[HIGH COURT OF AUSTRALIA.]

HUGHES AND VALE PROPRIETARY LIMITED PLAINTIFF;

AND

THE STATE OF NEW SOUTH WALES AND OTHERS . . . . . DEFENDANTS.

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1952.
MELBOURNE, *Oct.* 15, 16, 17, 20, 21.

1953.
SYDNEY, *April* 16.

Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

Constitutional Law (Cth.)—Freedom of inter-State trade commerce and intercourse—State Statute—Validity—Prohibition or regulation—Prohibition of public vehicles operating on State roads without licence—Grant of licence discretionary—Condition imposed for payment of money in respect of each mile of competitive distance of journey wholly or partly competitive with railways or tramways—Differential rates in respect of journeys to or from different States—Discrimination against inter-State trade—Excise duty—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 90, 92—*State Transport* (*Co-ordination*) *Act* 1931-1952 (*No.* 32 *of* 1931—*No.* 24 *of* 1952) (*N.S.W.*) *ss.* 12, 17, 18 (5).

Section 12 of the *State Transport* (*Co-ordination*) *Act* 1931-1952 provides that no person shall operate a public motor vehicle unless such vehicle is licensed under the Act. A "public motor vehicle" is defined by s. 3 as meaning, *inter alia*, a motor vehicle used in the course of any trade or business. Section 16 (1) of the Act makes registration of the vehicle under the *Motor Traffic Act* 1909-1952 (N.S.W.) or the *Transport Act* 1930-1952 (N.S.W.) a condition precedent to the issue of a licence in respect of that public motor vehicle, and s. 17 (3) provides that in dealing with an application for a licence the licensing authority shall consider all such matters as it may think necessary or desirable and in particular the following:—(*a*) the suitability of the route or road on which a service may be provided under the licence; (*b*) the extent, if any, to which the needs of the proposed areas or districts, or any of them, are already adequately served; (*c*) the extent to which the proposed service is necessary or desirable in the public interest; (*d*) the needs of the district, area, or locality as a whole in relation to traffic, the elimination of unnecessary services, and the co-ordination of all forms of transport, including transport by rail or tram; (*e*) the condition of the roads to be traversed with regard to their capacity to carry proposed public vehicular traffic without unreasonable damage to such roads; (*f*) the suitability and fitness of the applicant to hold the licence applied for; (*g*) the construction and equipment of the vehicle

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and its fitness and suitability for a licence. Section 17 (4) makes the grant of the licence otherwise in the complete discretion of the licensing authority, which was permitted under s. 17 (2) to determine the terms and conditions applicable to, or with respect to, a licence, if granted, including the following (a) the fares, freights, or charges, or the maximum or minimum fares, freights, or charges to be made in respect of any services to be provided by means of the public motor vehicle referred to in the licence; (b) the use of such public motor vehicle as to whether passengers only or goods only or goods of a specified class or description only shall be thereby conveyed, and as to the circumstances in which such conveyance may be made or may not be made (including the limiting of the number of the passengers or the quantity, weight, or bulk of the goods that may be carried on the vehicle). Section 18 (5) of the Act provides that a condition may be imposed in a licence that the licensee shall pay sums of money ascertainable in a manner to be determined, but not exceeding threepence per ton per mile of the mileage travelled upon a weight consisting of the aggregate weight of the vehicle unladen and of the loading the vehicle is capable of carrying.

Held, by *Dixon* C.J., *McTiernan*, *Williams* and *Webb* JJ. (*Fullagar*, *Kitto* and *Taylor* JJ. dissenting), the Court should follow *McCarter* v. *Brodie* (1950) 80 C.L.R. 432, holding that the *State Transport* (*Co-ordination*) *Act* 1931-1952 (N.S.W.) was not invalid as infringing s. 92 of the Constitution.

The *Transport Cases*, from *R.* v. *Vizzard*; *Ex parte Hill* (1933) 50 C.L.R. 30 to *McCarter* v. *Brodie* (1950) 80 C.L.R. 432; and *Commonwealth* v. *Bank of New South Wales* (1950) A.C. 235; (1949) 79 C.L.R. 497, discussed.

Per Dixon C.J., *Fullagar* and *Kitto* JJ. (*McTiernan*, *Williams* and *Webb* JJ. *contra*, *Taylor* J. expressing no opinion). The *Transport Cases*, and in particular *McCarter* v. *Brodie* (1950) 80 C.L.R. 432, are wrongly decided and are inconsistent with *Commonwealth* v. *Bank of New South Wales* (1950) A.C. 235; (1949) 79 C.L.R. 497 and (*per Fullagar* and *Kitto* JJ.) with *James* v. *Cowan* (1932) A.C. 542; 47 C.L.R. 386 and *James* v. *Commonwealth* (1936) A.C. 578; 55 C.L.R. 1.

Held further, by *Dixon* C.J., *Williams* and *Webb* JJ. (*McTiernan*, *Fullagar*, *Kitto* and *Taylor* JJ. expressing no opinion), that the levy of the charges under the Act did not amount to an excise duty, within the meaning of s. 90 of the Constitution, and, therefore, was not beyond the power of the Parliament of New South Wales.

The principle of *stare decisis* in relation to constitutional cases considered.

DEMURRER.

Hughes and Vale Proprietary Limited a company incorporated in the State of New South Wales, commenced an action in the High Court of Australia, against the State of New South Wales, the Honourable William Francis Sheahan, who, as Minister of State for Transport of the State of New South Wales was the Minister

responsible for the administration of the *State Transport (Co-ordination) Act* 1931-1952, and the Director of Transport and Highways, which was a body corporate under the law of the State of New South Wales. The statement of claim in the action, so far as is relevant, was as follows :—

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

5. The plaintiff is the owner of certain vehicles in respect of which it holds licences, under s. 12 of the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.) to operate the said motor vehicles as public motor vehicles within the meaning of the said Act.

6. Such licences are issued subject to the following special conditions :—" SPECIAL CONDITIONS (Non-competitive Licence) :—

(1) The within-mentioned vehicle is authorised to operate as a goods motor vehicle on or in routes, roads, areas or districts within the State of New South Wales :—
   (a) on journeys none of which, for a distance exceeding fifty (50) miles, is competitive with the Railways or Tramways ;
   (b) when used solely for the transport of fresh fruit, vegetables, eggs or poultry from farm to market on journeys of any distance.

(2) In respect of any journey which is wholly or partly competitive with the railways or tramways, the licensee shall pay to the Commissioner for Road Transport and Tramways for the full competitive distance (in addition to any other sums payable under the *State Transport (Co-ordination) Act*, 1931, as amended, and this licence or either of them) :— Three pence per ton, or part thereof, of the aggregate of the weight of the vehicle unladen and of the weight of loading the vehicle is capable of carrying for each and every mile, or part thereof, travelled by the within-mentioned vehicle along a public street.

(3) Provided that the terms conditions and authorities of or attached to this licence are complied with, the licensee and the driver of the vehicle herein referred to, and each of them, shall be exempt from the conditions mentioned in sub-s. (5) of s. 18 of the *State Transport (Co-ordination) Act*, 1931, as amended, and unless the Commissioner otherwise determines, from the obligations imposed by regs. 9 and 10 under that Act in respect of any journey which is not, for a distance exceeding fifty (50) miles, competitive with the

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railways or tramways, or of a journey of any distance when the vehicle herein referred to is used solely for the transport of fresh fruit, vegetables, eggs or poultry from farm to market. For the purpose of the terms, conditions and authorities of or attached to this licence and of this exemption, where goods are transhipped from one public motor vehicle to another or are carried by a public motor vehicle to a receiving depot, shop or store, and are carried from the place of transhipment or from such receiving depot, shop or store by a public motor vehicle the whole journey shall be regarded as one journey and if the vehicle to which this licence relates takes part in it, it shall be regarded as having undertaken the whole journey".

7. The regulations made under the *State Transport (Co-ordination) Act* 1931-1952 provide that the operators of public motor vehicles shall make application to the defendant, the Director of Transport and Highways, for the issue of a permit to operate a public motor vehicle for a specified day or days or for a specified period for the conveyance of specified goods (which permit is granted by the said defendant on the payment by the applicant therefor of the charge mentioned in par. 8 hereof) before operating a vehicle for the carriage of general merchandise within the State of New South Wales upon journeys from or to any place in the State of Queensland which for a distance exceeding fifty (50) miles are competitive with the railways or tramways.

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

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

10. The charge imposed and levied by the defendants, the Minister and the Director of Transport and Highways, in respect of the operation of public motor vehicles when carrying goods, similar to the goods carried by the plaintiff, on journeys in the State of New South Wales being part of journeys into and out of

the States of Victoria and South Australia, is calculated and assessed at the rate of three pence per ton per mile for the first hundred miles competitive with the railways or tramways (hereinafter called competitive miles), two pence per ton per mile for the second hundred competitive miles, and one penny per ton per mile thereafter for the whole of the competitive miles of the journey all of such charges being assessed in respect of the unladen weight of the vehicle, together with the weight the vehicle is capable of carrying, whether the vehicle be carrying that weight or some lesser weight.

The defendants by their defence admitted the allegations contained in the statement of claim pars. 4, 5, 6, 8, 9, 10. As to par. 7 they alleged that the regulations therein referred to were not sufficiently set forth. The defendants further stated by par. 4 of the defence that the charges which had been levied on the plaintiff had been levied pursuant to certain instructions issued by the defendant, the Director of Transport and Highways to District Motor Registries, which instructions were set forth and deemed to be incorporated in the defence. Certain of the said instructions were as follows :—

11th OCTOBER, 1951.

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

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

Motor Registry Officers should keep closely in touch with Railway Station Masters in connection with the availability of railway services from wool producing centres. It is considered that rail services should be regarded as reasonably available where trucks and other equipment can be supplied within five days of the date for which

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orders were lodged. Should it be agreed that longer periods may elapse before rail trucks can be supplied and consignors elect to forward their wool by road, the circumstances may be met by the issue of road permits on payment of the prescribed charge per mile of three pence per ton of the weight of the vehicle and the weight of loading it is capable of carrying.

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

23rd June, 1952.

