

GAVAN DUFFY, RICH AND STARKE JJ. We agree that the demurrer of the defendant to the statement of claim should be overruled, and that the demurrer of the plaintiff to par. 7 of the defence should be allowed.

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TAXATION

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BOOT
FACTORY
LTD.

Demurrer of defendant to statement of claim overruled. Demurrer of plaintiff to par. 7 of the defence allowed. Defendant to pay costs. Leave to defendant to amend its pleadings as advised.

Solicitor for the plaintiff, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the defendant, *Minter, Simpson & Co.*

B. I.

Appl
Victoria &
New South
Wales v
Commonwealth (1957)
CLR 575

Appl
Pye v
Renshaw
(1951) 84
CLR 58

[HIGH COURT OF AUSTRALIA.]

THE STATE OF VICTORIA AND OTHERS . PLAINTIFFS ;

AGAINST

THE COMMONWEALTH DEFENDANT.

Constitutional Law—Powers of Commonwealth Parliament—Granting financial assistance to any State—The Constitution (63 & 64 Vict. c. 12), secs. 51, 96, 99—Federal Aid Roads Act 1926 (No. 46 of 1926), secs. 2, 3, Schedule—Surplus Revenue Act 1910 (No 8 of 1910).

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Practice—Parties—Action by State against Commonwealth—Declaration of invalidity of Commonwealth statute—Joinder of other States as defendants—Rules of the High Court 1911, Part I., Order II., r. 9.

SYDNEY,
Nov. 29, 30.

KNOX C.J.,
ISAACS, HIGGINS,
GAVAN DUFFY,
POWERS, RICH
AND STARKE JJ.

Held, by the whole Court, that the *Federal Aid Roads Act 1926* is a valid exercise of the power conferred upon the Parliament of the Commonwealth by sec. 96 of the Constitution to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

In an action brought in the High Court by two States and their respective Attorney-Generals the plaintiffs asked for declarations that the *Federal Aid Roads Act 1926* was *ultra vires* the Parliament of the Commonwealth and void, that any agreement made by the Commonwealth with any State in the form or to the effect set out in the Schedule to that Act was *ultra vires* the Commonwealth and void, and that all moneys which purported to be appropriated

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under that Act were part of the surplus revenue of the Commonwealth within the meaning of the Constitution and the *Surplus Revenue Act* 1910, and also for an injunction restraining the Commonwealth from paying to any State any sum under or in pursuance of such Act or under any agreement with any State in the form or to the effect set out in the Schedule to the *Federal Roads Aids Act* 1926.

Held, by Knox C.J., Isaacs, Gavan Duffy, Powers, Rich and Starke JJ. (Higgins J. dissenting), that the action was properly constituted whether the decision of the Court were in favour of or against the validity of the Act.

ACTION referred to the Full Court.

An action was brought in the High Court by the State of Victoria and the Attorney-General thereof, and the State of South Australia and the Attorney-General thereof, against the Commonwealth in which the statement of claim was as follows:—

1. On 11th August 1926 an Act intituled “An Act to authorize the execution by the Commonwealth of agreements between the Commonwealth and the States in relation to the Construction and Reconstruction of Federal Aid Roads, and to make provision for the carrying out thereof,” the number of such Act being 46 of 1926, and the short title thereof being the *Federal Aid Roads Act* 1926, was enacted by the Parliament of the Commonwealth, and was assented to by His Excellency the Governor-General of the Commonwealth on 16th August 1926.

2. The said Act purports (*inter alia*) to authorize the execution by and on behalf of the Commonwealth of agreements, in the form contained in the Schedule thereto, between the Commonwealth and each State of the Commonwealth, and to appropriate the Consolidated Revenue Fund to the extent of such amount as is necessary for the purposes of each agreement executed by the Commonwealth.

