

[HIGH COURT OF AUSTRALIA.]

RIVERINA TRANSPORT PROPRIETARY }
LIMITED }

PLAINTIFF ;

AND

THE STATE OF VICTORIA AND ANOTHER DEFENDANTS.

Constitutional Law—Freedom of trade, commerce and intercourse among the States—
Validity of State Act—Regulation of facilities for transport—Licensing of motor
vehicles—Refusal of all licences for carrying goods inter-State—Discrimination
between intra-State and inter-State trade—The Constitution (63 & 64 Vict. c. MELBOURNE,
12), sec. 92—Transport Regulation Act 1933 (Vict.) (No. 4198), Part II.— June 1-4.
Transport Regulation Act 1935 (Vict.) (No. 4298).

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July 2, 28.

Part II. of the *Transport Regulation Act 1933* (as amended by the *Transport Regulation Act 1935*) (Vict.) provided that a commercial goods vehicle should not operate on any public highway unless licensed in accordance with the Act. The Transport Regulation Board was empowered to grant such licences, and it was provided that in granting or refusing licences the board should have regard to the interests of the public generally and should take into consideration the advantages of the service proposed to be provided and its convenience to the public, the adequacy of the existing transportation service and the effect on it of the service proposed to be provided, and the character, qualifications and financial stability of the applicant. It was further provided that no decision of the board granting or refusing a licence should have any force or effect until reviewed by the Governor in Council, and that the Governor in Council might approve or disapprove the decision of the board or make any determination in the matter which the board might have made.

Latham C.J.,
Rich, Dixon,
Evatt and
McTiernan JJ.

Held that the Act did not contravene sec. 92 of the Constitution.

The plaintiff operated services for the carriage of goods in commercial goods vehicles between Melbourne and places in New South Wales. It applied to the Transport Regulation Board for licences for its vehicles under the *Transport Regulation Act 1933* (Vict.), but the applications were refused. The decisions of the board were subsequently approved by the Governor in Council.

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The plaintiff then brought an action against the board and the Governor in Council in which (on the basis that the Act was held to be valid) it claimed a declaration that the refusal of the licences was unlawful as being contrary to sec. 92 of the Constitution and that the Act did not operate so as to prohibit the conduct of the plaintiff's services. It alleged that there had been discrimination against inter-State trade in that the granting of licences had been confined to vehicles operating solely in Victoria.

Held that the plaintiff was not entitled to the relief sought:—

By *Latham C.J.*, because, even if it were established that the decisions of the board had discriminated against the plaintiff because it was engaged in inter-State trade, the plaintiff had no cause of action which was cognizable in a court.

By *Rich J.*, because there was no evidence of any design on the part of the authorities to obstruct the flow of goods across the border or to increase the movement of goods within the State at the expense of traffic across the boundaries.

By *Dixon J.*, because, in view of the previous decisions of the High Court, the Act must be accepted as validly operating to prohibit the carriage of goods in the course of inter-State trade without a licence, and the facts alleged did not afford any legal basis for granting the plaintiff relief.

By *Evatt and McTiernan JJ.*, because the plaintiff had not shown that there was any discrimination against inter-State trade as at the border.

Per Latham C.J. : Neither a Federal nor a State statute dealing with trade and commerce can be held to be invalid on the sole ground that it discriminates between, or makes it possible for an administrative authority to discriminate between, inter-State and intra-State trade and commerce.

Per Evatt J. : Sec. 92 of the Constitution prohibits the executive and administrative as well as the legislative authority of a State from discriminating against inter-State trade, and the High Court is empowered to restrain such executive and administrative discrimination. Such discrimination is not so much an independent ground for applying sec. 92; rather, it provides conclusive evidence that there has been an infringement of sec. 92, that is, a forbidden interference with "freedom as at the frontier." Such infringement is established by proof that discrimination is being enforced adversely to inter-State trade, that is, by reference to the passage of goods or persons into or out of the State.

James v. The Commonwealth, (1936) A.C. 578; 55 C.L.R. 1, *R. v. Vizzard*; *Ex parte Hill*, (1933) 50 C.L.R. 30, *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (N.S.W.)*, (1935) 52 C.L.R. 189, and *Duncan and Green Star Trading Co. Pty. Ltd. v. Vizzard*, (1935) 53 C.L.R. 493, applied.

CASE referred to the Full Court.

Riverina Transport Pty. Ltd. brought an action in the High Court against the State of Victoria and the Transport Regulation

Board of that State. By the statement of claim the plaintiff alleged that at all material times, including the period of thirty days immediately before 29th August 1933, the plaintiff had been operating regular services solely for the carriage of goods inter-State in commercial goods vehicles within the meaning of the *Transport Regulation Acts* (Vict.) between Melbourne and places in New South Wales and between Geelong and places in New South Wales, and had also been operating a regular service for the carriage of milk intra-State in Victoria. The plaintiff held licences under the *State Transport (Co-ordination) Act* 1931 (N.S.W.). After 29th January 1936 the board prosecuted the plaintiff and its drivers in respect of alleged contraventions of Part II. of the *Transport Regulation Act* 1933 or regulations thereunder. The plaintiff alleged that Part II. of the *Transport Regulation Act* 1933 was contrary to the Commonwealth Constitution and void. The plaintiff applied to the board for licences under Part II. of the Act, but the board refused to grant licences in respect of any of its vehicles which operated in the carriage of goods inter-State, and the plaintiff alleged that Part II. of the Act was thus made to operate in contravention of the Federal Constitution. The plaintiff further alleged that the board had discriminated against the plaintiff and all other operators of commercial goods vehicles carrying goods inter-State by refusing to grant licences for vehicles carrying goods inter-State while granting licences for vehicles operating solely within Victoria, and by refusing to apply to applications for licences for vehicles carrying goods inter-State the same principles which it applied in the consideration of applications for licences for vehicles carrying goods solely within Victoria, and by refusing applications for licences for vehicles carrying goods inter-State on that ground alone. The plaintiff further alleged that the board acted under instructions from the Governor in Council of Victoria or the Minister for Transport, and that the Governor in Council approved of the discrimination against vehicles operating inter-State, and that the effect of the administration of the *Transport Regulation Acts* was to restrict and diminish the free flow of goods between Victoria and New South Wales and other States. The plaintiff claimed a declaration that Part II. of the *Transport Regulation Acts* was contrary to

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the Federal Constitution and void ; alternatively, that Part II., so far as it operated to prohibit the plaintiff from operating its inter-State services, was contrary to the Constitution and void ; alternatively, that the acts of the Transport Regulation Board and the Governor in Council of Victoria were contrary to the Constitution and unlawful and that the *Transport Regulation Act* 1933 did not operate so as to prohibit the plaintiff's inter-State operations. The plaintiff also claimed consequential injunctions. By its defence the defendant denied the invalidity of the *Transport Regulation Act*, denied that the board acted under instructions from the Governor in Council and denied that the effect of the administration of the Act was to restrict the flow of goods inter-State.

The applications for licences made by the plaintiff related to twenty-seven commercial goods vehicles which it had been using for the purpose of carrying goods between Melbourne and districts in the Riverina in New South Wales. The board refused these applications on 13th June 1935. The *Transport Regulation Act* 1935 came into operation on 2nd October of that year, and, by sec. 4, provided that "no decision of the board granting or refusing to grant any application for . . . a commercial goods vehicle licence . . . shall have any force or effect until such decision is reviewed by the Governor in Council." On 4th December 1935 the plaintiff again made application to the board with respect to twenty-four vehicles which were operated inter-State and the applications were again refused. The chairman of the board was called as a witness in the action and gave evidence that the board in reaching its decisions applied the same principles as had been applied to applicants for services within Victoria. The board was of opinion that, applying these principles, it was proper to refuse all the plaintiff's applications. On 24th January 1936 the Governor in Council approved the refusal of the board to grant the applications. The Cabinet considered the policy to be applied in relation to the regulation of motor transport and an announcement was made by the Premier on 4th March 1936 which included the following statements :—"Riverina Cases : The decision of the Transport Board in Riverina cases to stand. Road Hauliers : Operators who were running in August 1933 and who provided reliable, efficient and regular services

will be granted licences to continue operating on the route or routes upon which they were then operating.” In accordance with the directions contained in this statement, the board applied the policy adopted by the Cabinet.

The action was heard by *Evatt J.*, who directed that the case be argued before the Full Court pursuant to sec. 18 of the *Judiciary Act*.

The State of New South Wales obtained leave to intervene.

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Fullagar K.C. (with him *Sholl*), for the plaintiff. The *Transport Regulation Act* is *ultra vires* as infringing sec. 92 of the Constitution, and if the whole Act is not invalid it has been administered in such a way as to discriminate between different States and to that extent has infringed sec. 92. The court should reconsider *R. v. Vizzard* ; *Ex parte Hill* (1). Even if that case be still accepted, the effect of the legislation, in view of the fact that all inter-State licences have been refused, is that in the light of the judgment of the Privy Council in *James v. The Commonwealth* (2) it must be held that there has been an interference with the freedom of inter-State trade and intercourse. There is not merely a refusal of a licence, but the effect of the refusal is to divert trade and commerce which formerly went to Melbourne, and which now goes to Sydney. The licences were refused because of the inter-State character of the trade. That is, the Victorian Transport Regulation Board has purported to regulate transport in the Riverina. There is also a discrimination by the board between inter-State and intra-State trade by the administration of different principles in considering applications for licences. An action is the appropriate remedy, because the result is the same as if the Act itself prohibited inter-State trade. Where an administrative act infringes sec. 92, statute cannot authorize the act so done. The board has acted outside its powers, having regard to sec. 92. It may be difficult to attack the administrative acts under sec. 92, but the position is the same whether the act is positive or negative. The board was acting outside its powers in discriminating between different States, and the operation of the Act is in conflict with sec. 92 because of the action of the board. Sec. 92

(1) (1933) 50 C.L.R. 30.

(2) (1936) A.C. 578 ; 55 C.L.R. 1.