Following an examination of the transport position in relation to the rail services at present available and in sight, the Director of Transport and Highways has decided to vary the conditions under the *State Transport (Co-ordination) Act*, 1931, as shown in Circular C.51/74 for the carriage of goods by road. On and from 1st July, 1952, the conditions applicable to the operation of goods motor vehicles for distances exceeding fifty miles in competition with the railways will be as set out in statement "A" attached.

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

(a) road permits will be issued exempt from charges under the Act;

(b) road permits will be issued on payment of charges as prescribed in the Act;

(c) road permits will be declined at times that rail trucks and other services are reasonably available.

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

Special steps have been taken by the Commissioner for Railways to improve services for transport of general merchandise by rail. In this connection, the Director of Transport and Highways desires that attention of road operators and others be invited to the improved services and, in particular, to the arrangements which

can be made for goods to be transported by rail under " composite " truck rates and conditions. Any person seeking further information on rail freight rates and services should be advised by Motor Registry Officers to contact the local Station Master or to communicate with the Railway Chief Traffic Manager, Central Railway Station, Sydney.

N. McCUSKER,
Secretary.

The plaintiff demurred to the whole of the defence on the following grounds :—

(1) The *State Transport* (*Co-ordination*) *Act* 1931-1952 is beyond the powers of the Parliament of the State of New South Wales and invalid.

(2) Sections 12, 13, 14, 15, 16, 17, 18, 19, 21 and 28 of the said Act are beyond the powers of the Parliament of the State of New South Wales and invalid.

(3) The defendant, the Director of Transport and Highways, in levying and imposing the charges referred to in sub-pars. (d), (e), (f) and (g) of par. 4 of the statement of defence, have exercised powers not authorised by the said Act, or, if so authorised, not within the powers of the Parliament of the State of New South Wales.

J. D. Holmes Q.C. (with him *N. H. Bowen* and *G. D. Needham*), for the plaintiff. The legislation in question in this case is different from that considered in any of the previous cases. The *State Transport* (*Co-ordination*) *Act* 1931, ss. 4-11, provided for the setting up of a board to co-ordinate transport. This board was abolished by the *Ministry of Transport Act* 1932, s. 9, it being replaced by a board of commissioners (s. 7). The *Transport* (*Division of Functions*) *Act* 1932 by s. 14 abolished the board of commissioners and transferred its functions with respect to road transport and tramways to the Commissioner for Road Transport and Tramways (s. 5), with respect to railways to the Commissioner for Railways (s. 4) and with respect to main roads to the Commissioner for Main Roads (s. 6). Functions of the board of commissioners, other than those transferred, ceased altogether. The *Transport* (*Division of Functions*) *Amendment Act* 1952, s. 11, abolishes the office of Commissioner for Road Transport and Tramways and divides the functions between the Director of Transport and Highways, a body corporate, and the Commissioner of Government Tram and Omnibus Services. So that ss. 4-11 of the *State Transport* (*Co-ordination*)

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Act 1931-1952 have been either impliedly repealed or are otiose. The planning and co-ordinating authority is now the New South Wales Transport and Highways Commission constituted by the *Transport and Highways Act* 1950 and presided over by a person, the Director of Transport and Highways, who is not the defendant in this action. The defendant in this action is the Director of Transport and Highways, a body corporate having no co-ordinating functions, which is constituted by the *Transport (Division of Functions) Amendment Act* 1952. Sections 4-11 having been impliedly repealed, the Act is a bare licensing Act, administered by an authority which has no co-ordinating functions. This distinguishes this legislation from the Victorian legislation considered in *McCarter* v. *Brodie* (1) and the South Australian legislation considered in *Bessell* v. *Dayman* (2). In *R.* v. *Vizzard*; *Ex parte Hill* (3) ss. 4-11 were taken as operative, whereas in fact they had been impliedly repealed. There are two systems of licensing provided in the Act, namely, that contained in s. 17 and the permit system which exists by virtue of the implications arising from s. 28 and s. 48 (8). *R.* v. *Vizzard*; *Ex parte Hill* (3) was not concerned with the permit system. The licensing authority is not restricted to the matters contained in s. 17 (3) (a)-(g). The licensing system, being arbitrary, is in breach of s. 92 just as were the licensing systems in *James* v. *Commonwealth* (4); *Gratwick* v. *Johnson* (5); *Australian National Airways Pty. Ltd.* v. *Commonwealth* (6). Alternatively, it is submitted that the *Transport Cases* should not be regarded as binding for the following reasons (1) that it has now been held that the carrier is himself in trade, and therefore, in inter-State trade, which proposition is recognized by all the Justices in *McCarter* v. *Brodie* (1); (2) that there is no consistent line of reasoning by the majority of the Justices in the *Transport Cases* themselves; (3) that all of the cases, so far as the majority of Justices in each is concerned presume that *R.* v. *Vizzard*; *Ex parte Hill* (3) is correctly decided, whereas the reasoning of that case cannot be supported. The refusal by the Privy Council to grant special leave to appeal against the decision in *McCarter* v. *Brodie* (7) is not conclusive, since no reasons for the decision were given. This Court has never applied the rule of *stare decisis* in constitutional cases. In *McCarter* v. *Brodie* (1); *Latham* C.J., *McTiernan* and *Williams* JJ. took the view that the Act in question

(1) (1950) 80 C.L.R. 432.
(2) (1934) 52 C.L.R. 215.
(3) (1933) 50 C.L.R. 30.
(4) (1936) A.C. 578; 55 C.L.R. 1.
(5) (1945) 70 C.L.R. 1.
(6) (1946) 71 C.L.R. 29.
(7) (1950) 80 C.L.R. 432; and see Memoranda.

was regulatory, but for different reasons. *Latham* C.J. (1) accepts the view of *Gavan Duffy* C.J. in *R.* v. *Vizzard*; *Ex parte Hill* (2). *McTiernan* J. agreed, but expressed a separate view (3). *Williams* J. expresses a view based on the balancing of competing facilities (4). In the present case the *State Transport* (*Co-ordination*) *Act* 1931-1952 (N.S.W.) gives an unqualified power to interfere with the liberties of the inter-State transporter to move inter-State. As such, the Act contravenes s. 92. See *Commonwealth* v. *Bank of New South Wales* (5). The impact of the Act is direct and not consequential on the person who seeks to trade inter-State. It is not a case of a rule being prescribed for persons who may travel on the road, e.g., a rule that no vehicle may cross certain bridges when carrying a weight greater than eight tons. In the light of the passages cited above from *Commonwealth* v. *Bank of New South Wales* (6) the view taken by *Latham* C.J., *McTiernan* and *Williams* JJ. in *McCarter* v. *Brodie* (7) that the Act in that case was a regulatory Act cannot be supported. The *Transport Regulation Act* 1933-1947 (Vict.) which was considered in *McCarter* v. *Brodie* (7) did provide by s. 34 as amended by the *Transport Regulation* (*Licences and Fees*) *Act* 1947 (Vict.), s. 7, an upward limit of five shillings per cwt. based on loading capacity, whereas the Act here by s. 18 (5) provides no upward limit on the payment. The only persons who may obtain a licence under the Act are persons whose vehicles are registered in New South Wales. That appears from s. 16 (1). The *Transport Regulation Act* 1933 (Vict.), s. 33, as amended by the *Transport Regulation* (*Licences and Fees*) *Act* 1947, s. 5 (2), excludes from its operation vehicles registered in other States so that the legislation considered in *McCarter* v. *Brodie* (7) contained significant differences from that now in question. In that case *Webb* J. proceeded on the basis that *R.* v. *Vizzard*; *Ex parte Hill* (8) had been approved by the Privy Council in *James* v. *Commonwealth* (9). That is not so. Only one passage in one of the judgments was approved. Lord *Wright* was there examining the decisions before and after *W. & A. McArthur Ltd.* v. *State of Queensland* (10) not from the point of view of s. 92, but for the purpose of ascertaining whether those decisions were consistent or inconsistent with the view put forward in *McArthur's*

(1) (1950) 80 C.L.R., at p. 461.
(2) (1933) 50 C.L.R., at p. 47.
(3) (1950) 80 C.L.R., at p. 471.
(4) (1950) 80 C.L.R., at p. 477.
(5) (1950) A.C. 235, at pp. 305, 309-310; (1949) 79 C.L.R. 497, at pp. 635, 639, 640.
(6) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(7) (1950) 80 C.L.R. 432.
(8) (1933) 50 C.L.R. 30.
(9) (1936) A.C. 578; 55 C.L.R. 1.
(10) (1920) 28 C.L.R. 530.

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Case (1). In *Commonwealth* v. *Bank of New South Wales* (2) the Privy Council, while expressing the view that *James* v. *Cowan* (3) and *R.* v. *Vizzard*; *Ex parte Hill* (4) were reconcilable did not express any view that the decision in the latter case was correct. The Government of the State of New South Wales is not controlled by the *State Transport (Co-ordination) Act* 1931-1952 and it could immediately set up a Government monopoly of land transport. It is admitted that the charges imposed on road transport operators are designed for the purpose of driving them off the roads. See circular dated 23rd June, 1952 issued by the Department of Transport and Highways to district motor registries. That distinguishes this case from *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (5): see per *Rich* J. (6); per *Evatt* and *McTiernan* JJ. (7). The charge is not for the maintenance of roads, so that the reasoning in *McCarter* v. *Brodie*, per *Williams* J. (8), is not applicable. Moreover the charge is discriminatory as between States, in that it is lower on journeys into and out of the States of Victoria and South Australia, than on journeys into or out of the State of Queensland. This differential rate is at the basis of the very thing that s. 92 is intended to prevent. [He referred to *Fox* v. *Robbins* (9).] The charges are differential in respect of different goods carried. This is a tax on the goods, which is intended to be carried on and form a part of the ultimate retail cost. Such charges amount to an excise duty within the meaning of s. 90 of the Constitution. [He referred to *Parton* v. *Milk Board (Vict.)* (10); per *Rich* and *Williams* JJ. (11); per *Dixon* J. (12); *R.* v. *Caledonian Collieries Ltd.* (13); *Matthews* v. *Chicory Marketing Board (Vict.)* (14).]