3. The said *Federal Aid Roads Act* 1926 is, or alternatively sec. 3 or alternatively secs. 2, 3 and 4 thereof are, *ultra vires* the Parliament of the Commonwealth and is or are inoperative and void in that (a) there is no power under sec. 51 of the Commonwealth Constitution or under any other section of such Constitution enabling the Parliament of the Commonwealth to enact the said *Federal Aid Roads Act* 1926 or the aforesaid sections thereof, or authorizing the execution by or on behalf of the Commonwealth of an agreement in the form aforesaid; (b) there is no power under sec. 96 of the Commonwealth Constitution or under any other section of such

Constitution enabling the Parliament of the Commonwealth to appropriate any part of the Consolidated Revenue Fund of the Commonwealth or any other Commonwealth account or fund for the purposes of or referred to in the said *Federal Aid Roads Act* 1926; (c) alternatively the provisions of sec. 96 of the Constitution have not been complied with in that any financial assistance granted to any State by or under the said *Federal Aid Roads Act* 1926 is not granted on such terms and conditions as the Parliament of the Commonwealth thinks fit; (d) the said *Federal Aid Roads Act* 1926 is not a valid exercise of any power reposed in the Commonwealth or the Parliament thereof.

4. The defendant will unless restrained from so doing proceed to execute agreements in the form aforesaid with various States of the Commonwealth and to pay or cause or permit to be paid to such States sums of money under or in pursuance of the aforesaid *Federal Aid Roads Act* 1926 and/or such agreements.

5. The plaintiff the State of Victoria is one of the States of the Commonwealth within the meaning of the *Commonwealth of Australia Constitution Act* and the *Surplus Revenue Act* 1910 of the Commonwealth.

6. All moneys which purport or may purport to be appropriated under the said *Federal Aid Roads Act* 1926 are part of the surplus revenue of the Commonwealth within the meaning of the Acts mentioned in the last preceding paragraph hereof.

The plaintiffs claimed (1) a declaration that the said *Federal Aid Roads Act* 1926 or alternatively sec. 3 or alternatively secs. 2, 3 and 4 thereof is or are *ultra vires* the Parliament of the Commonwealth and is or are inoperative and void; (2) a declaration that any agreement or agreements by the said Commonwealth with any State or States in the form or to the effect set out in the Schedule to the said *Federal Aid Roads Act* 1926 is or are or would be *ultra vires* the said Commonwealth and illegal and void; (3) a declaration that all moneys which purport or may purport to be appropriated under the said *Federal Aid Roads Act* 1926 are part of the surplus revenue of the Commonwealth within the meaning of the *Commonwealth of Australia Constitution Act* and the *Surplus Revenue Act* 1910 of the Commonwealth; and (4) an injunction restraining the