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gives a liberty which cannot be interfered with by State or Commonwealth. The persons who operate the vehicles are themselves engaged in inter-State trade and the applications must be considered on their own merits (*James v. The Commonwealth* (1)). By reason of the action of the board there was a definite diminution in the trade between the Riverina and Victoria. The policy of the Government was that all intra-State trade carriers should receive a licence if carrying in August 1933, but this rule did not apply to inter-State carriers. If the Act contains a provision of a discriminatory character with regard to licence fees, it would infringe sec. 92 and the result would be that the penal provisions would not apply to inter-State operators (*Fox v. Robbins* (2); *W. & A. McArthur Ltd. v. State of Queensland* (3); *Peanut Board v. Rockhampton Harbour Board* (4); *Willard v. Rawson* (5); *R. v. Vizzard*; *Ex parte Hill* (6); *Duncan and Green Star Trading Co. Pty. Ltd. v. Vizzard* (7); *James v. South Australia* (8); *Bessell v. Dayman* (9); *Acts Interpretation Act 1930* (Vict.), sec. 2). All the recent cases have recognized that interference may be effected either by legislative or by executive action. Sec. 92 does not give a right or impose a duty in the sense that any action by a person contrary to it will give a right of action. Sec. 92 confers a liberty and if any legislative or administrative act interferes with that liberty it is invalid and must be read down. If sec. 92 operates on this legislative or administrative action, the penal provisions cannot come into operation and, therefore, the whole of the legislative and administrative action affecting inter-State transport is invalid. The Act cannot operate so as to attach penal consequences to an executive infringement of sec. 92. The fact that one has to examine the acts done by the executive in order to ascertain whether there has been discrimination does not create any difficulty. The only difficulty is the negative character of the act which has been done. What is prohibited by sec. 92 is hostile

(1) (1936) A.C., at pp. 618, 619, 622, 630; 55 C.L.R., at pp. 47, 48, 51, 58.

(2) (1908) 8 C.L.R. 115, at pp. 130, 131.

(3) (1920) 28 C.L.R. 530, at pp. 551, 552.

(4) (1933) 48 C.L.R. 266, at p. 295.

(5) (1933) 48 C.L.R. 316, at pp. 321, 323, 324, 326.

(6) (1933) 50 C.L.R., at pp. 52, 80, 82, 94, 102.

(7) (1935) 53 C.L.R. 493, at pp. 503, 508.

(8) (1927) 40 C.L.R. 1, at p. 14.

(9) (1935) 52 C.L.R. 215, at p. 220.

action directed at inter-State trade and that action has been taken in this case. A declaration should be made that the plaintiff is entitled to a licence.

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Wilbur Ham K.C. (with him *T. W. Smith*), for the State of Victoria. The validity of the Act cannot be impugned in view of *R. v. Vizzard*; *Ex parte Hill* (1) and *James v. The Commonwealth* (2). The Act being a licensing Act with power to grant or refuse licences (as was the Act considered in *R. v. Vizzard*; *Ex parte Hill* (3)) it cannot be said that the mere refusal of a licence to particular carriers contravenes sec. 92. All that sec. 92 postulates is freedom of trade, commerce and intercourse, not freedom of the instruments of trade (*R. v. Vizzard*; *Ex parte Hill* (4); *James v. The Commonwealth* (5)). Freedom of trade does not involve immunity of traders or those conducting operations of trade from general legislative control of the States. The plaintiff must prove that there has been or must necessarily be interference in fact with the passage of goods across the border. Any system of licensing must involve discrimination between those who are licensed and those who are not. Any system of road control of transport must discriminate between one carrier who is permitted to use the most convenient route and another carrier who is precluded from using the most convenient route. This necessarily involves the limitation of choice of the trader so that he must use a certain channel or channels and not necessarily the one most convenient to him. Any system of road control embarked on by a State is necessarily limited to its own territory. A carrier from either State bordering Victoria may obtain as of right a licence to enter Victoria to connect with the Victorian system. Discrimination *per se* does not invalidate an Act. It must be a discrimination directed to impair the free passage of goods at the border. The board in treating the competitive route parallel with the railways as one which *prima facie* should be refused is entitled and bound under sec. 26 of the Act to take into

(1) (1933) 50 C.L.R. 30.

(2) (1936) A.C. 578; 55 C.L.R. 1.

(3) (1933) 50 C.L.R. 30.

(4) (1933) 50 C.L.R., at pp. 51, 52,
79, 82, 87, 91-94, 106, 107.

(5) (1936) A.C., at pp. 611, 618, 621-
623, 625, 628, 629, 632; 55
C.L.R., at pp. 41, 47, 50-54, 57,
58, 60.

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consideration the factors mentioned in that section and particularly sec. 26 (c). But having regard to the territorial limits of its authority, it is not concerned to inquire into or provide for additional transport in other States. The plaintiff's complaint must be against the action of the Governor in Council, for the board can only make a non-operative determination; it is in effect only a recommendation, which the Governor in Council not merely can refuse to ratify but may also reverse. The motives, legality, honesty and propriety of the action of the Governor in Council are not proper subjects for inquiry in a court of law (*Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan* (1)). The administration of the Act cannot make a valid Act invalid. If the administrative act could be regarded as contrary to any law of the Commonwealth or the Constitution, it would only be *ultra vires* as being outside the power conferred, and this would not warrant any relief in the present action. One discriminating refusal would not invalidate other prior valid grants. If the board's refusal to grant a licence to the plaintiff is invalid, the approval of the decision by the Governor in Council is invalid. The applicant would then be in the same position as if his application had never been dealt with. This does not put him in the position of having a licence. Any application of sec. 92 involves the invalidity of some law. Executive action unauthorized by a valid law is a trespass. It may be evidence of the character of the act as in *James v. The Commonwealth* (2), but it cannot itself be said to infringe sec. 92. The administration of the Act was not directed to interfering with or limiting inter-State trade, nor had it that operation, and it was not directed to restrict or diminish the free flow of inter-State trade nor has it had that effect nor is it probable that it will have that effect. The first refusal by the board to grant Riverina licences to the plaintiff was on 13th June 1935. It was refused on the ground that the route applied for was competitive with the Victorian railways and duplicated transport services provided by the railways. In arriving at its decision the board took into account the matters set out in sec. 26 of the Act and particularly in pars. a, b and c thereof. The board's decision was in accordance

(1) (1931) 46 C.L.R. 73.

(2) (1936) A.C. 578; 55 C.L.R. 1.

with the principles acted on by the board and declared by it in a previous decision on an intra-State application. After 2nd October 1935, the date of the proclamation of the 1935 Act, the board refused a renewed application by the plaintiff on 4th December 1935 for the same reasons. The board's decision became operative on 24th January 1936 on the approval of the Governor in Council. These refusals of licences to the plaintiff were all before the policy of the Government, communicated on 4th March 1936, was considered or communicated. Subsequently, in order to give effect to the Premier's communication of 4th March 1936 the board proceeded to apply the policy therein set forth, and continued, in all cases which did not fall within the concession contained in the communication, to apply the principle of refusing applications for services competitive with railway services. Thereafter, the board, prior to 27th July 1936, refused the plaintiff's application for a licence for twenty vehicles for the route between Melbourne and/or Geelong and Bombala and Delegate and between Melbourne and Geelong and between Melbourne and Trafalgar. On 27th July 1936 the Governor in Council approved the board's decision. The Victorian railways at all times have maintained a service sufficient to deal with the whole of the inter-State trade into and from Victoria. Free and unfettered access to the Victorian railways and the Victorian road services have been throughout available to all inter-State trade by road and rail from other States. The board had licensed local radius carriers at all the border towns with authority to carry goods from adjoining States into Victoria to the Victorian towns which are the terminals of both the rail and road services in Victoria. In the case of border railways extending from the Victorian system into New South Wales, no limitations on the road carriage to the railhead of such railways exists for a distance of at least fifty miles. As regards all goods carried by rail from the railheads in Victoria or carried from terminal towns on the border by road carriers, all goods other than those in the terminal town have to be transferred from the radius carrier to the railways or the road hauliers. The necessity of transferring inter-State goods therefore puts them on exactly the same footing as intra-State goods in this respect. There has not been any discrimination against the free flow of inter-State

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trade into or from Victoria. The rates charged by the Victorian railways have at all times been reasonable. No licence has been refused to any applicant for a route between any railhead or road service terminal and the border.

Herring K.C. (with him *T. W. Smith*), for the Transport Regulation Board. This case is determined by *R. v. Vizzard*; *Ex parte Hill* (1) and *James v. The Commonwealth* (2). The basis of the decision in the former case was that the New South Wales Act, which prohibited any motor transport in New South Wales except such as the board chose to admit, did not impede inter-State traffic. Taking a long view, inter-State trade was going to be facilitated and not impeded. Applying the tests in *R. v. Vizzard*; *Ex parte Hill* (3), there has been no discrimination and sec. 92 is not violated. The Act is valid and the board has power to refuse all licences. There can be no discrimination where the services allowed are more than the minimum required by the Act. If it would be legitimate to drive all commerce off the road, trade cannot be made unfree by granting certain facilities. It is suggested that the New South Wales carriers have been discriminated against in favour of Victorian carriers, but what the plaintiff is really complaining about is that there was a different discrimination applied to it from that applied in Victoria. There is a discrimination among the long distance carriers in New South Wales and a discrimination among Victorian carriers and a different system of discrimination was applied in each case. It is not proper to compare Victorian with inter-State carriers and the plaintiff is really complaining that it has not been given special rights. It is desirable that there should be co-ordination of transport.

Teece K.C. (with him *Leaver*), for the State of New South Wales, intervening. The administrative act of refusing a licence was perfectly legal and in no case was inter-State trade made a *discrimen* of the grant or refusal of a licence. The criterion applied was substantial advantage. The action of the board was valid in the

(1) (1933) 50 C.L.R. 30.

(2) (1936) A.C. 578; 55 C.L.R. 1.

(3) (1933) 50 C.L.R. 30.

first instance and could not be made invalid *ex post facto*. The mere fact that the board made concessions does not make what was previously legal into an illegal act. The board originally refused the plaintiff's application and again refused it later. In each case its action was justified. The mere presence of discrimination is not in itself decisive of the question whether the Act infringes sec. 92.

