for the moment with Section 17 of that Act, and I am unable to see any grounds upon which it could be fairly claimed that the Director's discretion under that section to grant or refuse licences is subject to any saving limitation. The direction in sub-section 3 concerning the particular matters to be considered by the Director in no way detracts from the provision in the same sub-section that he shall consider all such matters as he may think necessary or desirable, or from the plain words of sub-section 4. But even if these latter provisions should be construed subject to the particular matters specified in sub-section 3 and some limitation of the discretion thereby ascertained, the conclusion could not be otherwise. An examination of these matters suggests to my mind that they were prescribed for consideration, primarily, in relation to the co-ordination of transport within the State and without regard to the provisions of Section 92 and, clearly, they embrace matters which, on my view of the authorities, cannot form any basis for the regulation of inter-State trade. As Fullagar, J. said in *McCarter v. Brodie* (*supra*, at pp. 498-9), when speaking of the legislation then under consideration: "The truth is that it is possible to regard such legislation " as regulatory with respect to trade and commerce if, but not unless, we " regard Section 92 as referring not to the trading and commercial activities " of individuals but to a totality or general volume or flow of trading " and commercial activities. A simple prohibition, or a prohibition subject

In the High Court of Australia.

New South Wales Registry.

No. 2. Judgment. 16th April 1953.

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“ to discretionary exemption, of the trade of an individual may be regarded  
 “ as regulatory of the general flow or volume of trade. It cannot possibly  
 “ be regarded as regulatory of the trade of the individual who is simply  
 “ not allowed to carry on his trade at all. The view that Section 92 does  
 “ not protect an individual trader but has regard only to a general volume  
 “ of inter-State trade could hardly have been more emphatically rejected  
 “ by the Privy Council, and it must now, I would think plainly be regarded  
 “ as unsound. And, without it, the view that the Victorian Transport  
 “ Regulation Act is merely regulatory, so far as it affects inter-State trade  
 “ and commerce, cannot stand.”

10

(g) Taylor,  
 J.—  
*continued.*

The views which I have expressed do not, of course, mean that the Act or any part of it is wholly invalid. Section 3 (2) of the Act provides that it shall be read and construed so as not to exceed the legislative power of the State to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power it shall, nevertheless, be a valid enactment to the extent to which it is not in excess of that power. This is, as Starke, J. said in *The King v. Vizzard ex parte Hill (supra)*: “ a legislative declaration that the Act shall operate  
 “ on so much of this subject matter as Parliament might lawfully have  
 “ dealt with and so as not to exceed the legislative power. . . . It excludes,  
 “ I think, from its operation any interference or control of trade and  
 “ commerce obnoxious of the provisions of Section 92 of the Constitution.”

A similar provision, in not dissimilar circumstances, was considered by the Court in *Cam & Sons Pty. Ltd. v. The Chief Secretary New South Wales and Anor.* (84 C.L.R. 442), and the majority of the Court took a similar view with respect to the effect of such a provision.

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In the circumstances, I am of the opinion that the State Transport (Co-ordination) Act has no application to public motor vehicles which are operated, within the meaning of that Act, in the course of and for the purposes of inter-State trade and, accordingly, it is unnecessary to consider  
 the other submissions which were made in the case.

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Accordingly I am of the opinion that the demurrer should be allowed.

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No. 3.

Order.

In the High  
Court of  
Australia.

Between

HUGHES AND VALE PTY. LIMITED ... .. *Plaintiff*

and

THE STATE OF NEW SOUTH WALES THE HONOURABLE  
WILLIAM FRANCIS SHEAHAN and THE DIRECTOR OF  
TRANSPORT AND HIGHWAYS ... .. *Defendants.*New South  
Wales  
Registry.No. 3.  
Order.  
16th April  
1953.

Before their Honours :

10 THE CHIEF JUSTICE (Sir Owen Dixon), Mr. Justice McTIERNAN,  
Mr. Justice WILLIAMS, Mr. Justice WEBB, Mr. Justice FULLAGAR,  
Mr. Justice KITTO, and Mr. Justice TAYLOR.

Thursday, the Sixteenth day of April, One thousand nine hundred and  
fifty-three.

WHEREAS on the 7th day of July 1952 the abovenamed Plaintiff  
issued out of the New South Wales Registry of this Court a Writ of Summons  
in an action numbered 18 of 1952 against the abovenamed Defendants  
AND WHEREAS on the 15th day of August 1952 the Plaintiff delivered an  
amended Statement of Claim in the said action AND WHEREAS on the  
20 20th day of August 1952 the Defendants delivered a Defence in the said  
action AND WHEREAS on the 20th day of August 1952 the Plaintiff  
demurred to the whole of the Defence of the Defendants AND the demurrer  
of the Plaintiff coming on for argument in Melbourne on the fifteenth,  
sixteenth, seventeenth, twentieth and twenty-first days of October, 1952  
WHEREUPON AND UPON READING the demurrer book herein AND UPON  
HEARING Mr. J. D. Holmes of Queen's Counsel with whom were Mr. N. G.  
Bowen and Mr. G. D. Needham of Counsel on behalf of the Plaintiff and  
Mr. M. F. Hardie of Queen's Counsel with whom was Mr. R. E. Mitchell  
of Counsel for the Defendants AND UPON HEARING Mr. P. D. Phillips  
30 of Queen's Counsel with whom was Mr. C. I. Menhennitt of Counsel  
intervening on behalf of the Commonwealth of Australia and Her Majesty's  
Solicitor General in and for the State of Victoria with whom was Mr. G. A.  
Pape of Counsel intervening on behalf of the State of Victoria and  
Mr. G. A. Pape of Counsel intervening on behalf of the State of Queensland  
THIS COURT DID ORDER that the demurrer should stand for judgment  
and the same standing in the list of matters for judgment in Sydney this  
day in the presence of Mr. G. D. Needham of Counsel for the Plaintiff,  
Mr. R. E. Mitchell of Counsel for the Defendants and of Mr. A. F. Mason  
of Counsel for the intervenant the Commonwealth of Australia and no one  
40 appearing for the intervenants the State of Victoria and the State of  
Queensland THIS COURT DOTH ORDER that the demurrer be and the same  
is hereby overruled AND THIS COURT DOTH FURTHER ORDER that it be