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 1926. permitting to be paid to any State or States any sum or sums under
 ~~~~~ or in pursuance of the said *Federal Aid Roads Act* 1926 or under or  
 VICTORIA or in pursuance of any agreement or agreements with any State or  
 v. States in the form or to the effect set out in the Schedule to the  
 THE Commonwealth. the said *Federal Aid Roads Act* 1926.  
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The defence was as follows :—

1. The defendant admits par. 1 of the statement of claim.
2. As to par. 2 of the statement of claim the defendant does not admit that it correctly states the purport and effect of the said Act.
3. As to par. 3 of the statement of claim the defendant denies each and every allegation contained therein.
4. The defendant admits that the Commonwealth intends to execute agreements of the kind specified in the Schedule of the said *Federal Aid Roads Act* 1926 with such States as are willing to enter into the same and that it intends to carry out the terms of such respective agreements if and when the respective State Parliaments have by statute duly approved, adopted, authorized or ratified the same within the meaning of clause 1 of such agreements. Save as aforesaid the defendant does not admit the allegations in par. 4 of the statement of claim.
5. The defendant admits that the State of Victoria is one of the States of the Commonwealth within the meaning of the *Commonwealth of Australia Constitution Act* and the *Surplus Revenue Act* 1910 of the Commonwealth. Save as aforesaid the defendant does not admit the allegations in par. 5 of the statement of claim.
6. The defendant does not admit any of the allegations contained in par. 6 of the statement of claim.
7. There are and were at all times relevant to the enactment of the said *Federal Aid Roads Act* 1926 facts in existence arising out of and/or connected with the Great War and/or the defence and/or the need for the immigration into and settlement of the people of Great Britain in Australia and/or other purposes of the Commonwealth which justified the Federal Parliament in determining that it was a matter of importance and urgency to the whole of Australia to have roads of the kind described in the said Act made and maintained in the respective Australian States and for the Commonwealth.

to grant financial assistance to such States to enable them to make and maintain such roads.

Particulars.—It is submitted that the Court should infer the matters stated in such par. 7 from the following:—(1) Various statutes of the Commonwealth Parliament including Appropriation Acts: (2) the principal migration agreement mentioned in sec. 3 of the *Development and Migration Act* 1926, No. 29: (3) the supplementary migration agreements mentioned in the said sec. 3: (4) as the result of the War the Commonwealth of Australia has incurred an indebtedness of about £305,000,000, which is financially unproductive: (5) there is now a total public indebtedness of Commonwealth and States of about £991,000,000, of which about £486,000,000 is owing to creditors outside Australia, in respect of which latter interest has to be remitted outside Australia; almost the whole of the total exports of Australia consist of its primary products: (6) each of the States in Australia contains large areas of unoccupied Crown country lands suitable for the settlement of British migrants and for the production of an increased amount of primary products if (*inter alia*) proper access and development by means of roads is made to and through such lands; and also large areas of other lands, both Crown and privately owned, suitable for carrying a much larger population than at present and producing a much greater quantity of primary products if (*inter alia*) similar proper access and development by roads is afforded: (7) that Great Britain has had during the years since the War and still has to pay many millions of pounds annually to a large but varying number of unemployed persons; many of such unemployed and many other persons in Great Britain are suitable to be settled on the above-mentioned country lands of Australia; such settlement would (a) increase the number of suitable persons available to defend Australia by land, sea and air, (b) increase the consumption in Australia of Australian and British goods, and so develop and maintain trade between Australia and Great Britain and assist Great Britain to maintain an Imperial Navy capable of protecting Australia from the attack of any foreign fleet, as Britain has done in the past: (8) since the War the export trade of Great Britain to the foreign countries with whom she mainly traded before the War

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has shown a large falling off, while on the other hand Britain's export trade to Australia has shown an increase : (9) both the Commonwealth and the States have expended large sums of money in the settlement of returned soldiers upon country lands ; in many cases such settlement will be unsuccessful unless the land upon which they are settled is developed by roads such as are described in the said Federal aid agreement : (10) since the War both the Imperial Parliament and the Commonwealth Parliament have legislated for and established Governmental Departments for the purpose of facilitating and increasing the immigration and settlement in Australia of persons in Great Britain and have spent large sums of public moneys in each country towards promoting and assisting in such immigration, and have lately entered into the said agreement mentioned in clause 2 : (11) what is usually known as the White Australia policy is now the avowed objective of the Australian Parliament, but such policy will be difficult to maintain against outside pressure unless the population of Australia is largely increased by suitable migration : (12) since the War there has been an increasing tendency for the people now in Australia to move into its principal towns from the country lands, largely by reason of want of proper road communications preventing their having sufficient postal communications and other amenities of life.

8. The defendant says that there are no matters alleged in the statement of claim which entitle the plaintiffs or any of them to bring or maintain this action and/or obtain the declarations or other relief claimed.

Upon the defence the plaintiffs joined issue.

The plaintiffs, for the purposes of the cause, admitted the statutes referred to in clause 1 of the particulars, the documents referred to in clauses 2 and 3, the facts set out in clauses 4, 5, 8 and 10, the facts set out in clause 7 down to the words " Australian and British made goods," and the facts set out in clause 9 down to the words " upon country lands."