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Fullagar K.C., in reply. Persons engaged in the act of transportation are engaged in trade, commerce and intercourse among the States (*R. v. Vizzard* ; *Ex parte Hill* (1) ; *Willoughby on The Constitutional Law of the United States*, 2nd ed. (1929), vol. II., pp. 729 et seq. ; *James v. Cowan* (2)). Discrimination *per se* may not be the test, but wherever discrimination exists which is based on the inter-State character of the trade it constitutes an interference with the freedom of trade. Discrimination is merely a means to a conclusion, the conclusion being that there is interference with inter-State trade. In the granting and refusing of licences there has been discrimination between inter-State and intra-State traders (*Willoughby on The Constitutional Law of the United States*, 2nd ed. (1929), vol. III., pp. 1931, 1932 ; *Yick Wo v. Hopkins* (3)). *Clyde Engineering Co. Ltd. v. Cowburn* (4) and *H. V. McKay Pty. Ltd. v. Hunt* (5) are illustrations of inconsistent State and Federal legislation.

Cur. adv. vult.

The following written judgments were delivered :—
LATHAM C.J. This case comes before the Full Court upon a direction made by my brother *Evatt* under sec. 18 of the *Judiciary Act* 1903-1934.

July 28.

The Victorian *Transport Regulation Act* 1933, sec. 23, provides that a commercial goods vehicle shall not operate on any public highway unless such vehicle is licensed in accordance with the Act. The defendant, the Transport Regulation Board, is empowered by the Act to grant or refuse licences. The plaintiff, which is engaged

(1) (1933) 50 C.L.R., at p. 98.
(2) (1930) 43 C.L.R. 386, at pp. 407, 409, 418.
(3) (1885) 118 U.S. 356, at pp. 373, 374; 30 Law. Ed. 220, at pp. 227, 228.
(4) (1926) 37 C.L.R. 466.
(5) (1926) 38 C.L.R. 308.

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in the motor carrying business, particularly between Melbourne and the Riverina district of New South Wales, applied for licences for its vehicles. The applications were refused and the Governor in Council approved the decision of the board.

The board is entrusted with powers of organization and co-ordination of motor transport in Victoria under a licensing system. Sec. 26 of the Act requires the board to take into consideration the matters there mentioned in dealing with applications for licences. Under the *Transport Regulation Act* 1935, sec. 4, it is provided that "no decision of the board granting or refusing to grant any application for a commercial passenger vehicle licence or a commercial goods vehicle licence or revoking or suspending any such licence shall have any force or effect until such decision is reviewed by the Governor in Council." The section also provides that in reviewing any decision the "Governor in Council may by order within six months of the board giving a decision—(a) approve the decision of the board; (b) disapprove the decision of the board; or (c) make any determination in the matter which the board might have made—and every such order shall be given effect to as soon as may be by the board."

The plaintiff's applications related to some twenty-seven commercial goods vehicles which it had been using for the purpose of carrying goods between Melbourne and districts in the Riverina in New South Wales. On 13th June 1935 the board refused the applications. The Act of 1935 came into operation on 2nd October 1935 and contained the provision giving the Governor in Council the power of review to which I have already referred. Applicants who had been unsuccessful were given a further opportunity of applying for licences and on 4th December 1935 several applications were made by the plaintiff and were again refused by the board. The chairman of the board, Mr. P. D. Phillips, was called as a witness in this action, and he gave evidence that the board in reaching its decisions applied the same principles as had been applied to applicants for services within Victoria. The result of the application of these principles was that in the opinion of the board it was proper to refuse all the plaintiff's applications.

On 24th January 1936 the Governor in Council approved the refusal of the board to grant the applications.

The Cabinet considered the policy to be applied in relation to the regulation of motor transport and an announcement was made by the Premier on 4th March 1936 which included the following statements:—"Riverina Cases: The decision of the Transport Board in Riverina cases to stand. Road Hauliers: Operators who were running in August 1933 and who provided reliable, efficient and regular services will be granted licences to continue operating on the route or routes upon which they were then operating."

The board, in accordance with the directions contained in this statement, has applied and proposes to continue to apply the policy adopted by the Cabinet.

The plaintiff complains that applications such as those of the plaintiff for commercial goods vehicle licences in respect of inter-State services have been uniformly refused by the board, while applications for licences for routes comparable in length and other relevant characteristics have been granted in respect of services confined to Victoria. It is said that the policy of the Government and the decisions of the board in conformity therewith mean in practice that no inter-State licences will be granted at all. It is further complained that the concession in favour of services operating before August 1933 has been limited to services operating within Victoria and that therefore applications in respect of inter-State services are dealt with upon a footing different from, and less favourable than, that upon which applications relating to services within Victoria are dealt with. It is argued that there is accordingly a practice of discrimination in the administration of the Act by the board which entitles the plaintiff to a remedy because such discrimination is forbidden by sec. 92 of the Constitution of the Commonwealth, which provides that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." The plaintiff claims declarations that the Acts are invalid either *in toto* or in so far as they prevent the plaintiff from carrying goods inter-State: that the refusal of the board to issue licences and the approval by the Governor in Council of that refusal are unlawful: that it is lawful

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for the plaintiff to operate its motor vehicles in inter-State services without any licence : and consequential injunctions.

It was first contended that the *Transport Regulation Act* was invalid because its licensing provisions imposed restrictive conditions upon the inter-State carriage of goods and because they were such as made possible an illegal discrimination against inter-State trade and commerce. It is impossible to accept this contention. In *James v. The Commonwealth* (1) the Privy Council considered the whole question of the meaning of sec. 92. Their Lordships expressly approved the decision in *R. v. Vizzard; Ex parte Hill* (2), which raised the question whether the *State Transport (Co-ordination) Act* 1931 (N.S.W.) contravened sec. 92. The court held that the reasoning of the majority of the court holding that the Act was valid was correct, and expressly approved the judgment of *Evatt J.* It is not possible to distinguish this New South Wales Act from the Victorian Act under which the question arises in the present case. It must, therefore, be accepted as a basis of any judgment in the present case that the Victorian Act is valid.

My brother *Evatt* has referred to the court all the evidence in the case and the court is in a position to determine all the questions which are raised by the evidence in relation to the pleadings of the parties. There is much to be said for the proposition that it has not been established that any discrimination has been shown, in relation to the applications of the plaintiff, between inter-State and intra-State trade and commerce. The evidence of Mr. Phillips shows that the results reached in relation to the Riverina applications can reasonably be supported upon the basis of the principles applied by the board in the case of purely Victorian applications. The declaration of policy made by the Government did not operate in relation to the plaintiff's applications, because they had been finally dealt with by 24th January, whereas the declaration of policy was not made by the Government, and necessarily accepted by the board, until 4th March 1936. But, for the purposes of this case, I am prepared to assume in favour of the plaintiff that all the allegations they make are true, that is to say, that the board has refused their applications simply because they are applications for licences in

(1) (1936) A.C. 578 ; 55 C.L.R. 1.

(2) (1933) 50 C.L.R. 30.

relation to inter-State transport, and further that, if the board were now to consider the applications, the board would not apply in favour of the plaintiff the concession which is made to services regularly operating in Victoria before August 1933. I am also prepared to assume in favour of the plaintiff, though there is but little evidence to support the proposition, that as a result of the refusals of licences to the plaintiff the trade between Victoria and New South Wales has been diminished in total volume. I proceed to consider the case upon the basis of these assumptions.

It is necessary to deal with some preliminary questions of principle. In the first place, the validity of an Act cannot be affected by what a government, board or any person does or attempts to do in real or pretended reliance upon the provisions of the Act. The same Act with one set of administrators may be administered in an entirely different way from that in which it would be administered by another set of administrators.

It is, I think, a serious error to suppose that a statute can begin life as a valid statute and then at some point of time become invalid because some person takes some action which he unsuccessfully attempts to justify under the statute. The validity of the Act obviously cannot depend upon what people do, or think that they are entitled to do, under the Act.

When a person purports to do a particular act under the authority of a statute it may be the case that what is done is not authorized by the terms of the statute, and therefore that the act done does not by virtue of the statute either create rights in any person or impose duties upon any person. If the act which is done is not authorized by the statute and is a breach of duty or an interference with a right for which the law provides a remedy, the person doing the act is liable in ordinary legal proceedings. He is liable simply because the ordinary law which makes him liable applies, and he is unable to claim the protection of the statute because, upon the proper construction of the statute, his act was not authorized or protected by the statute.

Another case arises where an act which is performed by a person is authorized by the provisions of a statute but that statute is

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invalid, so that the act has only apparent and not real legal justification. If what has been done in real or pretended reliance upon the statute is a breach of duty or an interference with a right for which the law provides a remedy, then the person doing the act is liable in ordinary legal proceedings. The position may be simply illustrated by the example of a trespass to goods, where the plaintiff complains of seizure of his goods by the defendant. Such a seizure gives a cause of action at common law unless it can be justified or excused. If the defendant justifies under a statute he must show that his act is authorized by the statute. If this is the only defence and it fails, there will be judgment for the plaintiff. If his act is authorized by the words of the statute upon which he relies, but that statute is invalid because it offends against sec. 92 of the Constitution or for any other reason, then the defence fails. The plaintiff then recovers damages, not for any breach of the Constitution, but for the common law wrong of trespass. No interference with right can be justified by an invalid statute, and, the invalid statute being out of the way, the common law applies.

What I have said applies to cases where complaint is made of interference with a right or of breach of a duty for which the law provides a remedy. There is, however, another class of case which raises different questions, and the present controversy falls within that class. The plaintiff's complaint is that the board and the Governor in Council have failed to act properly in relation to the plaintiff's applications for licences. It is a case of failure to act in the plaintiff's favour by granting a licence.

If a legal duty is imposed upon a person or a public body to act in a particular way, that duty may be enforced by a court in appropriate proceedings. Thus a body which has the power and the duty of making decisions affecting the rights of persons, or of issuing licences and conferring rights upon persons, may, in a proper case, be compelled to perform its duty of duly hearing and determining an application according to law. Such a remedy, by way of mandamus, is quite distinct from a remedy by way of appeal. The remedy, however, is inapplicable and inappropriate in such a case as the present, where the Governor in Council possesses an arbitrary power under the statute to approve or disapprove the action of the

board or to make a new decision. There are no principles according to which a court could review or control the exercise of such a power.