M. F. Hardie Q.C. (with him *R. Else-Mitchell*), for the defendants. This Court should not refuse to follow *McCarter* v. *Brodie* (15) because to do so would mean that all the *Transport Cases*, which have been uniform and consistent from 1933 to 1950, must fall also. The Privy Council in *James* v. *Commonwealth* (16) expressly approved the decision in *R.* v. *Vizzard*; *Ex parte Hill* (4), and its approval was implied in *Commonwealth* v. *Bank of New South*

(1) (1920) 28 C.L.R. 530.
(2) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(3) (1932) A.C. 542; 47 C.L.R. 386.
(4) (1933) 50 C.L.R. 30.
(5) (1935) 52 C.L.R. 189.
(6) (1935) 52 C.L.R., at p. 199.
(7) (1935) 52 C.L.R., at p. 214.
(8) (1950) 80 C.L.R., at p. 478.
(9) (1909) 8 C.L.R. 115.
(10) (1949) 80 C.L.R. 229.
(11) (1949) 80 C.L.R., at p. 252.
(12) (1949) 80 C.L.R., at p. 258.
(13) (1928) A.C. 358.
(14) (1938) 60 C.L.R. 263.
(15) (1950) 80 C.L.R. 432.
(16) (1936) A.C. 578, at p. 622; 55 C.L.R. 1, at p. 51.

Wales (1). Moreover the Privy Council refused to grant leave to appeal not only in *McCarter* v. *Brodie* (2), but also, in *Duncan* v. *Vizzard* (3) and *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways* (*New South Wales*) (4). If the *Transport Cases* were overruled, *Hartley* v. *Walsh* (5) and the *Milk Board* (*New South Wales*) v. *Metropolitan Cream Pty. Ltd.* (6) must also be overruled. All the *Transport Cases* proceed substantially on the formulation of the law by *Rich* J. in *Peanut Board* v. *Rockhampton Harbour Board* (7) and *Willard* v. *Rawson* (8). The problem here is different from that in *Australian National Airways Pty. Ltd.* v. *Commonwealth* (9) and *Commonwealth* v. *Bank of New South Wales* (10), because here there is not, as there was in those cases, a simple prohibition which contemplated the exclusion of all competition. The legislation dealt with in *McCarter* v. *Brodie* (11) is identical, so far as licences are concerned, with the *State Transport* (*Co-ordination*) *Act* 1931-1952 (N.S.W.). [He referred to *McCarter* v. *Brodie* per *Latham* C.J. (12).] There is no material difference between the form of licence in the present case, and that which was upheld in *Duncan* v. *Vizzard* (13). Even if the primary object of the charges is to divert goods to the railways, it does not render the administrative act which imposes the charges invalid as contravening s. 92, because the plaintiff has not shown that its business is affected in any way by the charges.

[KITTO J. What the plaintiff says in effect is that if the Act is valid, it is only valid to the extent to which it does not infringe s. 92 and that it, therefore, cannot be construed as authorising the imposition of charges for the purpose of diverting inter-State trade.]

The charges are not designed to do more than rationalize the carriage of goods as between the railways and road transport. Those goods which are more conveniently and logically carried by the railways are to be carried by them. There is no discrimination against the plaintiff because it is engaged in inter-State trade in the fact that the charges are less in the case of goods carried from Sydney to Melbourne and Adelaide than in the case of goods carried from Sydney to Brisbane, because the rates which apply to operators from Sydney to places in New South Wales close to the border between New South Wales and Queensland are the same. [He

(1) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(2) (1950) 80 C.L.R. 432; and see Memoranda.
(3) (1935) 53 C.L.R. 493; and see 56 C.L.R. Memoranda.
(4) (1935) 52 C.L.R. 189; and see 56 C.L.R. Memoranda.
(5) (1937) 57 C.L.R. 372.
(6) (1939) 62 C.L.R. 116.
(7) (1933) 48 C.L.R. 266.
(8) (1933) 48 C.L.R. 316.
(9) (1945) 71 C.L.R. 29.
(10) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(11) (1950) 80 C.L.R. 432.
(12) (1950) 80 C.L.R. 432, at p. 446.
(13) (1935) 53 C.L.R. 493.

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referred to *Riverina Transport Pty. Ltd.* v. *Victoria*, per *Latham* C.J. (1).] The charges are not an excise duty, because they are imposed on a person who is engaged solely in the transport of goods from one place to another.

[FULLAGAR J. Can *James* v. *Commonwealth* (2) be reconciled with *R.* v. *Vizzard*; *Ex parte Hill* (3) ?]

In *James* v. *Commonwealth* (4) the legislation created a licensing system in order to restrict people in the amount of dried fruits sent from one State to another, and therefore operated directly on the traffic of goods across the border. The legislation in *R.* v. *Vizzard*; *Ex parte Hill* (3) related to the use of motor vehicles in transport, and the regulating argument which applied could not apply to the direct restriction in *James' Case* (5). Moreover the justification for regulation in the present case, which is the wear and tear on the State-provided roads by vehicles which destroy these roads, could not have been present in *James* v. *Commonwealth* (5). The principles discussed by the American Courts in deciding whether legislation is regulation or not are of relevance here. [He referred to *Continental Baking Co.* v. *Woodring* (6); *South Carolina State Highway Department* v. *Barnwell Brothers Inc.* (7); *Sproles* v. *Binford* (8); *Stephenson* v. *Binford* (9).]

P. D. Phillips Q.C. (with him *C. I. Menhennitt*), for the Commonwealth of Australia, intervening pursuant to leave. The problem really is whether a law which regulates and controls the individual road transporter in the world in which he finds himself—namely in a State with a comprehensive railway system—is a law which regulates and controls him within the meaning of *Commonwealth* v. *Bank of New South Wales* (10). The first proposition is that a law co-ordinating transport is not obnoxious to s. 92. The decisions in *Municipal Corporation of City of Toronto* v. *Virgo* (11) and *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (12) have given the foundations for the views as to what is regulation. In seeing whether a law is regulatory, it is necessary to take into account the whole of the circumstances, including persons other than the person being regulated or prohibited. [He referred to

(1) (1937) 57 C.L.R. 327, at p. 354.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1933) 50 C.L.R. 30.
(4) (1936) A.C. 578; 55 C.L.R. 1.
(5) (1936) A.C. 578; 55 C.L.R. 1.
(6) (1932) 286 U.S. 352 [76 Law. Ed. 1155].
(7) (1938) 303 U.S. 177; [82 Law. Ed. 734].
(8) (1932) 286 U.S. 374 [76 Law. Ed. 1167].
(9) (1932) 287 U.S. 251 [77 Law. Ed. 288].
(10) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(11) (1896) A.C. 88.
(12) (1896) A.C. 348.

Gold Seal Ltd. v. *Dominion Express Co. and The Attorney-General for the Province of Alberta* (1). *Reference Re Validity of Section* 5 (*a*) *of the Dairy Industry Act* (2); *Canadian Constitutional Law* by *Bora Laskin* (1951), p. 220; *S.M.T. (Eastern) Ltd.* v. *Ruch* (3); *Winner* v. *S.M.T. (Eastern) Ltd.* (4); *Slattery* v. *Naylor* (5).] The Canadian cases establish that there may be limited prohibition and that prohibition, for the sake of prohibition, may still be regulatory. The whole point of the decision of the Privy Council in *Commonwealth* v. *Bank of New South Wales* (6) is that there is no logical test by which the validity of a restriction can be tested. The test is one of fact and circumstance. It is significant that the Privy Council in that case put the determination as to whether a law is regulatory not so much upon legal, as upon political social or economic considerations. A transport co-ordination law is a law which authorizes operations of road transport upon a selective basis directed to the elimination of uneconomic activities in the transport system as a whole. A railway system is essential, in that it is comprehensive both as to quality and space. Much of the freight structure of a railway system is invulnerable to competition in that the charges are so low that no other system can carry at comparable rates. The *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.) rationalises competition at the critical point at which the freight structure of the New South Wales Railways is vulnerable to competition. The licensing system set up by the *State Transport (Co-ordination) Act* is not arbitrary, nor unlimited, and it is not immune from judicial control.

H. A. Winneke Q.C., Solicitor-General for the State of Victoria (with him *G. A. Pape*), for the State of Victoria, intervening pursuant to leave. The Court should refuse to reconsider *McCarter* v. *Brodie* (7). The States have set up legal machinery to deal with the problem of transport control on the assumption that the decisions in the *Transport Cases* were correct, and it would cause great inconvenience to overrule them now. [He referred to *McCarter* v. *Brodie*, per *Williams* J. (8).] The true approach to s. 92 problems is, in the last resort, a question of the proper interpretation of the word " free " in the section, and, regarded in this light, each one of the cases comes down to a question of fact. In the present case it has not been shown that the plaintiff has been hampered in any

(1) (1921) 62 S.C.R. 424.
(2) (1950) 4 D.L.R. 689.
(3) (1940) 1 D.L.R. 190.
(4) (1951) 4 D.L.R. 529.
(5) (1888) 13 App. Cas. 446.
(6) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(7) (1950) 80 C.L.R. 432.
(8) (1950) 80 C.L.R., at pp. 476, 477.

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way in its inter-State journeyings. The necessity of obtaining a licence is a burden on the plaintiff, but it does not go beyond what is permissible as regulation, having regard to the decision of the Privy Council in *Commonwealth* v. *Bank of New South Wales* (1).

G. A. Pape, for the State of Queensland, intervening pursuant to leave. The legislation of the State of Queensland contained in *The State Transport Facilities Act of* 1946 is in all respects similar to the legislation under attack here. If the *Transport Cases* were reconsidered very considerable confusion would result. If inter-State traffic was not subject to State regulation, it would be very difficult to police the regulation of intra-State traffic.

J. D. Holmes Q.C., in reply. The American cases are not concerned with the personal right of the trader to trade, but that element is at the foundation of any discussion as to whether legislation contravenes s. 92.

[DIXON C.J. referred to *Spector Motor Service Inc.* v. *O'Connor* (2).]

The roads in New South Wales are not provided by the State, but by shires, municipalities, the Commissioner for Main Roads, and by private individuals. [He referred to the *Local Government Act* 1919-1952 (N.S.W.), ss. 232, 234.] The Court should not be deterred from reconsidering *McCarter* v. *Brodie* (3) by reason of the doctrine of *stare decisis*. [He referred to *Australian Agricultural Co.* v. *Federated Engine-drivers and Firemen's Association of Australasia*, per *Isaacs* J. (4); *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.*, per *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (5); *Burnet* v. *Coronado Oil & Gas Co.*, per *Brandeis*, *Roberts* and *Cardozo* JJ. (6); *Helvering* v. *Mountain Producers Corporation* (7).]