The action was referred by *Knox* C.J. to the Full Court.

*Robert Menzies* (with him *Fullagar*), for the State of Victoria and the Attorney-General thereof. The *Federal Aid Roads Act*

1926 is invalid because it is a law relating to road-making and not a law for granting financial aid to the States. It is, therefore, not warranted by either sec. 96 or sec. 51 of the Constitution. Looking at the preamble to the Act and its substance, and applying the rule in *R. v. Barger* (1), the Act is one to provide for the construction and reconstruction of roads, and the States are only concerned as contributors to the costs of construction and reconstruction and as agents of the Commonwealth for the purpose of carrying out the works. The defence power would only authorize an Act for constructing roads for military purposes. The *Federal Aid Roads Act* is not within the power conferred by sec. 51 (XXXVIII.) of the Constitution, for the Imperial Parliament is not the only Parliament which could legislate as to road-making. If the Act is one for granting financial aid to States, it does not comply with sec. 96 of the Constitution. Under that section the Parliament cannot attach as conditions to its grant any conditions which amount in substance to the exercise of any legislative power which is not within sec. 51 of the Constitution. Alternatively, the terms and conditions referred to in sec. 96 are financial terms and conditions unless they are terms and conditions falling within one of the legislative powers in sec. 51. The terms and conditions referred to in sec. 96 must be terms and conditions imposed by the Parliament itself and not terms and conditions fixed by executive authority.

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*Hannan*, for the State of South Australia and the Attorney-General thereof. The terms and conditions referred to in sec. 96 of the Constitution are analogous to the terms and conditions of a mortgage, which are imposed to secure repayment of the loan. Under this *Federal Aid Roads Act* there is a gift of money to the States, and any terms and conditions that are imposed by it are not for the return of the money or for keeping the asset in a good condition as a security, but they are of such a nature as to show that it is the Commonwealth which is to make the roads, acting through the States as its agents. To come within sec. 96 the financial assistance must be such that it is not merely incidental to the carrying out of the purpose, which, in this case, is the construction of roads.

(1) (1908) 6 C.L.R. 41.

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*Brissenden* K.C. (with him *McTague*), for the State of New South Wales intervening. If only one State took advantage of the *Federal Aid Roads Act*, as might be the case, that State would be entitled to a sum of money appropriated out of the Consolidated Revenue of the Commonwealth to the extent of the grant. Sec. 96 in its terms applies only loans for temporary purposes (see *Quick and Garran's Constitution of the Australian Commonwealth*, p. 870). If the *Federal Aid Roads Act* may have the effect of one State only receiving money from the Commonwealth, the Act is within the prohibition of sec. 99 of the Constitution as giving preference to one State over others, for there would then be so much less surplus revenue to be divided among the States.

*Sir Edward Mitchell* K.C. (with him *Drake-Brockman*), for the defendant. The terms and conditions which sec. 96 of the Constitution requires are those stated in sec. 2 of the *Federal Aid Roads Act*, namely, that each State that comes in is to sign the agreement in the Schedule. [Counsel was stopped.]

KNOX C.J. The Court will put its reasons into writing.

Nov. 30.

The following written judgments were delivered :—

PER CURIAM. The Court is of opinion that the *Federal Aid Roads Act* No. 46 of 1926 is a valid enactment.

It is plainly warranted by the provisions of sec. 96 of the Constitution, and not affected by those of sec. 99 or any other provisions of the Constitution, so that exposition is unnecessary.

The action is dismissed.

HIGGINS J. I concur in the opinion expressed by the Chief Justice for the Court that the objections fail, which have been taken by the two plaintiff States to the validity of the *Federal Aid Roads Act* 1926.

But I desire to add, for myself only, some remarks as to the framework of this action. The only plaintiffs are two States (with their Attorneys-General); the only defendant is the Commonwealth; and the question is as to the validity of a Commonwealth Act. Counsel for the State of New South Wales has been heard, on his request; and he has supported the attitude of the two States which are plaintiffs. But, in my opinion, all the other States ought to be

parties to an action such as the present. It would be very awkward if our conclusion happened to be adverse to the Commonwealth Act. The other States have as much right to be heard on such a subject as the two plaintiff States. If our decision happened to be adverse to the Commonwealth Act, the other States might have their financial arrangements seriously upset; and yet they would not be bound by that decision as they are not parties. This Court might have to entertain a fresh action by some other State, seeking to induce this Court to reconsider its pronounced decision. We could not dismiss the action for want of parties (Order II., r. 9); but it is a case eminently suitable for the application of the power given in the subsequent part of that rule: "The Court . . . may, at any stage of the proceedings, . . . *without the application of either party*, . . . order . . . that the names of any persons who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause . . . be added, either as plaintiffs or defendants."

This is the modern way for enforcing the sound principle that the Court should make the performance of the judgment of the Court perfectly safe for all concerned, and prevent the chance of further litigation.

KNOX C.J. With reference to the observations made by my brother *Higgins* as to the framework of this action, I desire to say that all the other members of the Court carefully considered the position, and were and still are of opinion that the action is properly constituted whether the decision of the Court be in favour of or against the validity of the Commonwealth Act.

*Action dismissed.*

Solicitors for the plaintiffs, *Frank G. Menzies*, Crown Solicitor for Victoria; *A. J. Hannan*, Acting Crown Solicitor for South Australia.

Solicitor for the defendant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitor for the intervener, *J. V. Tillett*, Crown Solicitor for New South Wales.

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