It is contended, however, by the plaintiff that the board and the Governor in Council have, contrary to sec. 92 of the Constitution, illegally discriminated against inter-State trade and commerce in dealing with the plaintiff's applications for licences and that for that reason there must be some form of remedy available to the plaintiff. I therefore proceed to consider the case upon the basis that there has been the discrimination against the plaintiff of which the plaintiff complains.

In the first place there is no sign of discrimination in the terms of the statute itself, and, as I have already said, the statute must be held to be valid. A statute may contain provisions which are invalid on the ground of an illegal discrimination. A Federal statute with respect to taxation might discriminate between States or parts of States and so infringe sec. 51 (ii.) of the Constitution. So also a Federal law or regulation with respect to trade, commerce or revenue might give preference to one State or a part thereof over another State or a part thereof and so infringe sec. 99 of the Constitution. Such statutes would be invalid because the discrimination or preference was forbidden by the Constitution.

Quite different questions arise when the subject of complaint is not discriminatory legislation (which may make a statute invalid) but discriminatory administration of a valid statute. In such a case it is contended that an authority acting in pursuance of a valid statute has exercised a prohibited form of discrimination so that its action is unlawful for that reason. It is here alleged that such discrimination has been exercised by the board and/or by the Governor in Council. It is necessary to examine carefully the principles which are relevant in such a case.

Discrimination can exist only where two persons or two subjects are treated in different ways. Where they are so treated in different decisions of such an authority as the Transport Regulation Board, questions arise which have not hitherto been the subject of direct decision in relation to the Commonwealth Constitution. It is plain that the first decision given under the *Transport Regulation Act*, whatever its character may be, cannot be a discriminatory decision.

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Discrimination can be introduced only when another decision or decisions are given. If sec. 92 forbids discrimination against inter-State trade and commerce by an administrative authority—so that such discrimination is a ground for holding a decision or decisions of such authority or authorities to be invalid—each decision is affected by the invalidating circumstance. The first decision, when given, was obviously not invalid on the ground of discrimination. Invalidity could only be suggested when a later decision, say the tenth, was alleged to have the effect of producing forbidden differential treatment in relation to inter-State trade and commerce. When the tenth decision, which for the first time reveals the discrimination, is given, is it that decision which is invalid?—or are the other decision or decisions (by comparison with which the discrimination appears) the decision or decisions which are invalid? *Ex hypothesi* every decision would have been valid by itself. Are they all invalidated because at some time in the history of the activities of the authority a discriminatory decision appears? If one hundred decisions have been given, ninety-nine of which deal with intra-State trade and commerce, and then one decision is given dealing with inter-State trade and commerce, and the last-mentioned decision is alleged to have discriminated against inter-State trade and commerce by giving less favourable terms in the case of that trade and commerce, which decisions are to be regarded as invalid on the ground of discrimination—the ninety-nine decisions—or the one decision—or the whole one hundred decisions? Further, when the discriminatory decision has been given, does it invalidate other decisions as from the moment when it is given? If this were the case, an element of the greatest uncertainty would be introduced into governmental administration. It would seldom be possible to determine without a knowledge of the whole history of the relevant administrative activities whether any of the decisions were valid. If it is to be held that actions of an administrative authority can be set aside on the ground of discrimination forbidden by sec. 92 of the Constitution, it must be remembered that discrimination arises from a comparison of a number of decisions and not from any single decision. It seems to me to follow that, wherever the discrimination operates, the decisions which show discrimination must, on the suggested principle,

all be set aside. Thus the fact, if it be a fact, that the Transport Regulation Board has in its decision discriminated against inter-State trade and commerce must, if it is a ground for interference by a court, be a ground for setting aside all the decisions which demonstrate the discrimination. All the decisions would be wrong, those on inter-State trade because they are relatively and wrongly disadvantageous to such trade and commerce as compared with intra-State trade and commerce, and those on intra-State trade and commerce because they are relatively and wrongly advantageous to such trade and commerce as compared with inter-State trade and commerce.

In this case the result would be that no licences would exist under the Act. If that be the result it must be accepted, but in my opinion there are at least two objections to the view which would result in such a conclusion. In the first place the Act itself is valid and cannot be made inoperative or in effect invalid because the board or the Governor in Council has gone wrong (if either has gone wrong) at some point of time by acting on a discriminatory basis. The contrary view appears to me to involve a radically unsound view of the nature of an Act of Parliament and of the true significance of constitutional prohibitions in the Commonwealth Constitution. In the second place, for reasons which I propose to state, discrimination in relation to inter-State trade and commerce is not, taken simply by itself, a constitutional objection to any Federal or State law of trade or commerce. I postpone for the moment the justification of this statement.

I recognize that it may be urged against what I have said that the result of holding that sec. 92 forbids a discriminatory action by an authority and renders it invalid is not that all the decisions of the authority are of no effect, but that only those which affect inter-State trade and commerce in a forbidden manner are of no effect. If this be so, the consequence would be that the decision of the Governor in Council and of the board refusing the plaintiff's applications should at least be set aside.

Then the plaintiff would simply be at liberty to make a fresh application. The court, however, could not order that a licence should be granted to the plaintiff. Many considerations other than

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those which are alleged to be associated with the alleged discrimination must be considered by the board and the Governor in Council in determining whether to grant or refuse a licence in any particular case. There is no right of appeal from the decision of the board or of the Governor in Council to any court, and no court can substitute its judgment for that of the authority or authorities appointed under the Act to determine questions arising under the Act. A mere rehearing of the application by the board would be useless unless the Government changed its policy. Courts have no authority or power to prescribe principles of policy, though they may protect citizens against unlawful acts which are done by a Government or by any person. It cannot be contended that any person has a right under the legislation in question to obtain a licence, and, therefore, neither the board nor the Governor in Council interferes with any right in refusing to grant a licence.

Thus, in my opinion, even if it be fully established that the board and the Governor in Council are, as a matter of deliberate policy, discriminating against certain inter-State trade and commerce because it is trade between Victoria and New South Wales, there is, as the law stands, no remedy available to any person who, in consequence of that policy, fails to obtain a licence.

I now return to the proposition that the Constitution itself does not, simply because it is discrimination, forbid any form of discrimination, in either Federal or State legislation, against inter-State trade and commerce. This, however, does not mean that the Constitution does not make it possible to provide means for obtaining a remedy in such a case. The remedy, if a remedy is desired, can be provided by aptly framed Federal legislation, which the Constitution permits in all cases, and for which it makes specific provision, subject to special safeguards, in the case of State railways.

As I have already said, a Federal taxation statute may be invalid because on its face it discriminates between States, and a Federal law or regulation of trade, commerce or revenue may be held to be invalid because it gives preference as between States or parts of States. But neither a Federal statute nor a State statute dealing with trade and commerce can, in my opinion, be held to be invalid

on the sole ground that it discriminates between, or makes it possible for an administrative authority to discriminate between, inter-State and intra-State trade and commerce.

In the first place, Federal laws as to inter-State trade and commerce passed under the power conferred by sec. 51 (i.) of the Constitution are necessarily laws which deal only with such trade and commerce. They cannot validly deal with intra-State trade and commerce. As they cannot deal with both subjects they cannot discriminate between them—unless, indeed, it is to be said that, as they of necessity apply only to inter-State trade and commerce, they with equal necessity discriminate between such trade and commerce and intra-State trade and commerce. Upon this view all Federal laws dealing with inter-State trade and commerce would necessarily be invalid. The Constitution does not involve such an absurdity. The view suggested does not give any real meaning to the word “discrimination.” Discrimination at least involves differential treatment of two matters by the same authority. It cannot be discovered in treatment confined to one matter only—that being the only matter with which the authority can and does deal. Thus a Federal statute dealing only with inter-State trade and commerce cannot discriminate against that trade and commerce. If a Commonwealth law of trade and commerce was a law with respect to both inter-State and intra-State trade and commerce, and discriminated against the former, no question of discrimination could arise from a legal point of view, because the provisions dealing with intra-State trade and commerce would simply be invalid, as the Commonwealth Parliament has no power to legislate upon that subject. They would disappear from the statute, and the alleged discrimination would necessarily disappear with them. Thus discrimination against inter-State trade can never be a ground upon which a Federal statute can be held to be invalid.

In the second place, a State Parliament can legislate with respect to both inter-State and intra-State trade and commerce (*James v. The Commonwealth* (1)). It may be that such a law in terms discriminates between the two subjects, and in terms treats inter-State trade and commerce disadvantageously as compared with

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intra-State trade and commerce. In my opinion, such a law would not be rendered invalid by sec. 92 by reason of any such discriminatory provision. This may seem to be a surprising statement, particularly because in cases dealing with sec. 92 many references have been made to discrimination as constituting a possible infringement of sec. 92. But there has been no decision which necessarily depends upon such a proposition so far as State laws are concerned. *Fox v. Robbins* (1) is, I think, the only decision of the court against the validity of a State statute under sec. 92 which can be said to be based upon discrimination as a principle. But the Privy Council in *James v. The Commonwealth* (2) has now expressly explained that what the State statute did in *Fox v. Robbins* (1) "was clearly inconsistent with the absolute freedom of the border," and has approved the decision upon that ground. A similar view has been taken of *Fox v. Robbins* (1) by *Evatt J.* in *R. v. Vizzard*; *Ex parte Hill* (3). Discrimination is not the test. The test is to be found in the answer to the question whether the freedom of inter-State trade is restricted. The latest authoritative statement is to be found in the decision of the Privy Council in *James v. The Commonwealth* (4), where it is said:—"Nor does 'free' necessarily connote absence of discrimination between inter-State and intra-State trade. No doubt conditions restrictive of freedom of trade among the States will frequently involve a discrimination; but that is not essential or decisive." The rule is clear—restriction of freedom of trade and commerce "as at the frontier" (5) is the invalidating circumstance under sec. 92—not discrimination, though discrimination may be involved in such a restriction, just as discrimination may result from a preference which is contrary to sec. 99. But it is the restriction or the preference, as the case may be, and not the discrimination, which is the invalidating feature. (To avoid misunderstanding it may be mentioned that sec. 99 forbids trade preference in relation to States or parts of States, and not in relation to the intra-State or inter-State character of trade.)

Before referring to certain provisions of the Constitution which, unlike sec. 92, do relate to the subject of discrimination in trade

(1) (1909) 8 C.L.R. 115.