Cur. adv. vult.

April 16, 1953.

The following written judgments were delivered :—

DIXON C.J. The facts are few upon which the plaintiff company is content to rest the right it asserts in this action to relief by way of declaration of right and injunction, and a brief statement of what matters will suffice. The facts are to be collected from the

(1) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(2) (1951) 340 U.S. 602 [95 Law. Ed. 573].
(3) (1950) 80 C.L.R. 432.
(4) (1913) 17 C.L.R. 261, at p. 279.
(5) (1920) 28 C.L.R. 129, at p. 142.
(6) (1932) 285 U.S. 393, at pp. 405 *et seq.* [76 Law. Ed. 815, at pp. 823, *et seq.*].
(7) (1938) 303 U.S. 376 [82 Law. Ed. 907].

pleadings; for the proceeding before us is a demurrer to the defence delivered by the defendants.

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

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

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

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

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

A further condition, forming cl. 3, provides that if the terms conditions and authorities are complied with the licensee and his driver are to be exempt from the conditions mentioned in the legislative provisions (s. 18 (5) of the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.)) authorizing the imposition of charges and of certain other obligations. These clauses have been long in use and they were considered in *Duncan* v. *Vizzard* (1) where *Evatt* J. explained their effect in the following passage, the first reference in which is to cl. 3: "The verbiage of this clause may be subject to criticism, but its intendment and meaning are not in doubt. Its object is to grant an exemption from the payment authorized to be imposed by sec. 18 (5) of the Act, and actually imposed in respect of the full competitive distance by clause 2 of the special conditions. Clause 3, in its last sentence, describes itself as an 'exemption'. The exemption gives relief from the restrictions mentioned, but it is strictly coterminous with the authority to operate the vehicle granted by clause 1 of the special conditions. The vehicle is to be 'exempt . . . in respect of any journey which is not, for a distance exceeding fifty miles, competitive with the railways or tramways'. It is also to be 'exempt . . . in respect . . . of a journey of any distance when the vehicle . . . is used solely for the transport of fresh fruit . . . from farm to market'. It is impossible to imply from these conditions any authority to drive or operate the vehicle on any journey which is, for more than fifty miles, competitive with the railways. On the contrary, the exemption granted by clause 3 may be said to offer an inducement to observe the main condition contained in clause 1 of the licence. The exemption from the money payment imposed by

(1) (1935) 53 C.L.R. 493, at pp. 506, 507.

clause 2 of the special conditions is strictly conditioned by the observance of clause 1 ".

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

On the occasion of the issue of such a permit the road transport authority of the State exacts payment of the tonnage charge per mile. That permits are so used is a fact which does not appear distinctly in the pleadings, but the course of practice was made clear to us during the argument. What statutory authority there is for issuing permits for the carriage of goods I do not know. As was pointed out in effect in the case of *Duncan* v. *Vizzard* (1), per *Rich* J. and per *Evatt* J. (2), the power expressly conferred by the legislation to grant permits is restricted to the carriage of passengers. The relevant statutory provisions have not been changed. However the pleadings do not raise the question what warrant exists for the administrative procedure of issuing permits and making that the occasion of collecting the charges. To show that the permits were invalidly issued would be of little profit to the plaintiff, if the clauses of the licence be valid. For they would expose the licensee to the same charges. That, at all events, is the operation given to the clauses in the passage already cited from the judgment of *Evatt* J. Even if the clauses of the licence, still assuming them to be constitutionally valid, failed so to operate as to impose the liability, yet there would remain s. 37 (1) of the *State Transport (Co-ordination) Act*, which enables the road transport authority of the State to impose upon a person operating such motor vehicles in contravention of the Act an obligation to pay such sums as the authority determines not exceeding what would be exigible by means of a licence. If this provision be constitutional the same amounts could be imposed as have already been collected.

The legislation under which all this is done begins with the *State Transport (Co-ordination) Act* 1931 (No. 32 of 1931) but it has a confused subsequent history, chiefly because of the many changes made in the organization for the control of land and air transport in New South Wales. It is not necessary to trace its course. The writ in this action was issued on 7th July 1952 and it is enough to state briefly the result of the legislation as it now

(1) (1935) 53 C.L.R., at p. 503. (2) (1935) 53 C.L.R., at p. 508.

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

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

In the beginning a board of four commissioners was set up, which, subject to the control of the Minister, was to carry into effect the objects and purposes of the Act and discharge the duties powers

and authorities the Act conferred or imposed: s. 4 (1). The board was called the State Transport (Co-ordination) Board and it was the licensing authority. But this board was superseded as long ago as 22nd March 1932. Since then not a few statutory changes have taken place and now, after the field of transport administration and control has undergone more than one division, the powers and authorities conferred by the Act with respect to road transport and probably aircraft have come to reside in an officer called the Director of Transport and Highways. He is constituted a corporation sole but in his natural capacity he is the chairman of a commission called the New South Wales Transport and Highways Commission, the functions of which seem to be rather to plan and recommend than to administer. As chairman moreover the director has the privilege of submitting any decision of the commission of which he disapproves to the Minister, who may then determine whether the decision is or is not to be carried into effect: see Act No. 10 of 1950, ss. 3, 4, 6 (4) and 8. In his corporate capacity the Director of Transport and Highways is the road transport authority of the State. But in the exercise and performance of the powers duties and functions conferred upon him as a result of the various statutes he is subject to the direction and control of the Minister: Act No. 15 of 1952, s. 3 (4). No purpose would be served by recounting the legislative steps by which the director became the road transport authority. It is enough to mention the successive provisions from which the result ensues, which are :—No. 3 of 1932, ss. 9 (1) and 12 (2); No. 31 of 1932, ss. 5, 14 (1) and (2), and 20 (1) (b) and (2) (c); No. 10 of 1950, ss. 3, 6 and 8 (1) (g) and (2); No. 15 of 1952, s. 2, s. 3 considered with s. 4, ss. 5 (1), 11, 17 (1) (a) and (2) (a).

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

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

My personal opinion has long been that, in the case of provisions of this description prohibiting transport unless licensed and authorizing the imposition of such a levy, the question must be answered

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that neither the prohibition nor the levy is consistent with s. 92. Notwithstanding the failure of this conclusion to gain acceptance, the more immediate considerations which arise upon the very face of the statutory provisions, to say nothing of the levy and the conditions of the licence, still appear to me to make demands upon reason that are too insistent to admit of any other answer to the question whether trade commerce and intercourse is left absolutely free.

I take it as finally settled that the burdens and restrictions against which s. 92 protects inter-State commerce are not only those which are imposed differentially upon inter-State commerce or affect it in a special manner. Inter-State commerce is protected also from restrictions and burdens which fall alike on commerce confined to a State and commerce crossing its borders. The carriage of merchandise from one State to another is not a thing incidental to inter-State commerce but in the language used by *Johnson* J. of navigation, in *Gibbons* v. *Ogden* (1), is " the very thing itself; inseparable from it as vital motion is from vital existence ".

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

It is not my purpose to enter upon an examination of the question either in principle or upon authority, excepting of course the authority of the decision in *McCarter* v. *Brodie* (2). But I should perhaps say that to my mind the distinction appears both clear and wide between, on the one hand, such levies and such provisions prohibiting transportation without licence as the foregoing and

(1) (1824) 9 Wheat. 1, at p. 229 [6 Law. Ed. 23, at p. 78].

(2) (1950) 80 C.L.R. 432.

on the other hand the regulation and registration of motor traffic using the roads and the imposition of registration fees. In the same way the distinction is wide between such provisions and the use of a system of licensing to ensure that motor vehicles used for the conveyance of passengers or goods for reward conform with specified conditions affecting the safety and efficiency of the service offered and do not injure the highways by excessive weight or immoderate use or interfere with the use of the highways by other traffic. The validity of such laws must depend upon the question whether they impose a real burden or restriction upon inter-State traffic.

For myself I do not know why a uniform law for the organization and the regular conduct of motor traffic or a uniform law prescribing conditions for the business of carrying by road should be regarded as necessarily impairing the freedom of inter-State trade commerce and intercourse. The provision which in *Willard* v. *Rawson* (1), all the judges but myself upheld as valid did not appear to me to be of this character. It was a special provision affecting only motor cars registered in other States if used in Victoria for the carriage of goods. Motor cars if registered in another State were exempt from registration in Victoria and from the payment of the registration fee annually payable in that State. But the provision impugned specially withdrew this exemption if the vehicle was used to carry goods. Thus entry into Victoria of a New South Wales lorry carrying goods at once exposed it to the levy of what to a Victorian car would be an annual fee. This appeared to me to be a direct burden upon inter-State trade. I am quite prepared to accept the view that my conclusion as to the character or characterisation of the provision was erroneous, but it has nothing to do either with the present case on the one hand or with a general regulation of transport on the other hand.

The decisions of this Court that the *State Transport (Co-ordination) Act* 1931 (N.S.W.) and the legislation of other States *in pari materia* did not infringe s. 92 were based on grounds which, as it seemed to me, were no longer tenable in face of the reasons of the Privy Council in the *Commonwealth of Australia* v. *Bank of New South Wales* (2). In *McCarter* v. *Brodie* (3), however, a majority of the Court decided that notwithstanding the decision of the Privy Council the *Transport Cases* should be followed. In the present case the plaintiff asks us to re-consider the question thus decided in *McCarter* v. *Brodie* (3).

(1) (1933) 48 C.L.R. 316.
(2) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(3) (1950) 80 C.L.R. 432.

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The strength of the considerations against refusing to follow that decision is very great. It is a recent decision of the Court dealing with the very question of the authority of the *Transport Cases*. It was fully considered and, whether many of the reasons and the conclusion of those cases are, as I think, or are not, at variance with the principles expounded in the *Banking Case* (1), nothing has occurred since this Court decided *McCarter* v. *Brodie* (2) adding to or altering the considerations then before the Court. These circumstances, in my opinion, make it right to decline to enter upon a reconsideration of *McCarter* v. *Brodie* (2) unless independent reasons exist for overruling it which appear to be imperative.