In the High  
Court of  
Australia.

New South  
Wales  
Registry.

No. 3.  
Order.  
16th April  
1953—  
*continued.*

referred to the proper officer of this Court to tax and certify the costs of the Defendants occasioned by the demurrer AND that such costs when so taxed and certified be paid by the Plaintiff to the Defendants or to their Solicitor, Mr. F. P. McRae, Crown Solicitor for the State of New South Wales.

By the Court,

F. C. LINDSAY,  
*District Registrar.*

In the Privy  
Council.

No. 4.  
Order in  
Council  
granting  
special  
leave to  
Appeal to  
Her  
Majesty in  
Council.  
19th June  
1953.

No. 4.

Order in Council granting special leave to Appeal to Her Majesty in Council. 10

AT THE COURT AT WINDSOR CASTLE.

The 19th day of June, 1953.

Present

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT.

MR. MACMILLAN.

MR. SELWYN LLOYD.

SIR EDWARD BRIDGES.

SIR NORMAN BROOK.

MR. JOHN EDWARDS.

MR. HOLT.

SIR PATRICK SPENS.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 17th day of June 1953 20 in the words following, viz. :—

“ WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Hughes and Vale Pty. Limited in the matter of an Appeal from the High Court of Australia between the Petitioner Appellant and The State of New South Wales The Honourable William Francis Sheahan and The Director of Transport and Highways Respondents and The Commonwealth of Australia The State of Victoria and The State of Queensland interveners setting forth (amongst other matters) : that the Petitioner 30

desires special leave to appeal from a Judgment of the High Court of Australia which by a majority of four Judges to three dismissed a demurrer by the Plaintiff (Petitioner) to the Defendants' Statement of Defence : that the Petitioner is a Company incorporated according to the laws of the State of New South Wales and at all material times was and is carrying on business as a carrier of general merchandise between Sydney in the State of New South Wales and Brisbane in the State of Queensland : that the State Transport (Co-ordination) Act 1931-1952 of New South Wales (being the legislation here in question) prohibits individuals from engaging in the business of carrying goods between the State of New South Wales and any other State except upon the licence of an official who is free in his own discretion to refuse to grant any such licence : that the Petitioner sought relief against the Respondents by way of a declaration and an injunction : that the question arising in this Appeal is whether Section 92 of the Commonwealth Constitution renders the said legislation invalid or inoperative in respect of the inter-State trade of the Petitioner : And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment of the High Court of Australia dated 16th April 1953 and such further or other relief as to Your Majesty in Council may seem meet :

In the Privy Council.

No. 4.  
Order in Council granting special leave to Appeal to Her Majesty in Council.  
19th June 1953—  
*continued.*

“ THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel on behalf of both Parties and the Interveners Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute its Appeal against the Judgment of the High Court of Australia dated the 16th day of April 1953 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs :

“ AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same.”

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW.

**In the Privy Council.**

No. 40 of 1953.

ON APPEAL FROM THE FULL COURT OF THE  
HIGH COURT OF AUSTRALIA.

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BETWEEN

HUGHES AND VALE PTY. LIMITED  
*Appellant*

AND

THE STATE OF NEW SOUTH WALES  
THE HONOURABLE WILLIAM  
FRANCIS SHEAHAN and THE  
DIRECTOR OF TRANSPORT AND  
HIGHWAYS ... .. *Respondents*

AND

THE COMMONWEALTH OF  
AUSTRALIA THE STATE OF  
VICTORIA and THE STATE OF  
QUEENSLAND ... .. *Interveners.*

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RECORD OF PROCEEDINGS

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FARRER & CO.,  
66 Lincoln's Inn Fields,  
London, W.C.2,  
*Solicitors for the Appellant.*

LIGHT & FULTON,  
24 John Street,  
Bedford Row,  
London, W.C.1,  
*Solicitors for the Respondents.*

COWARD, CHANCE & CO.,  
St. Swithin's House,  
Walbrook, E.C.4,  
*Solicitors for the Interveners*  
*The Commonwealth of Australia.*

FRESHFIELDS,  
1 Bank Buildings,  
Princes Street, E.C.2,  
*Solicitors for the Interveners The State of*  
*Victoria and The State of Queensland.*