(2) (1936) A.C., at p. 617; 55 C.L.R.,
at p. 46.

(3) (1933) 50 C.L.R., at p. 93.

(4) (1936) A.C., at p. 628; 55 C.L.R.,
at p. 56.

(5) (1936) A.C., at p. 630; 55 C.L.R.,
at p. 58.

legislation, I think that it is necessary to say something about the nature of the problem which is raised by the discriminatory administration of a valid law. An example will be useful to explain precisely what I mean. Differential freight rates on railways are a very obvious and common method of discriminating in practice against certain trade or commerce. Such rates are generally to be found as items in intricate and comprehensive schedules. They are generally prescribed in Australia by departmental by-laws or by orders made by railway commissioners. The only way to deal with unfair discrimination against districts or States is to bring about a revision of the rates so as to establish a new schedule. It is, I think, plain that but little contribution would be made to the practical solution of such a problem as this if a court were to declare all the rates invalid because they or some of them were based upon a discriminatory principle, or if a court were to declare invalid the rates which were regarded as unfair to certain trade, for example, inter-State trade. The only result of such a declaration by a court would be that there would be no rates applying to any goods or any routes in the one case, or, in the other case, no rates provided for the trade of the injured party. The result would certainly not be that either all persons in the one case, or the injured persons in the other case, could get their goods carried for nothing. The problem presented by discriminatory legislative provisions or discriminatory administrative practices in relation to railway rates cannot be dealt with by a court unless the court has the power to vary the rates as it thinks proper and to prescribe a new schedule of rates. But this kind of work cannot be done by any court acting upon legal principles. The problem is not one which can be solved otherwise than by the adoption of some economic, commercial, financial or other policy. This is the sort of work which the Inter-State Commerce Commission does in the United States of America and it is almost a necessary incident of a fully developed Federal system. I have taken railway freight rates as an illustration. Similar observations apply to a transport licensing system. A consideration of the carefully thought out and reasoned decisions of the Transport Regulation Board which have been placed before the court will demonstrate the nature of the functions of such a tribunal. Such a tribunal must

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adopt a policy, either its own policy or a policy prescribed by a statute or by a government. Judicial qualities are very desirable in the persons who perform such functions, but the work is not judicial work in the sense of interpreting and applying merely legal principles. Such a body must, subject to its statute, provide its own principles or take them from some other source.

The Commonwealth Constitution recognizes that State laws or administrative decisions are not made invalid simply because they discriminate against the trade of, or against trade with, another State. In 1900 motor traffic was negligible and inter-State motor traffic was unknown as an element in trade and commerce. But it was then recognized that problems of discrimination might arise, particularly in connection with railways. The Constitution accordingly made special provisions for the purpose of dealing with discrimination in relation to State railways. Before examining the sections which contain these provisions and other provisions relevant to the question under consideration, I wish to make it clear first, that, for the purpose of this case, the important thing is that these provisions clearly assume that discriminatory State railway legislation is not, because it is discriminatory in character, therefore invalid as contravening sec. 92 or any other provision of the Constitution. Secondly, the Constitution actually prevents the invalidation by Federal legislation or Federal action of certain discriminatory State railway legislation. It does not operate by giving authority to the Commonwealth to preserve such legislation as if it were *prima facie* an infringement of the Constitution requiring some special action to make it valid. On the contrary, the Constitution operates in relation to this matter by preventing any interference with such legislation by Federal action. Thirdly, these provisions place a limitation upon Federal legislative power in relation to inter-State trade and commerce as carried on by means of railways. They leave unimpaired the possible scope of Federal legislation for or in relation to such trade and commerce carried on by other means, such as ships, motor vehicles, or aircraft.

The provisions of the Constitution upon which I base the reasoning which leads to the conclusion stated are the following :—

Sec. 101 : “There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems

necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.”

Sec. 102 :—“ The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State ; due regard being had to the financial responsibilities incurred by any State in connection with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.”

Sec. 103—providing for the appointment and tenure of members of the Inter-State Commission.

Sec. 104 : “ Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.”

I deal with these sections in turn.

Sec. 101.—The Inter-State Commission is not a legislative body. It cannot make laws. It adjudicates concerning laws and administers those laws. It executes and maintains those laws. Those laws are the provisions of the Constitution relating to trade and commerce, and all the Federal laws made under such provisions. The functions of the commission are limited by the words “ within the Commonwealth.” Thus the commission cannot deal with foreign trade outside the Commonwealth. The outstanding provision of the Constitution with reference to trade and commerce is sec. 51 (i.) which empowers the Commonwealth Parliament to make laws with respect to inter-State trade and commerce. This provision is limited by sec. 92 (*James v. The Commonwealth* (1)). Sec. 92 does not authorize the making of any laws. It prevents the making of any laws which interfere with the freedom of inter-State trade and

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commerce. But sec. 92 is, as already explained, not a completely self-executing provision. It may operate to invalidate Federal or State statutes, but it cannot, of its own force, deal with cases of, e.g., discrimination in the administration of valid legislation. If sec. 92 is to be fully operative, it needs an administrative organization to deal with and to correct interferences with the freedom of inter-State trade and commerce which are the result of administrative action under legislation which is not itself an infringement of sec. 92. The Inter-State Commission is that administrative organization, but it cannot function unless there are laws for it to "execute and maintain."

The Commonwealth Parliament can, under sec. 51 (i.), make laws with respect to inter-State trade and commerce. Under this vitally important power the Commonwealth Parliament may pass laws to protect the freedom of inter-State trade and commerce and so really to give full effect to sec. 92. If the Commonwealth Parliament passed such a law and created an Inter-State Commission, the statute would confer defined powers on the commission. Under a suitable statute the commission could be given power to adjudge that acts of State administration were inconsistent with the constitutional freedom of inter-State trade and commerce, and power, as a matter of administration, to substitute for State decisions its own decisions in accordance with the will of the Commonwealth Parliament as declared in the Federal law. I refer again to the illustration of discriminatory railway rates. Sec. 101 (subject to the limitations in that case of sec. 102) contemplates legislation enabling the Inter-State Commission to prescribe fair rates for inter-State rail transport, thus effectively dealing with the problem with which, as I have already shown, a court cannot deal. A court would not really deal with such a problem by using the only methods available to a court, such as declaring some statute or regulation invalid or declaring that some administrative action was ineffective. Curial action could only "create a blank." It could not substitute other provisions for any provision which it declared to be invalid. The Constitution therefore does not look to any court to deal with this particular problem. It looks to Federal legislation, administered by the Inter-State Commission. So also, in the case of transport

regulation, the Commonwealth Parliament can legislate with respect to inter-State transport. Such legislation would be legislation with respect to inter-State trade and commerce (*James v. The Commonwealth* (1)), but would not necessarily be restrictive of the freedom of inter-State trade and commerce (2). Indeed, the Commonwealth Parliament could pass a statute, limited to inter-State transport, on the general lines of the Victorian *Transport Regulation Acts*. The Inter-State Commission or some other body could be empowered to grant licences in respect of inter-State transport. These licences could authorize inter-State carrying notwithstanding any State statute or any action of a transport regulation board or other authority under a State statute. Appropriate legislation would be effective by virtue of the Commonwealth Constitution, secs. 51 (i.), 101 and 109. It is by such means that, when the Commonwealth Parliament is satisfied that the necessity arises, the freedom of inter-State trade and commerce can be protected against interference under valid State legislation such as the *Transport Regulation Acts*.

The practical difficulty in securing the freedom of inter-State trade does not arise mainly from the risk of invalid legislation. Such legislation, when detected, is of no effect. The real difficulty is to be found in all kinds of differentiating treatment in the course of the administration of perfectly valid State statutes. The statutes are valid, but they may be used, as is alleged to be the case here, for the purpose of making many varieties of discrimination against, and creating disadvantages affecting, traders associated with other States. Administrative authorities and officers need not, generally speaking, give any reasons for what they do, and a court cannot possibly deal with an administrative policy which just happens to lead to the position that "no one from another State need apply." A court can give a remedy for a legal wrong such as trespass. A court can declare that an act is not authorized by a statute. It may suspect that a mere refusal to issue a licence is inspired by the fact that an applicant comes from the wrong side of the Murray River. But, even if this is proved, the court cannot issue a licence under an Act such as the *Transport Regulation Act*. A court may

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(1) (1936) A.C., at p. 627; 55 C.L.R., at p. 55. (2) (1936) A.C., at p. 629; 55 C.L.R., at p. 57.

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believe that certain railway rates are essentially discriminatory against another State, but the court cannot construct a new schedule and make it operative. The Inter-State Commission, acting under appropriate Federal statutes, is expressly designed to deal with just such problems by "executing and maintaining" Federal statutes.

Sec. 102.—This section is most important in relation to the contention raised in this case that State legislation is necessarily bad if it discriminates against inter-State trade and commerce. The terms of the section conclusively show that this is not the case.

The railways of Australia are almost entirely State-owned. At the time of federation they were, with shipping, the principal means of carrying on inter-State trade and commerce. Inter-State shipping was placed completely within the power of the Commonwealth Parliament by sec. 98 of the Constitution. The same section provides that the power of the Parliament to make laws with respect to trade and commerce (i.e., in the case of inter-State trade and commerce) should extend also to railways the property of any State. It was plainly considered not to be wise or proper to leave this latter power without some special limitation for the purpose of fairly protecting State interests—a limitation which was not necessary in the case of shipping, which was not State owned. Accordingly, sec. 102 imposes limitations upon Federal correction of discriminatory State railway legislation or administration. It is true that the section provides that the Parliament may, by any law with respect to trade and commerce (inter-State trade and commerce), forbid railway preferences or discriminations by a State or by a State authority. But the object of sec. 102 is not to confer this power, which exists in relation to all inter-State trade and commerce, whether carried on by railways or not, under sec. 51 (i.). The object of sec. 102 is to limit that power. The power of forbidding railway preferences or discriminations is limited in three ways:—(1) The preference or discrimination must be undue and unreasonable, or unjust to some State. (2) Due regard must be had to the financial responsibilities incurred by the discriminating or preferring State in connection with the construction and maintenance of its railways. (3) It is for the Inter-State Commission, and not for the Parliament itself, to determine, in the case of State

railways, whether any preference or discrimination is, within the meaning of the section, undue and reasonable, or unjust to any State.