I do not waiver at all in my belief that the transport cases cannot be reconciled with principle or in the opinion that the grounds on which they were in fact decided have for the most part been expressly rejected in the judgment of the Privy Council in the *Banking Case* (1), but I do not regard that as enough. I believe, however, that I would regard it as an imperative judicial necessity to overrule *McCarter* v. *Brodie* (2) if it appeared inevitable that the consequences of the decision would extend beyond the subject of commercial transport by road and would make it necessary to hold that over the whole area of inter-State trade commerce and intercourse a power existed in every legislature to impose a prohibition subject to a licence to be granted or refused at the discretion of the Executive. At first sight it may seem that these consequences ought logically to ensue, if the decision is allowed to stand. Nevertheless, after a full re-examination of the *Transport Cases* in the light of the reasons of the majority of the Court in *McCarter* v. *Brodie* (2), I have come to the conslusion that the application of these cases may be confined to the particular conditions or considerations which arise from the fact that the railways and the roads form facilities for the carriage of goods (and presumably of passengers) for the provision and maintenance of which the State is responsible. I do not mean to suggest that in these conditions or considerations a ground can be found which in my opinion would suffice to support the decisions in the *Transport Cases* as correct or upon which by itself the judges who decided those cases were, or would have been, content to place them. But I have ventured before to describe the conclusion that the transport legislation was valid as a "pragmatical solution which those cases gave to a problem which they approach as a complex" (*Australian National Airways Pty. Ltd.* v. *Commonwealth* (3)) and I think that

(1) (1950) A.C. 235; (1949) 79 C.L.R. 497.

(2) (1950) 80 C.L.R. 432.

(3) (1945) 71 C.L.R. 29, at p. 90.

these conditions or considerations formed part of the complex and were taken into account by the learned judges, who gave different degrees of emphasis to them. I am fully alive to the very great legal and practical importance of the conclusion in favour of the validity of the transport legislation which the Court has upheld. But that is the very subject matter of *McCarter* v. *Brodie* (1) and I am not prepared to regard the importance of the subject matter as sufficient to overcome the weight of the circumstances I have enumerated as otherwise making it right to decline to reconsider the decision. If the *Transport Cases* have no future application except where the conditions or considerations exist that arise from the State providing facilities for the carriage of goods both in the form of railways and in the form of roads, the danger is removed of the decision operating generally over the whole area covered by s. 92 and on that footing I think that we ought not to reconsider it. I have been much encouraged to adopt such a view of the transport cases by the following passage in the reasons of *Williams* J. in *McCarter* v. *Brodie* (2). Referring to the *Transport Cases* his Honour says :—" In my opinion they ought not to be re-opened in this Court without the greatest hesitation. The Acts do regulate competition between land transport by rail and road, both of passengers and goods, but only so far as such competition arises out of competing facilities provided by the States themselves. In this respect the Acts differ fundamentally from the legislation held to be invalid in the *Australian National Airways Case* (3) and the *Bank Case* (4), for there the effect of the legislation was simply to prohibit competition with the government airlines in the one case and the government banks in the other. The *Transport Regulation Acts* do not prevent individuals carrying on the business of land transport among the States without a licence. But they do prevent individuals plying their vehicles on the public roads of the States without a licence. They proceed on the broad principle that the interests of the State require the regulation of the whole service of land transport wherever it is conducted upon the public roads. I am of opinion that a State must have a wide power to regulate the use of the facilities which it provides for trade and commerce, so that the public funds invested in such facilities, in this case the railways, shall not be jeopardised by undue competition brought about solely by the provision of another facility by the State. It is a question of fact whether

(1) (1950) 80 C.L.R. 432.
(2) (1950) 80 C.L.R., at p. 477.
(3) (1945) 71 C.L.R. 29.
(4) (1950) A.C. 235 ; (1949) 79 C.L.R. 497.

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such Acts are, as they profess to be, regulatory or something more, and the solution of this question raises social and economic problems. The competition could be destroyed, as *Evatt* J. pointed out in *Vizzard's Case* (1), by the State adopting the simple if drastic expedient of destroying the roads so as to compel all traders and travellers to use the railways. The same result could be achieved by allowing the roads to fall into a sufficient state of disrepair. Another way would be for a State to stop the roads short of the boundary and sell a strip of land along its frontiers with other States to private individuals. It has not yet been suggested that the freedom guaranteed by s. 92 is violated if a private individual refuses to allow an inter-State trader or traveller to pass over his land. By building and maintaining State Highways States provide means of competition with their own railways, and I can find nothing in the judgment of the Privy Council which leads me to alter the opinion expressed in the *Australian National Airways Case* [*No.* 1] (2), that 'it is simply an exercise of the sovereign rights of the States to co-ordinate traffic by rail or road, and to confine the use of roads to particular persons and vehicles. If the choice of these persons and vehicles has no relation to their passage across the border, but the legislation operates without discrimination with respect to all persons and vehicles desirous of using the roads, such legislation is not aimed or directed at inter-State commerce but at regulating, maintaining and co-ordinating a number of utilities for trade, commerce, and intercourse, State and inter-State, provided by the State'."

It must be borne in mind that if his Honour had not acted on this view the Court would have been equally divided and the decision would not have been an effective precedent: cf. *Tasmania* v. *Victoria* (3). Moreover there are passages in the judgments of the members forming the majority of the Court in *R.* v. *Vizzard*; *Ex parte Hill* (4), which show the important part this element played in the decision.

Gavan Duffy C.J. said, "Again, a distinction has been made between interfering with trade, commerce and intercourse and interfering with the methods by which they are carried on. No one would suggest that the State must furnish such roads or other conveniences as the inter-State traveller may desire, nor, I think, would any one suggest that the State must leave unaltered all conveniences for travelling which are already in existence. It

(1) (1933) 50 C.L.R. 30, at p. 82.
(2) (1945) 71 C.L.R., at p. 109.
(3) (1935) 52 C.L.R. 157, at pp. 184, 185.
(4) (1933) 50 C.L.R. 30.

has been said that the Legislature is not necessarily controlling or regulating inter-State trade when it prescribes the facilities it will offer for carrying on trade generally, though if, on examination, it appears that the object of the Legislature is really to prejudice inter-State trade, its enactment may be invalid " (1). *Rich* J. said, " It (the case) arises upon a new aspect of the legislation relating to the use of roads, vehicles and railways—an aspect which could scarcely have struck the minds of those who resorted to the emphatic but uncertain terms of sec. 92 " (2). Then in the course of describing the legislation his Honour said, " It is directed to secure an ordered system of public transportation in which the integers (not the least important of which are State railways) do not engage in mutual slaughter by irrational competition. As part of the means to this end it sets up a licensing system for motor vehicles which act as common carriers or which otherwise engage in the carriage of goods " (3). Finally the learned judge propounds the question he regarded as critical as follows :—" The question which I have to ask myself is whether, in a scheme which allows complete freedom to go or to send from one place to another but *in the process of co-ordinating the means and of rationalizing the facilities*, denies a completely unregulated choice of means, a direct restraint upon or interference with trade, commerce, and intercourse is imposed " (4). In the course of the judgment of *Evatt* J. the following passage occurs :—" On the contrary, I think that a State does not infringe sec. 92 if, having no concern, interest or object in restricting or prohibiting trade between States, it chooses to organize, regulate and co-ordinate those facilities and services which are provided and conducted within the State as instruments essential to all trade, commerce and intercourse, including inter-State trade, commerce and intercourse " (5). Then, after dealing with the financial and other responsibilities of States in relation to the provision and the maintenance of Government Railways *Evatt* J. said : " Where the States have also expended large sums of money for the purpose of constructing and maintaining roads, the problem of ' co-ordination ' of the railway and road services becomes one of direct national concern " (6).

McTiernan J. both in his description of the legislation and in the use his Honour made of citations from decisions of the United States Supreme Court clearly showed that he considered that the provision by the State of both roads and railways was a

(1) (1933) 50 C.L.R., at p. 48.
(2) (1933) 50 C.L.R., at p. 49.
(3) (1933) 50 C.L.R., at p. 50.
(4) (1933) 50 C.L.R., at p. 51.
(5) (1933) 50 C.L.R., at pp. 81, 82.
(6) (1933) 50 C.L.R., at p. 83.

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very important factor. His Honour said: "An examination of the provisions of the Act and the Acts constituting the various public bodies whose activities and services it was passed to co-ordinate and improve shows that the real object of arming the Board with the powers of granting or refusing licences to persons desiring to operate public motor vehicles on the roads of New South Wales was to protect the utility of the public facilities for transport, to save the publicly owned railways of the State from the destructive effect of the uncontrolled or unrestricted use of the facilities for travelling provided by the State out of public moneys and to protect the public finances and the credit of the State. It is, in my opinion, within the legislative power reserved to the States to enact the provisions which are now in question and such provisions are not affected by sec. 92" (1). In the citation made by his Honour from the opinion of the Court delivered by *Hughes* C.J. in *Sproles* v. *Binford* (2), there occurs the statement "The State provides its highways and pays for their upkeep. Its people make railroad transportation possible by the payment of transportation charges. It cannot be said that the State is powerless to protect its highways from being subjected to excessive burdens when other means of transportation are available" (3). *McTiernan* J. after completing the quotation said: "This statement applies with equal force where the railways as well as the roads are built and maintained out of public funds and are owned and managed and controlled by the State" (3).

On the whole I think that it is now possible to regard the *Transport Cases* as confined in their application to the control by the States of the use of roads provided and maintained by the States as an alternative to the use of railways also provided and maintained by the States. I hope that I have already said enough to make it unnecessary for me to add that I must not be taken as agreeing that such a view of the use of a highway for inter-State trade justifies an interference which otherwise s. 92 would not allow. In truth my personal opinion is entirely to the contrary. But that is nothing to the point. The point is that once the decisions are confined to such a situation they do not so govern the general operation of s. 92 as to cause an ever recurring difficulty in applying s. 92 according to the principles which otherwise would appear now to be established. On the footing that they are so confined I shall act on the authority of *McCarter* v. *Brodie* (4).

(1) (1933) 50 C.L.R., at p. 104.
(2) (1932) 286 U.S. 374, at p. 394 [76 Law. Ed. 1167, at p. 1182].
(3) (1933) 50 C.L.R., at p. 105.
(4) (1950) 80 C.L.R. 432.

The plaintiff, however, contended that another reason existed for declining to apply the *Transport Cases* to the legislation as it stands. That reason lies first in the virtual disappearance of the powers which might have enabled the old State Transport (Co-ordination) Board to perform the function, of which so much is said in these cases, of co-ordinating rail and road transport, and second in the vesting in an officer, bound by ministerial direction, of the authority to licence and of the almost uncontrollable discretion that now exists. For the plaintiff it was pointed out, indeed, that in *Vizzard's Case* (1) itself notwithstanding that the date of the offence from which it arose was 30th April 1933, no account was taken of the important changes produced successively by the *Ministry of Transport Act* 1932 (N.S.W.) as from 22nd March 1932 and by the *Transport (Division of Functions) Act* 1932 (N.S.W.) as from 29th December 1932.

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

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

Finally the point was taken that the levy of the tonnage rates amounted to an excise duty placed beyond the power of the State by s. 90 of the Constitution. In answer to this contention it is, I think, enough to say that the tonnage rate is not a tax directly affecting commodities. It is calculated on the combined weight of the vehicle and weight of the load it is capable of carrying and is payable in respect of the employment of the vehicle upon a journey independently of the weight or quantity of the commodities carried. It is a tax on the carrier because he carries goods by motor vehicle.

Having decided to treat *McCarter* v. *Brodie* (2), for the reasons I have given as not open to review in this proceeding, it follows

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

(2) (1950) 80 C.L.R. 432.

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in my opinion that my conclusion must be against the plaintiff's demurrer to the defence.

I think the demurrer should be overruled.

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

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

I am unable to agree that the decision in *R.* v. *Vizzard*; *Ex parte Hill* (1) is wrong. It was affirmed in *McCarter* v. *Brodie* (2) upon the propositions which the Judicial Committee in the *Bank Case* (3) laid down with respect to s. 92. The Judicial Committee refused a petition for special leave to appeal against the decision in *McCarter* v. *Brodie* (2). That was not the first occasion upon which the Privy Council refused to intervene in a case involving the question whether *Vizzard's Case* (1) was correctly decided. The case was in the foreground in *James* v. *Commonwealth* (4). *Latham* C.J. and *Williams* J. have said in the course of judgments upon s. 92 that the Judicial Committee in *James* v. *Commonwealth* (4) approved of the decision in *Vizzard's Case* (1). Their

(1) (1933) 50 C.L.R. 30.
(2) (1950) 80 C.L.R. 432.
(3) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(4) (1936) A.C. 578; 55 C.L.R. 1.

Honours were not members of the Court which decided *Vizzard's Case* (1). I have always been of the same opinion. It seems to me that unless the Judicial Committee in *James* v. *Commonwealth* (2) were of the opinion that the *State Transport (Co-ordination) Act* was in harmony with s. 92 the references to *Vizzard's Case* (1) are pointless. In *McCarter* v. *Brodie* (3) we were asked to overrule the decision in *Vizzard's Case* (1) and the *Transport Cases* which followed it. *Willard* v. *Rawson* (4) which preceded *Vizzard's Case* (1) escaped attack. The Court in *McCarter* v. *Brodie* (3) affirmed the decision in *Vizzard's Case* (1). Now, we are asked to overrule *McCarter* v. *Brodie* (3) and *Vizzard's Case* (1). The Court in the former case reaffirmed that the Transport Regulation Acts of Victoria are in harmony with s. 92. This legislation is akin to the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.). I adhere to what I said in *McCarter* v. *Brodie* (3) about the observations made by the Judicial Committee in the *Bank Case* (5) in reference to the decision in *Vizzard's Case* (1). These observations support the authority of the decision in the latter case. It is argued for the plaintiff that the decision in *McCarter* v. *Brodie* (3) is repugnant to the reasons and decision upon s. 92 in *Commonwealth* v. *Bank of New South Wales* (5). This argument, in my opinion, is wrong. Surely it is a telling reason against reviewing *McCarter* v. *Brodie* (3) and reversing it, that the Judicial Committee declined to intervene.

Vizzard's Case (1) was decided under a doctrine, laid down in *W. & A. McArthur Ltd.* v. *Federal Commissioners of Taxation* (6), which extended s. 92 so widely that in effect it contradicted s. 51 (i.), but as the doctrine included the theory that only the States were bound by s. 92, it did not render the Constitution unworkable. According to the doctrine, a State legislature was prohibited from regulating inter-State trade or commerce as such; but *James* v. *Commonwealth* (2) impinged upon this doctrine and demolished the theory that s. 92 is addressed only to the States. The *Bank Case* (5) removed what remained of the doctrine that regulation of trade commerce or intercourse among the States is incompatible with the freedom guaranteed by s. 92. Between *McArthur's Case* (6) and *Vizzard's Case* (1), notwithstanding the former case, this Court decided that s. 92 did not prohibit a State legislature from passing non-discriminatory laws with a primary object directed to matters, within the legislative powers of the State, affecting its

(1) (1933) 50 C.L.R. 30.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1950) 80 C.L.R. 432.
(4) (1933) 48 C.L.R. 316.
(5) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(6) (1930) 45 C.L.R. 1.

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economy or the common good, even though the freedom of inter-State trade commerce or intercourse was incidentally affected by the laws. I endeavoured to decide *Vizzard's Case* (1) upon that basis. I proceeded upon the American view that the transportation of goods by vehicles, which the Act requires to be licensed, is commerce.

The difficulty that s. 92 prohibited regulation, met with in *Vizzard's Case* (1), was not so pressing in *McCarter* v. *Brodie* (2), because the *Bank Case* (3) establishes that the regulation of commerce is compatible with its freedom. The majority in *McCarter* v. *Brodie* (2) arrived at their conclusion by applying the principles and rules which the Judicial Committee worked out in the *Bank Case* (3) to test a law for invalidity under s. 92.

Rich J. said in *Vizzard's Case* (1) that any restriction which may result from the *State Transport (Co-ordination) Act* to inter-State trade or commerce would not be sufficiently direct to invalidate the Act. The refusal of a licence would, of course, result in interference with inter-State commerce if the applicant for the licence were an inter-State carrier; for the Act would prohibit him from operating the vehicle, for which the licence was sought, in New South Wales. But it would be a purely accidental circumstance that the carrier's activities were of an inter-State character. The Judicial Committee said in the *Bank Case* (3), that they would not attempt to define the boundary between a restriction which is direct and one which is too remote. My conclusion in *McCarter* v. *Brodie* (2), in which I endeavoured to apply the criteria laid down in the *Bank Case* (3), was that the Transport Regulation Acts of Victoria are essentially regulatory of transport within the State, and any restriction upon inter-State commerce that may arise from the operation of the Acts would not be direct and immediate but indirect and consequential.

I have read a copy of the petition in *McCarter* v. *Brodie* (2) for special leave to appeal and of the transcript of the argument at the hearing of the petition. The reading of these documents has fortified me in the conclusion that the decision in *McCarter* v. *Brodie* (2) should not be reviewed. It appears from the documents that the decision of the majority was attacked and the decision of the minority was supported with all the arguments that were addressed to us on behalf of the plaintiff in the present case. The refusal of the petition is not at all helpful to the argument, advanced for the plaintiff in this case, that it is inconsistent with

(1) (1933) 50 C.L.R. 30.
(2) (1950) 80 C.L.R. 432.
(3) (1950) A.C. 235; (1949) 79 C.L.R. 497.

the decisions of the Judicial Committee in the *James Cases*, and with the decision and reasons of the Judicial Committee in the *Bank Case* (1), to decide that either the transport regulation legislation of Victoria or the *State Transport (Co-ordination) Act* of New South Wales, is in harmony with s. 92. The argument is founded upon the wide discretion conferred by each Act to grant or refuse licences. Notwithstanding this feature of the latter Act, the Judicial Committee said of the decision in *Vizzard's Case* (2) that it may be reconciled with the decision in *James* v. *Cowan* (3). That observation should be noticed in connection with the contention, made for the plaintiff, that the effect of the *State Transport (Co-ordination) Act* is to authorise the prohibition of inter-State commerce at the mere will of the Executive and to put direct and immediate restrictions upon such commerce. The contention, in my opinion, is based upon a misunderstanding of the Act. I venture to say that the Judicial Committee could not have thought either in *James* v. *Commonwealth* (4), the *Bank Case* (1), or at the hearing of the petition in *McCarter* v. *Brodie* (5), that the contention does justice to the legislative scheme of this transport legislation. The discretion conferred to grant or refuse licences is wide but not unlimited. Authority is not granted to refuse a licence merely because the applicant wants to use the vehicle, for which a licence is sought, in inter-State transportation across New South Wales, nor is any authority given to refuse a licence to any applicant out of bias, prejudice or for a reason irrelevant to the purposes of the Act. It is plain from the reasons of the Judicial Committee in the *Bank Case* (1) that s. 92 does not strike at every regulatory law under which inter-State commerce is not kept open to all comers. It was argued for the plaintiff that in a licensing scheme truly regulatory of motor transport and consistent with s. 92 the question of the facilities provided by the railways can play no part. This argument was advanced upon the hearing of the petition in *McCarter* v. *Brodie* (5) for special leave. The reason why that question is out of place, so the argument runs, is that in order to maintain harmony with s. 92 it is necessary to specify the conditions with which an inter-State carrier must comply. It was said that conditions directed to the safety of the public would be permissible, but subject to the proviso that the conditions impose no undue burden upon the commerce.

The scheme leaves very uncertain room for such burdens as premiums for third party insurance, workers' compensation,

(1) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(2) (1933) 50 C.L.R. 30.
(3) (1932) A.C. 542; 47 C.L.R. 386.
(4) (1936) A.C. 578; 55 C.L.R. 1.
(5) (1950) 80 C.L.R. 432.

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awards prescribing minimum wages and maximum hours of work and other burdens like pay-roll tax upon the wages of the inter-State carriers' employees.

Another instance which was put of the impact of s. 92 upon State law is that an inter-State carrier could complain that a toll on a bridge is an undue burden on inter-State commerce unless it is "reasonable". I agree with the criticism made by *Latham* C.J. in *McCarter* v. *Brodie* (1) of the suggestion that an inter-State carrier is entitled under s. 92 to have such a complaint investigated by a Court. If inter-State carriers and passengers are entitled to make such a complaint about a toll, other charges, made by the State and the Commonwealth, in connection with inter-State journeys would be exposed to challenge. In the case of the Sydney Harbour Bridge, in respect of which the suggestion was specifically made, the pursuit of the complaint, might involve an examination of the public finances of the State, and perhaps of the Commonwealth, because of the connection between them, also technical questions of depreciation and obsolescence, and political, social and economic issues. I do not agree that inter-State carriers or passengers are entitled by s. 92 to object to tolls or charges which fall equally upon them and intra-State carriers and passengers and as to which there is no question of discrimination.