These three limitations apply only in the case of railways controlled by a State, directly or through a State authority. They do not apply in the case of other forms of inter-State transport where the Commonwealth Parliament (so far as the Constitution is concerned) can make up its own mind as to what ought to be done without concerning itself whether any State regulation of the matter is undue or unreasonable or unjust to a State ; without considering the finances of a State ; and, if Parliament thinks proper, without any action by the Inter-State Commission, though, instead of legislating directly and in detail upon such matters, the Commonwealth Parliament could, if it thought proper, give the administration of a general statute to the commission.

The significant feature of sec. 102 for the purposes of this case is that the section clearly shows that discriminatory State railway legislation or administration is not in itself an infringement of the Constitution. If it were so the terms of sec. 102 would, as to such discrimination, be completely inappropriate. The section is not dealing with invalid State legislation or with statutes that do not exist in law. It is dealing with discriminatory statutes that are valid, and it is dealing with them in a very special way because they are valid, and because they relate to most important financial interests of the States. The section deals with both legislative and administrative discriminations which, unless corrected, will operate unduly, unreasonably or unfairly. The section specifies the means of correction, namely, (1) a Federal trade and commerce law (passed under sec. 51 (i.) and sec. 98) ; (2) an adjudication by the Inter-State Commission that the preference is undue and unreasonable or unjust to a State.

It is only when this process has been followed that a railway discrimination can be prevented. It can be prevented on the ground that it is a discrimination of a particular kind, forbidden by the Commonwealth Parliament (not by the Constitution itself), and adjudged by the Inter-State Commission to be of that kind. The section provides a special means of dealing with discriminating railway laws which would be foolish and unnecessary unless such

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laws are valid. As already mentioned, this section also makes it possible to deal effectively with administrative discrimination. I have referred particularly to discrimination because it is discrimination which is important in this case, but what I have said applies also to undue etc. preference by a State in connection with railways.

Sec. 103, as before mentioned, provides for the appointment and tenure etc. of members of the Inter-State Commission.

Sec. 104 is as follows : " Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States."

" Goods within the State " may be carried either intra-State or to another State : " goods passing into the State from other States " is a phrase which describes the rest of inter-State trading transport.

This section introduces a further limitation upon the power of the Commonwealth Parliament. The Commonwealth Parliament could itself, under sec. 51 (i.) and sec. 98, fix railway rates for inter-State trade and commerce if it thought proper to do so. (The limitations imposed by sec. 102 relate only to the forbidding of preferences and discriminations by States and State authorities and not to the general subject of the fixing of rates by the Commonwealth Parliament.) Sec. 104 operates to prevent the Commonwealth Parliament from making certain goods rates unlawful either by direct declaration that they are unlawful or by fixing a different rate as the rate to be applied. The rates which are so protected are such as the Inter-State Commission deems to be necessary for the development of the territory of a State. But such rates must be applied equally to inter-State and intra-State trade and commerce—they must not be discriminatory. If sec. 92 *per se* invalidated railway rates which discriminated against inter-State trade and commerce, the final clause of the section would have been quite unnecessary.

The conclusion which follows from all those considerations is that neither discrimination in the terms of a State statute against inter-State trade and commerce, nor discrimination against such

trade and commerce in the administration of a valid State statute, in itself constitutes an infringement of sec. 92 of the Constitution.

For the reasons stated I am of opinion that even if it is clearly established that the decisions of the Transport Regulation Board have discriminated against the plaintiff because it is a company engaged in inter-State trade and commerce, or that a different principle has been applied by the board in dealing with inter-State applications as compared with intra-State applications, the plaintiffs have no cause of action which is cognizable in a court. In my opinion the plaintiff's action should be dismissed.

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RICH J. In the state of current decisions I think it is unnecessary to overlay what has there been said and I shall state very briefly the conclusion I have arrived at.

The Privy Council refused special leave to appeal from *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (N.S.W.)* (1) and *Duncan and Green Star Trading Co. Pty. Ltd. v. Vizzard* (2). *Gilpin's Case* (1) and *R. v. Vizzard; Ex parte Hill* (3) were applied by this court in *Duncan and Green Star Trading Co. Pty. Ltd. v. Vizzard* (2). The reasoning in *R. v. Vizzard; Ex parte Hill* (3) appears to have been accepted by the Privy Council in *James v. The Commonwealth* (4), which also mentions *Willard v. Rawson* (5) without disapproval. The statute in the present case is of the same type as those in the cases referred to and I am unable to see that what are said to be differences serve to distinguish this case from the decisions I have cited.

The argument on behalf of the plaintiff company rested on the manner in which the board and the Executive Government had administered the licensing provisions of the Act. Elaborate proof was attempted of a discrimination in favour of intra-State carriers, or, as they appear to be called, by a revival of an ancient term, "hauliers." The evidence does not disclose on the part of the authorities any design to obstruct the flow of goods across the border or to increase the movement of goods within the State at the expense of traffic across the boundaries. In drawing a line between the

(1) (1935) 52 C.L.R. 189.

(2) (1935) 53 C.L.R. 493.

(3) (1933) 50 C.L.R. 30.

(4) (1936) A.C. 578; 55 C.L.R. 1.

(5) (1933) 48 C.L.R. 316.

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kind of case in which a licence ought on the merits to be granted and a case in which it should be refused for long-distance haulage, it seems to have been found convenient to take carrying into and from New South Wales and South Australia as a description. The suit seeks injunctions and declarations of right on the basis that by a discrimination the authorities have set the plaintiff company at liberty to operate goods' vehicles, without a licence. I do not say that, if an applicant for a licence could prove that his licence was refused simply because he was an inter-State carrier, he would be without remedy by way of mandamus or the like. But before he can carry he must obtain a licence. I cannot see how this suit can succeed upon the facts proved.

In my opinion the suit should be dismissed.

DIXON J. The purpose of this action is to obtain relief in some form or other from the application to the plaintiff's business of the *Transport Regulation Acts*. The business consists in, or at any rate includes, carrying goods by motor trucks between Melbourne and places in the Riverina district of New South Wales.

The legislation expressly says that no one may carry goods for hire or reward or in the course of trade by a motor vehicle upon a Victorian highway unless the motor vehicle is licensed for the purpose by the Transport Regulation Board (secs. 5, 23, 24 and 45 of Act No. 4198). The board was constituted about three years ago and, upon taking up its duties, it granted licences of a temporary character to allow carrying to go on while the applications for full licences were considered. The temporary or provisional licences were of two kinds. Some were granted under a discretionary power; others under a provision conferring upon those whose vehicles had been carrying goods since a time before 29th August 1933 a right to a licence up to 31st December 1934. Until it was able finally to dispose of an application for a full licence, the board granted successive renewals of the provisional or temporary licence in respect of the vehicle. By this means the plaintiff remained licensed until 29th January 1936 for about twenty-seven vehicles in respect of the Victorian portion of routes extending into New South Wales. Long before that date, however, the board had given its

decision upon the plaintiff's application for full licences. On 13th June 1935 it announced its determinations in respect of all applications for licences for carrying goods from Melbourne over Victorian routes to places in the Riverina. Speaking generally, it decided that none should be granted. Licences for some eighty-three vehicles, including the plaintiff's twenty-seven, accordingly were refused. In the course of dealing with applications by carriers whose routes were confined to Victoria, the board had declared the principles upon which it would act in granting or refusing licences. The basal principle that it had laid down for its own guidance was that freight should not be diverted from the railways of the Victorian commissioners by allowing motor vehicles to compete, unless it appeared that some substantial advantage would be gained by the public or some section of the public if organized motor transport between two places were continued or established. The refusal of all licences for carrying into and from the Riverina upon through journeys with Melbourne as a terminus seems to have been the consequence of applying this principle to the conditions affecting the Riverina. The chief consideration was the existence in that district of the railways of the Victorian commissioners which run respectively from Yarrawonga to Oaklands, Echuca to Deniliquin, Echuca to Balranald, and Murrabit to Stony Crossing. Under a special provision of the board's Act a licence must be granted for a vehicle carrying goods solely within a radius of twenty miles from the place of business of its owner. In virtue of licences of this kind, vehicles could ply into New South Wales from the many Victorian border towns. Moreover, the board took the view that it ought to grant such or similar licences to vehicles coming from New South Wales into Victoria for a distance of twenty miles or less. Thus goods might be carried from New South Wales to Victorian railheads or indeed to the terminals, within twenty miles of the New South Wales border, of routes in respect of which the board might see fit to grant licences for goods vehicles. But beyond this the board considered it ought not to go, and it would not sanction the carriage of freight by motor vehicle on a through journey from the Riverina to Melbourne. Before the board's decision was given it had made some progress in the work of determining how far the motor carrying

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business should be allowed in other parts of Victoria, work which the board performed according to geographical divisions of the State. At this point, however, the Government intimated its intention of bringing down an amendment of the statute and requested the board to stay its hand. The result was that it withheld any further determination of controversial applications and extended all temporary licences. At length, on 2nd October 1935, Act No. 4298 came into operation. It contained a provision that no decision of the board granting, refusing, suspending or revoking a licence should have any force or effect until the decision had been reviewed by the Governor in Council. Within six months of the board's decision the Governor in Council was empowered to approve, to disapprove or to make any determination that the board might have made. The Act also provided that, if approval were given to the board's refusal of a licence to a man holding a temporary licence in succession to a previous licence for a vehicle in use before 29th August 1933, then the decision should not take effect for six months after the refusal, and the temporary licence should be deemed extended for that period. In order to give applicants with whom it had already dealt the benefit of these amendments, the board took steps to obtain further applications from them. The plaintiff, among others, applied again, and, on 4th December 1935, its applications in common with other Riverina applications were again refused by the board. This time, of course, the board's refusal had no effect until the Governor in Council had dealt with it. But, on 24th January 1936, his approval was given to the refusal of all Riverina licences. This meant, substantially, that after 29th July 1936 the plaintiff would be without the protection of a licence.

The writ was issued on 3rd August 1936. The claim is that to enforce the decision of the Victorian Government would involve a restriction of the freedom of trade, commerce and intercourse among the States. The claim is not based solely upon the matters I have briefly stated. Much reliance is placed by the plaintiff upon the very different steps taken or authorized in reference to carriers of goods by motor vehicle upon routes confined to Victoria. These steps are further contrasted with the treatment of carriers plying to South Australia.