It is perhaps useful to observe that in New South Wales early legislation dealing with the provision of roads authorised the collection of tolls on roads. These tolls were abolished about 1890. In 1907 tolls on road ferries were abolished and local governing bodies took over the control of the ferries from the Government and it undertook to pay subsidies in respect of the running of the ferries. Ordinance No. 33 made under the *Local Government Act* 1919-1952 (N.S.W.) provides for the payment of charges in respect of certain ferries mentioned in cl. 3 and cl. 20c. Further, certain Acts provided for the charging of tolls on particular bridges. These are the George's River Bridge, the Spit Bridge and the Parramatta River Bridge (Ryde to Concord). The Acts are Nos. 23 of 1923, 24 of 1923 and 9 of 1931. These tolls are only chargeable until the capital cost of the bridge has been repaid. Upon this event, the plan is for the Main Roads Board to take over the bridge as part of the main road to which it is attached. Section 60 of the *Main Roads Act* 1924-1951 (N.S.W.), inserted in the Act in 1929, made provision for the levying of tolls and charges generally upon any bridge or ferry upon any metropolitan main road or a country State Highway. Local Government Ordinance No. 30 makes

(1) (1950) 80 C.L.R. 432.

provision for charging tolls on the Peat's Ferry Bridge. It appears that this bridge and the Sydney Harbour Bridge are the only toll bridges at present in New South Wales.

From the complaint made by the plaintiff about the limiting effect of the conditions of the licences and the permits upon its freedom to choose the roads on which to operate its vehicle, it seems to me that the plaintiff is asserting in respect of the roads and bridges of the State a right as general as that which *Evatt* J. described in the passage quoted by Lord *Wright* in *James* v. *Commonwealth* (1).

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

It is a matter of public knowledge that roads are constructed for the convenience of all classes of traffic which can be accommodated upon the roads, as feeders for the railways, for the development of the State and often with an eye to defence. Without

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

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roads, bridges and ferries the business of motor transport could not exist but it must not be imagined that these facilities are provided under these statutory provisions primarily as aids to the business. Section 92 does not operate as a dedication of the public roads and bridges of the State to inter-State transport. I cannot agree that by reason of the section, the right of the State to control its roads and bridges is so subordinate to the freedom of inter-State transportation, that the State Parliament is unable to regulate motor transport with the object of preventing such conditions as *Rich* J. described in *Vizzard's Case* (1) or to avoid damage to the economy of the railways and the State itself.

WILLIAMS J. So far as the plaintiff relies on s. 92 of the Constitution to invalidate the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.), or certain sections thereof, it is common ground that unless *McCarter* v. *Brodie* (2) is overruled the plaintiff must fail because the essential provisions of this Act are similar to those of the *Transport Regulation Act* 1933-1947 (Vict.) and the latter Act was held in this Court by a majority of four to two not to infringe s. 92. The present action has been brought in the hope that changes in the constitution of the Court might result in that case being overruled. I think that case was rightly decided and I did not intend to say more than that, in my opinion, it should be followed, with the consequence that the plaintiffs' case so far as it rests on s. 92 should fail. But the views of the majority (particularly my own) in that case are under attack and in particular it has been said that they are inconsistent with the three decisions upon the meaning of s. 92 given by the Privy Council and this moves me to add a few remarks to what I have already said. My brother *Kitto* has said of the *Transport Cases* that the judgment in *Commonwealth* v. *Bank of New South Wales* (3) wrote their epitaph in characters too plain to be missed or to be mistaken. Yet, of *R.* v. *Vizzard*; *Ex parte Hill* (1), the principal case, what the Privy Council actually said in the *Banking Case* (3) was that "The decisions in *James* v. *Cowan* (4) and in *Vizzard's Case* (1) may be reconciled: it would not be easy to reconcile all that was said by *Evatt* J. in the one case with all that was said by *Isaacs* J. in the other" (5). This is, with respect, a somewhat obscure epitaph for a long line of cases acted upon in the States which I venture to repeat should not be reopened without the greatest

(1) (1933) 50 C.L.R. 30.
(2) (1950) 80 C.L.R. 432.
(3) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(4) (1932) A.C. 542; 47 C.L.R. 386.
(5) (1950) A.C., at p. 309; (1949) 79 C.L.R., at p. 638.

hesitation. Then there is the fact that in *McCarter* v. *Brodie* (1), after a very full argument, special leave to appeal was refused by the Privy Council presided over by Lord *Porter* who also presided in the *Banking Case* (2). Their Lordships gave no reasons and too much significance should not be attached to this refusal. But one of the reasons which their Lordships gave in the *Banking Case* (2) for taking the unusual course of stating their views on the meaning of s. 92 in a case in which they held they had no jurisdiction to entertain the appeal was that it appeared to them that a large part of the appellant's argument was based on a misapprehension of the two previous cases decided by the Board. One might therefore have expected that their Lordships would have again intervened, if it appeared to them that this Court in *McCarter* v. *Brodie* (1), consistently with what they had said, could not have upheld the Victorian Act.

Does not the correctness of the decision in *McCarter* v. *Brodie* (1) really depend on what their Lordships meant when they said that regulation of trade commerce and intercourse among the States is compatible with its absolute freedom? If by regulation they meant regulation that went no further than prescribing rules of conduct reasonably required for the orderly carrying on of some form of trade and commerce with which it should be possible for everyone to comply and subject to which everyone would have the right to engage therein, it may be that the Transport Acts go too far. But is the regulation their Lordships contemplated as narrow as this? The general tenour of their remarks appears to me to be to the contrary. They say: "The problem to be solved will often be not so much legal as political, social, or economic, yet it must be solved by a court of law" (3). They contemplate that in certain circumstances, no doubt very exceptional, "it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade commerce and intercourse thus prohibited and thus monopolized remained absolutely free" (4). They cite a passage from the judgment of *Latham* C.J. in *Milk Board (New South Wales)* v. *Metropolitan Cream Pty. Ltd.* (5), reproduced in his judgment in *Australian National Airways Pty. Ltd.* v. *Commonwealth* (6), which reads as follows: "One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is

(1) (1950) 80 C.L.R. 432.
(2) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(3) (1950) A.C., at p. 310; (1949) 79 C.L.R., at p. 639.
(4) (1950) A.C., at p. 311; (1949) 79 C.L.R., at p. 641.
(5) (1939) 62 C.L.R. 116, at p. 127.
(6) (1945) 71 C.L.R. 29, at p. 61.

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invalid. Further, a law which is 'directed against' inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade, notwithstanding s. 92" (1). Their Lordships added "With this statement, which both repeats the general proposition and precisely states that simple prohibition is not regulation, their Lordships agree" (1). A glance at the *Milk Case* (2) will make it clear that the rules to which *Latham* C.J. was referring were certainly not confined to rules which left it open to everyone to compete in the industry, because the Act there in question provided for the expropriation of all the owners and the vesting of their milk in a board, the justification being that the expropriation was directed towards fixing the price for the sale of the milk in the metropolitan district of Sydney and its hygienic treatment and distribution so as to safeguard the health of the inhabitants of that district. The Privy Council has twice, at least, referred to the meaning of "regulation". In *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (3), their Lordships said that they saw no reason to modify the opinion which was recently expressed on their behalf by Lord *Davey* in *Municipal Corporation of City of Toronto* v. *Virgo* (4) in these terms: "Their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed". There is no suggestion in this definition that the regulation of some form of trade and commerce cannot in appropriate circumstances restrict the number of persons authorised to engage in it. The thing which is to continue to exist is the trade itself and not the right of every individual to engage in it.

I have never doubted that the freedom to engage in trade and commerce among the States guaranteed by s. 92 attaches to the individual and not to the goods. But their Lordships have said in the *Banking Case* (5) that regulation of trade and commerce among the States is compatible with its absolute freedom and, if I understand them aright, that there may be instances in which such regulation will not infringe this freedom, although it extends to excluding some individuals from engaging in it. One instance

(1) (1950) A.C., at pp. 310-311; (1949) 79 C.L.R., at p. 640.
(2) (1939) 62 C.L.R. 116.
(3) (1896) A.C. 348, at p. 363.
(4) (1896) A.C. 88, at p. 93.
(5) (1950) A.C. 235; (1949) 79 C.L.R. 497.

might be where the particular form of trade and commerce, possibly banking or life insurance, involves requirements, such as great financial stability and permanence, which make it proper to provide that only corporations should be authorised to take part therein. This would have the effect of excluding all individuals from directly engaging in these activities and would only allow them to do so indirectly as shareholders in or executives of a corporation. Provided regulation can, where there are exceptional circumstances, go beyond the limited conception of regulation under discussion, there is every reason for upholding the *Transport Cases*. Australia is a land of great distances inhabited by a comparatively small but growing population. The maintenance and extension of its railways and roads to keep pace with the growth of its population and the development of the country present an acute economic problem. It is obviously for the benefit of the country that it should possess first-class roads, especially main roads, but it is equally obvious that the States by constructing and maintaining such roads can injure their railways, unless they are entitled to control such competition and give carriage by rail priority where carriage by rail and road come into competition.