It appears that the Government's decision upon the Riverina cases was given before the determinations of the board upon purely Victorian cases were considered and that, before the Government dealt with them, an interval elapsed during which the board sought for its guidance some intimation of the course the Executive would take. On 4th March 1936 the Premier, by a memorandum, communicated to the board the decision of the Government. The memorandum was divided into two heads. The first said that the decision of the board in the Riverina cases should stand. The second was to the effect that carriers of goods by motor who immediately before 29th August 1933 were providing reliable, efficient and regular services should receive licences for the routes upon which they were then running. This ruling the board understood as applying only to routes the terminal points of which lay within Victoria, and a little later the Government confirmed this view by directing the refusal of all licences for the carriage of goods upon routes extending into South Australia. Licences for a radius of twenty miles, however, were to be continued on the borders of both New South Wales and South Australia. The board was required to apply to particular cases the principles expressed by the memorandum and proceeded to do so, a course wisely adopted to avoid a divergence between the decisions of the board and of the Governor in Council.

The plaintiff had made some other applications which I have not thought it necessary to describe. These were refused and the refusal was confirmed on 27th July 1936.

In applying the Government's principle, the board necessarily granted a very large number of licences which otherwise it must have refused. For that principle meant the complete desertion of the view laid down by the board, the view which it had applied to the Riverina cases. The practical result was that up to the borders 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

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the carriage of goods exclusively within the State a facility is widely allowed which is denied if the border is crossed. Why the Government persisted in drawing a distinction in the treatment of inter-State transport and transport within the State does not appear. No one supposes that it was for the purpose of hindering the marketing of wool or other commodities across the border. But the plaintiff relies upon the presence of three elements which are independent of purpose. There is, first, a consequence to those engaged or concerned in the trade or business of carrying. If they carried inter-State they cannot continue to do so. If their routes were confined to Victoria, they are allowed to go on. There is, secondly, the consequence to consignors and consignees. They may in very many places choose between rail and road and have through carriage by road but only if the goods are consigned in Victoria to a destination also in Victoria. There is, thirdly, the fact that, in deciding to licence those carrying goods immediately before 29th August 1933 and continuing to do so, the Government adopted the administrative principle of excluding all carrying upon inter-State journeys.

The existence of these features in the present case is said to distinguish it from *R. v. Vizzard*; *Ex parte Hill* (1), *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (N.S.W.)* (2), *Bessell v. Dayman* (3) and *Duncan and Green Star Trading Co. Pty. Ltd. v. Vizzard* (4). The decisions in those cases appear to me completely to establish the validity of legislation taking substantially the same form as the *Victorian Transport Regulation Acts*. In particular they decide that the prohibition of carrying goods by motor vehicle, except under licence, involves no impairment of the freedom of trade, commerce and intercourse among the States, although carriage of goods upon a journey across the border is included and although there is a full discretion to grant or withhold a licence. I remain quite unable to agree in that conclusion, but I should have thought that it covered the present case and that the elements relied upon by the plaintiff could make no difference. It is better that I should not attempt any restatement for myself of the principles upon which the decisions rest. Probably my grasp of

(1) (1933) 50 C.L.R. 30.
(2) (1935) 52 C.L.R. 189.

(3) (1935) 52 C.L.R. 215.
(4) (1935) 53 C.L.R. 493.

those principles is imperfect and, as a rule, it is neither safe nor useful for a mind that denies the correctness of reasoning to proceed to expound its meaning and implications. But I am called upon to say whether, according to the proper application of the decisions to the facts, the plaintiff has any title to relief from the operation of the State law or the consequences of its administration. Simply to adhere to the main conclusion established by the decisions is hardly enough for the discharge of the task ; some recourse to the reasoning behind it is necessary. It is, however, clear, I think, that one important step in that reasoning is the adoption of the view that the use of motor vehicles for the carriage of goods from one State to another, though an incident of trade, commerce and intercourse among the States, is not in itself within the protection of sec. 92. Something more must be found than a prohibition of, or a restraint upon, the use of motor vehicles in the carriage of goods before freedom of inter-State trade and intercourse is infringed upon ; consequently a general prohibition subject to a discretion to allow exceptions is valid.

I have endeavoured to state with as much accuracy as the need for brevity allows the circumstances of the present case so far as the plaintiff relies upon them, because the question is whether they provide the something more. I find it difficult to see how they can. What prevents the plaintiff from carrying goods across the River Murray in the course of trade between Victoria and New South Wales is the prohibition contained in sec. 23 of Act No. 4198 and the penalty imposed by sec. 45. These sections, with the definitions in sec. 5, penalize the carrying of goods by motor vehicle upon a highway for hire or reward or in the course of trade unless it be licensed. It is this prohibition that prevents all other persons carrying goods over the border on a through journey. It is the same provision that indirectly operates upon intending consignors of goods and prevents them from sending their goods by motor vehicle into or out of Victoria. The degree to which motor transport of goods within the State is allowed or restricted, while across the border it is wholly disallowed, may have a bearing upon the relative facility with which the two kinds of transaction may be carried through. But the presence of such a facility for intra-State trade

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can scarcely operate to increase the restriction upon inter-State trade, unless it provides an incentive for the diversion of trade. The principle cannot be that "true freedom is to share all the chains our brothers wear." I find it hard to believe that the application of sec. 92 depends on the question whether the existence within a State of a particular facility, the denial of which to inter-State trade is otherwise lawful, does provide an incentive for increasing domestic trade at the expense of inter-State trade. I feel some uncertainty as to the extent to which the decisions do authorize an inquiry into matters that for myself I would not regard as criteria of the application of sec. 92. But, as it must now be conceded that secs. 23 and 45 validly operate upon the carriage of goods in the course of inter-State trade, the facts must supply some other ground of relief against the consequences. All I can say is that I have been unable to discover in the facts I have stated any legal basis for granting to the plaintiff in the present action any form of relief whether by way of injunction, declaration of right, or otherwise.

It follows that the action ought to be dismissed.

EVATT J. In this action, the plaintiff, a company engaged in the business of carrying goods between New South Wales and Victoria, seeks two declarations, the substance of which may be thus stated: (1) a declaration that Part II. of the *Transport Regulation Act* of the State of Victoria is inconsistent with sec. 92 of the Constitution of the Commonwealth, at least so far as Part II. operates to prevent the plaintiff from operating with unlicensed vehicles its business of carrying goods on inter-State journeys: (2) a declaration that, in relation to licensing of commercial motor vehicles, the administrative policy of the Victorian Transport Regulation Board and the Governor in Council of that State, and the enforcement of that policy by prosecution in cases where vehicles have been operated without licences, involves a discrimination against inter-State trade contrary to sec. 92 of the Commonwealth Constitution.

The claim to the first declaration is completely answered by binding authorities. In *R. v. Vizzard*; *Ex parte Hill* (1), this court held that the *State Transport (Co-ordination) Act* of the State of New

(1) (1933) 50 C.L.R. 30.

South Wales was valid, in spite of the fact that, within that State, it operated adversely upon the business of a carrier whose motor vehicles were being operated without licence, but were also engaged exclusively in the carriage of goods between Victoria and New South Wales. The New South Wales statute established a scheme for the co-ordination of all transport within the State. The essence of the scheme was to limit uneconomic competition between the instruments of transport, so as to obtain a more efficient and satisfactory conduct and control of the service of transporting goods within the State, whether in the course of purely domestic or inter-State journeys. As a necessary part of the scheme, licences to operate were granted or refused according to the discretion of an administrative body. Subsequently, in the cases of *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (N.S.W.)* (1) and *Duncan and Green Star Trading Co. Pty. Ltd. v. Vizzard* (2), this court followed and applied the principle of *R. v. Vizzard* (3), and, in December 1935, the Privy Council refused special leave to appeal from *Gilpin's Case* (1) and *Duncan's Case* (2). Most recently, in *James v. The Commonwealth* (4), the Privy Council definitely accepted the actual decision in *R. v. Vizzard* (3) as having correctly applied sec. 92 of the Commonwealth Constitution. In the same case, the Privy Council also approved of important statements of principle contained in the judgment which I delivered in *R. v. Vizzard* (3), where I attempted to show, not only that the Commonwealth was bound by sec. 92, but also that both the Commonwealth and the States possess a wider sphere of legislative jurisdiction over inter-State trade than would have been permissible upon the adoption of some of the reasoning used in *McArthur's Case* (5).

For the purpose of applying sec. 92 of the Constitution, no valid distinction can be drawn between Part II. of the *Transport Regulation Act* of the State of Victoria and the New South Wales Act declared valid in the cases mentioned above. Each Act aims at the co-ordination throughout the State of all transport facilities, and each carries out the statutory scheme by licensing commercial motor vehicles. In each case, the Act also aims at the reasonable protection of the

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(1) (1935) 52 C.L.R. 189.

(3) (1933) 50 C.L.R. 30.

(2) (1935) 53 C.L.R. 493.

(4) (1936) A.C. 578; 55 C.L.R. 1.

(5) (1920) 28 C.L.R. 530.

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railways as instruments for the carriage of goods both intra-State and inter-State. In each case, moreover, it is a necessary consequence of the statutory scheme that particular operators must be seriously affected in their business activities, and also that, in the absence of the necessary State licence, vehicles which have been engaged solely in journeys from within one State to points in another State will be unable to proceed in the regulating State without penalties being incurred. But *R. v. Vizzard* (1) finally establishes that such restrictions do not constitute an infringement of the freedom of inter-State trade declared by sec. 92. The first part of the plaintiff's claim must fail.

As already stated, the second part of the plaintiff's claim is based solely upon allegations of discrimination. Evidence was called by both sides in order to prove the facts relative to the transport policy adopted by the administrative authorities of the State of Victoria.

It is plain that, if State legislation discriminates against inter-State trade and intercourse so as to prohibit it, it will be invalidated by sec. 92 (*Fox v. Robbins* (2); *R. v. Vizzard* (3)). And, having regard to the principles of the judgment delivered by Lord *Atkin* for the Privy Council in *James v. Cowan* (4), I am clearly of opinion that, if the executive or administrative, as distinct from the legislative, organ of a State sets up hostile discriminations inconsistent with the freedom declared by sec. 92, the operation of sec. 92 must at once be attracted, for the Constitution cannot be mocked by substituting executive for legislative interference with freedom (5). Difficulties may sometimes arise in moulding a suitable remedy in cases where sec. 92 is applied to executive action which is challenged upon the ground that it carries out a policy of hostile discrimination against inter-State trade. I think that such difficulties need not be elaborated and can easily be exaggerated. In some circumstances, the result of the application of sec. 92 may be to deprive the Government concerned of a defence to an action of tort (*James v. Cowan* (4)); in others, it may be merely to annihilate or avoid a decision or determination of an administrative tribunal. But I am unable to accept the proposition that discrimination by

(1) (1933) 50 C.L.R. 30.

(2) (1908) 8 C.L.R. 115.

(3) (1933) 50 C.L.R., at p. 93.

(4) (1932) A.C. 542; 47 C.L.R. 386.

(5) (1932) A.C., at p. 558; 47 C.L.R., at p. 396.

the executive or administrative authorities of a State can be remedied only by recourse to sec. 102 of the Constitution or by other legislation proceeding from the Commonwealth Parliament. Sec. 102 impliedly permits of the practising of certain discrimination on the part of the States. But I think it is erroneous to infer that, apart from sec. 102, the executive organs of a State possess a charter to close the inter-State borders so that this court is powerless to intervene. It would be a strange thing if the Parliament of the Commonwealth, which for sixteen years has sought to confer upon itself an entire immunity from the declaration of freedom in sec. 92, were made the sole protector of the citizens against infringement of that section by hostile discrimination on the part of the executive or administrative organs of a State. It is upon this court, and not upon the Commonwealth Parliament, that the primary duty devolves of guarding against all infringement of sec. 92, whether by the States or by the Commonwealth itself.

However, it has to be remembered that, whenever discrimination alone is relied upon in order to invalidate either legislation or executive action by reason of conflict with the overriding command of sec. 92, it must be proved that the discrimination is in relation to "freedom as at the frontier" or "goods passing into or out of the State" (*James v. The Commonwealth* (1)). These are the phrases used by Lord Wright M.R., and they indicate that, before there can be discrimination contrary to sec. 92, there must be satisfactory proof that the authority of the State or Commonwealth is being exerted *against* inter-State trade, the discrimination imposed being by reference to the fact that goods or persons have passed or are passing or will pass into or out of a State. Such is the discrimination which is forbidden by sec. 92. In truth, such discrimination is not so much an independent ground for the application of sec. 92; rather, it provides conclusive evidence of the fact that there has been a forbidden interference with "freedom as at the frontier."

In the present case, the particulars of the alleged discrimination are specified under three heads in par. 10 of the amended statement of claim, and they will be dealt with in that order.

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(1) (1936) A.C., at p. 630; 55 C.L.R., at p. 58.

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(1) The first allegation is that the transport board of the State of Victoria refused to grant licences for vehicles carrying inter-State, while granting a large number of licences for vehicles carrying goods solely within the State of Victoria. But there is nothing in this allegation to warrant the inference that the State of Victoria was pursuing any policy of restricting or prohibiting the trade between itself and its neighbouring States. The board's refusal of licences to carry goods inter-State by motor may have been due, and in fact the evidence shows that it was due, to the belief that the inter-State trade would be facilitated, not hindered, by the policy of bringing goods for carriage inter-State into the railway system at suitable points within and without Victoria, so that the railway and motor transport would together handle the aggregate haulage of inter-State goods more efficiently. No doubt, particular individuals would or might be disadvantaged by such a policy, but that is a necessary feature of any scheme of co-ordination.

(2) The second allegation is that the board refused to apply to applications for licences for inter-State vehicles the same principles as were applied by it in the consideration of applications in respect of vehicles carrying solely within Victoria. This allegation is based upon the fact that the transport board refused applications for licences made by the plaintiff and other carriers carrying inter-State, upon the principle that, in the circumstances, the railways and local hauliers could more conveniently dispose of the traffic; whereas in its subsequent consideration of applications for vehicles carrying within the State of Victoria the Governor in Council decided that, under stated conditions, it should have regard to the desirability of recognizing certain rights or claims existing as at the commencement of the *Transport Regulation Act* as well as to the general principle of co-ordinating with railway services. But sec. 92 does not guarantee a continuing or absolute uniformity at every stage in the administration of a complicated licensing system, which of necessity must be capable of adaption as new problems and unforeseen difficulties arise. In the present case, the board's primary decision to reject the applications of the plaintiff and other operators was based upon principles which were in no way impeached in these proceedings. Next, all the decisions of the board in respect of inter-State operators

were confirmed by the Governor in Council. It was subsequently, and, so far as appears, independently, that the Governor in Council laid down the further heads of policy which were applied to applications for intra-Victorian licences. The unreality of the plaintiff's claim that there was discrimination, even as against vehicles as distinct from the trade, is illustrated by the fact, which is sufficiently proved, that, if the policy subsequently adopted by the Governor in Council had been originally applied by the board in its primary decision, the plaintiff would, at the most, have received licences in respect of two only of its twenty-seven applications. It is also illustrated by the fact that, on the plaintiff's subsequently renewing its applications, they were refused, partly at least, upon the ground that, by reason of certain conduct, the plaintiff was regarded by the board as not a fit and proper person to be granted licences.

(3) The third allegation of discrimination is that the defendant board refused all licences for vehicles carrying goods inter-State for the reason that such vehicles were carrying, or intended to carry, goods inter-State. I consider that this allegation, if true, would alter the legal situation. But the facts entirely negative the allegation. The applications were refused, not because the vehicles were carrying, or intended to carry, goods inter-State, but because, in the board's opinion, the carriage of goods inter-State was being provided for already and in a more efficient manner by co-ordinating the services of the railway systems of the two States with local motor transport from all points in the Riverina to appropriate railway terminals. It is of significance that, with the consent of the Parliament of New South Wales, Victoria has been allowed to extend its railway system to considerable distances within the State of New South Wales, the gauge of these important border railways being the Victorian gauge, and the railways, so far as they are within New South Wales, being entirely controlled and managed by the Victorian railway administration. This important policy was carried out by arrangement between the two States for the very purpose of encouraging inter-State trade by facilitating the passage of goods across the State boundaries to the market deemed most suitable. Certainly, the desirability of ensuring a reasonable use of the border railways as instruments for the advancement of inter-State trade is a consideration

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which is not placed outside the discretionary powers of bodies whose duty it is to co-ordinate all transport facilities within the State of Victoria, the trade of which with New South Wales is largely dependent upon such railways.

Although I am of opinion that, in an appropriate case, discrimination of an executive, as well as a legislative character may be relied upon in order to prove an infringement of sec. 92, I am also of opinion that, on the facts of the present case, the case of the plaintiff has entirely failed.

The action should be dismissed with costs.

McTIERNAN J. The first declaration which the plaintiff claims is in substance that Part II. of the *Transport Regulation Acts* of Victoria is contrary to sec. 92 of the Constitution and void. The provisions of these Acts cannot be distinguished in principle from the *State Transport (Co-ordination) Act* 1931 (N.S.W.) which has been declared not to contravene sec. 92 (*R. v. Vizzard*; *Ex parte Hill* (1); *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways* (N.S.W.) (2); and these decisions were approved of in *James v. The Commonwealth* (3)).

Alternatively to the first claim, the plaintiff seeks a declaration that, although it might not be lawful according to the letter of the *Transport Regulation Acts* for the plaintiff's vehicles to operate in inter-State carriage of goods without a licence, the administrative and executive acts of the Transport Regulation Board and the State of Victoria, which have resulted in the refusal of the plaintiff's application for licences for its vehicles operating in the inter-State carriage of goods, contravene sec. 92.

From the facts proved the definite conclusion can be arrived at that neither the transport board nor the Executive Government exceeded their powers under the Acts respectively in refusing the plaintiff's applications for licences for these vehicles and in approving of the refusal of the applications. The administrative and executive acts complained of are fully authorized by legislation which does not itself contravene sec. 92. But, notwithstanding that the refusal

(1) (1933) 50 C.L.R. 30.

(2) (1935) 52 C.L.R. 189.

(3) (1936) A.C. 578; 55 C.L.R. 1.

of the licences has presumably a legal basis, the plaintiff says that the transport board and the Governor in Council have, by the exercise of their powers and discretions under the Acts in the case of the plaintiff's applications, contravened sec. 92 of the Constitution. To prove that case they rely on the fact that applications for licences for vehicles operating within Victoria were finally granted, whereas the plaintiff's applications which were for licences for vehicles pursuing inter-State routes were finally refused. The result of the refusal of the inter-State applications and the approval of the intra-State applications is that inter-State trade through Victoria has been made more dependent on the railways than on the roads. But it is not possible to deduce that the action taken by the transport board and the Governor in Council in dealing with the inter-State and the intra-State applications, if all the individual applications are placed in these two classes for the purpose of considering the action taken in relation to them, has placed any burden, hindrance or restriction on the freedom of inter-State trade as at the border. There is no interference with freedom of inter-State trade in the relevant sense of freedom as interpreted by the Judicial Committee in *James v. The Commonwealth* (1). "If it" (trade) "involves sea, railway or motor carriage, relevant Acts operate on it; it is subject to executive or legislative measures of State or Commonwealth dealing with wharves or warehouses or transport workers. It must be so subject" (2).

As it is not shown that the freedom guaranteed by sec. 92 has been invaded by the acts of the transport board and the Executive Government of Victoria, of which the plaintiff complains, it is of course entirely unnecessary to consider the nature of the relief to which the plaintiff would be entitled if he had made out his claim for relief. In my opinion there is no tenable ground shown for the declaration which is sought alternatively to the declaration that the *Transport Regulation Acts* themselves are void.

The action should be dismissed.

Action dismissed.

Solicitors for the plaintiff, *Alexander Grant, Dickson & Pearce.*

Solicitor for the defendants, *F. G. Menzies*, Crown Solicitor for Victoria.

H. D. W.

(1) (1936) A.C. 578; 55 C.L.R. 1. (2) (1936) A.C., at p. 629; 55 C.L.R., at p. 57.

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