Their Lordships have said that the problem to be solved, whether an enactment is regulatory or something more, is one of fact as to which there cannot fail to be differences of opinion. That is exactly what has happened in the *Transport Cases*. There are now, and have always been, differences of opinion on this Court. But that is not a ground for upsetting a long line of previous decisions, even on a constitutional issue, especially where those decisions are open to review in the Privy Council if special leave is granted without the necessity of obtaining a certificate from this Court under s. 74 of the Constitution. Section 92 does not say that anyone either the Commonwealth or a State or a private individual must provide anyone else with any facilities for carrying on trade and commerce among the States. A person who wishes to carry goods by road inter-State requires the necessary vehicles in which to carry the goods as well as the necessary roads on which to carry them. He may not be able to obtain the vehicles he requires in Australia and may have to import them from overseas. But it has never been contended that import laws which prevent him from doing so are a breach of s. 92. The problem of controlling and co-ordinating modern fast moving transport by rail and road is world-wide. Many of the provisions of s. 17 of the New South Wales Act are taken from s. 72 of the *Road Traffic Act* 1930 (Imp.) (20 & 21 Geo. 5 c. 43) relating to passenger transport. In this

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Act the expression occurs " the co-ordination of all forms of passenger transport, including transport by rail ". The same problem exists in the United States of America and is discussed in many cases, examples of which are *Buck* v. *Kuykendall* (1); *Bush & Sons Co.* v. *Maloy* (2) and *Lloyd A. Fry Roofing Co.* v. *Wood* (3). The power of Congress to make laws under the Constitution of the United States to regulate commerce among the States is, unlike the power to make laws with respect to that subject matter under s. 51 (i.) of the Australian Constitution, an exclusive power and it has therefore been held in the United States that laws similar to the Transport Acts are beyond the legislative powers of the States. But it is clear from the judgments in these cases that the power of Congress to regulate commerce is wide enough to authorise laws regulating competition between rail and road. The purpose of the New South Wales Act is to improve and co-ordinate the means of and facilities for locomotion and transport, the official charged with its administration now being a corporation sole, the Director of Road Transport. The principal section is s. 17. The discretion conferred upon him by this section is extremely wide but it is not unlimited. It must be exercised bona fide and so as to carry into effect the purposes of the Act. Otherwise the duty to exercise the discretion according to law could be enforced by mandamus. It is wrong to say that the Act is in no way concerned with roads or the use of roads as such. Section 17 provides that one of the considerations the director must have regard to is the condition of the roads to be traversed with regard to their capacity to carry the proposed vehicular traffic without unreasonable damage to such roads. Apart from the competitive angle, a State must have, I should think, wide powers of regulating the use of its roads in the interests of public safety and their maintenance. It must have the power within reason to decide for what kinds of vehicles the roads are suitable. It must have power to limit their length, width, height and weight. It must have power to prevent overcrowding though this would have the effect of limiting the number of vehicles.

The problems dealt with in the *Transport Cases* are altogether different from the problem that arose in the *James Cases*. Their Lordships have said so in the *Banking Case* (4). They said of these cases and *Vizzard's Case* (5): " The facts in relation both to subject-matter and to manner of restriction or interference are so widely

(1) (1924) 267 U.S. 307 [69 Law. Ed. 623].
(2) (1925) 267 U.S. 317 [69 Law. Ed. 627].
(3) (1952) 97 Ad. Repts. 145.
(4) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(5) (1933) 50 C.L.R. 30.

different in the two cases that it is difficult to apply to one case all that was said in the other". The effect of the State and the Commonwealth legislation impeached in the *James Cases* was to prevent growers of dried fruit disposing of their product inter-State unless they could get a licence to do so and, if they got a licence, only to the extent authorised by the licence. The Transport Acts do not prevent anyone carrying on the business of an inter-State carrier. What they do is to compel carriers to rely on such vehicles, whether publicly or privately owned, as the States authorise to use the railways or the roads which the States themselves provide. In this connection it should be noted that the passage from the judgment of *Evatt* J. which received the approval of the Privy Council in *James* v. *Commonwealth* (1) stated that s. 92 does not give to the owner of goods which are to be carried inter-State or to the contractor who carries them the right to choose "how" each of them will transport the commodities.

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

I would overrule the demurrer.

WEBB J. I would overrule the demurrer.

There has not been any change in this *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.) which renders inapplicable to the legislation as to how stands the decision of this Court in *R.* v. *Vizzard*; *Ex parte Hill* (2). Sections 17 and 18 are in the same terms as they were when that case was decided: they still empower the licensing authority to grant or refuse a licence, and to amend the conditions of a licence, and to do so in the uncontrolled discretion of the authority as I read them. They could hardly be made more open to attack under s. 92, short of being expressly directed against inter-State transport.

In *McCarter* v. *Brodie* (3) I was one of the majority of the Court that held that *Vizzard's Case* (2) should be regarded as having been rightly decided. It appeared to me that the reasoning of *Evatt* J. in that case had received the *imprimatur* of the Privy Council in *James* v. *Commonwealth* (4) and that this had not been withdrawn by their Lordships in *Commonwealth* v. *Bank*

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1933) 50 C.L.R. 30.
(3) (1950) 80 C.L.R. 432, at p. 478.
(4) (1936) A.C. 578, at p. 622; 55 C.L.R. 1, at p. 51.

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of New South Wales (1). On the contrary their Lordships in suggesting how far regulations might go without infringing s. 92 said in the *Banking Case* (2): "For their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation, and that inter-State trade, commerce and intercourse thus prohibited and thus monopolised remained absolutely free".

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

However, their Lordships in the *Banking Case* (1), did not think that a stage had yet been reached when the activities of banking could be made the subject of a State monopoly without a breach of s. 92. But I do not think it follows that they necessarily entertained the same view about road transport. The banking situation and the road transport situation are constituted of entirely different sets of fact, and questions that arise under s. 92 are always questions of fact, as has been pointed out by the Privy Council in *James* v. *Commonwealth* (3) in a passage (4) referred to in the *Banking Case* (5). As their Lordships pointed out in the *Banking Case* (5)—"The facts in relation both to subject-matter and to manner of restriction or interference are so widely different in the

(1) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(2) (1950) A.C., at p. 311; (1949) 79 C.L.R., at pp. 640-641.
(3) (1936) A.C. 578; 55 C.L.R. 1.
(4) (1936) A.C., at p. 631; 55 C.L.R., at p. 59.
(5) (1950) A.C., at p. 309; (1949) 79 C.L.R., at p. 638.

two cases that it is difficult to apply to one case all that was said in the other". Their Lordships had already stated (1) that every word of every judgment must be read *secundum subjectam materiam*.

If their Lordships reviewed the Australian road transport situation as it now exists I do not feel warranted in concluding from their observations in the *Banking Case* (2), that they would necessarily hold invalid this New South Wales transport legislation, or any other State's transport legislation which has come under review in this Court. After all in no case does such legislation go to the length of authorising a State or other monopoly; and it may well be that in no case can it be shown that it is not called for by the factual situation with which it deals, apart from the necessity to obey s. 92. I repeat here what I said in my reasons for judgment in *McCarter* v. *Brodie* (3): "If economic activities at some stage of social development could justify legislation giving a monopoly as being essentially regulatory, legislation short of that might be essentially regulatory in circumstances not so exceptional, e.g., legislation to co-ordinate and rationalise motor transport to protect State railways against competition".

Nothing has occurred to cause me to change the opinion I formed in *McCarter* v. *Brodie* (4), in the light of their Lordships' observations in *James* v. *Commonwealth* (5) and the *Banking Case* (6), although without the guidance afforded by those observations as I understand them I would have come to a different conclusion, as appears plainly enough in what I said in *McCarter* v. *Brodie* (7), and which is now recalled by *Fullagar* and *Kitto* JJ. The Privy Council refused special leave to appeal against the decision in *McCarter* v. *Brodie* (4), but it by no means follows that in refusing special leave their Lordships approved of that decision. It may be that their Lordships merely took the view that for the time being at all events they had given sufficient guidance, more particularly in the *Banking Case* (6), for the determination of s. 92 problems, seeing that they had indicated that those problems will often be not so much legal as political, social or economic, and that it is possible that valid solutions might cover a range so wide according to time and circumstance as to comprise even a State monopoly. Here it is to be noted that *Evatt* J. in *Vizzard's Case* (8) referred to partial and even complete monopolies of land transport as being

(1) (1950) A.C., at p. 308; (1949) 79 C.L.R., at p. 638.
(2) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(3) (1950) 80 C.L.R., at p. 481.
(4) (1950) 80 C.L.R. 432.
(5) (1936) A.C. 578; 55 C.L.R. 1.
(6) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(7) (1950) 80 C.L.R., at p. 482.
(8) (1933) 50 C.L.R., at pp. 81, 82.

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already within the power of a State. To say the least this has not yet been expressly denied by their Lordships.

I desire to add my respectful concurrence in the reasons of *Williams* J. in *McCarter* v. *Brodie* (1) for not re-opening these *Transport Cases* without the greatest hesitation.

I should also add that in my opinion charges imposed by this legislation do not infringe s. 90 of the Commonwealth Constitution. *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (2).

FULLAGAR J. After a careful consideration of this case, I have not been able to see the slightest reason for changing, or modifying in any way, the opinion which I expressed in *McCarter* v. *Brodie* (3). But, although I found myself in agreement with the present Chief Justice, and although my brother *Webb* (4) found it "difficult to see" how the legislation in question in that case could be regarded otherwise than as "prohibitive or restrictive", the view of the learned Chief Justice and myself did not prevail. The consequence of these two facts is that I seem now to be faced with a choice between two evils—saying that the majority decision in *McCarter* v. *Brodie* (3) ought not to be followed, or accepting a view which appears to me to strike at the root of inter-State freedom of trade. I do not think that I shall be repeating anything that I said in *McCarter* v. *Brodie* (3) if I begin by stating, as briefly as I can, the foundation of the position as I see it.

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

(1) (1950) 80 C.L.R., at p. 477.
(2) (1935) 52 C.L.R. 189, at p. 214.
(3) (1950) 80 C.L.R. 432.
(4) (1950) 80 C.L.R., at p. 482.

with which *McCarter* v. *Brodie* (1) was concerned, is just *the very kind of thing* which s. 92 was designed to prevent.

It has often been observed that inter-State free trade is probably a fundamental necessity of any federal system. In the case of Australia it was a primary object of Federation. When the Constitution was framed, the most prominent consideration which led to the adoption of s. 92 lay doubtless in the existence of customs duties, which were, before Federation, imposed by the States (then called Colonies) upon a great variety of goods not only when imported from overseas but also when imported from another State. But I do not think the idea has ever been seriously entertained that s. 92 was concerned only with these inter-State customs duties as such. One of several answers to any such view is found in the fact that s. 90 has already provided that the power to impose duties of customs and excise, and (subject to the exception prescribed by s. 91) the power to grant bounties on the production or export of goods, shall be exclusive powers of the Commonwealth. At the same time, as was observed in *James* v. *Commonwealth* (2), it cannot be doubted that the fundamental conception behind s. 92 was that of a "free border": every person was to be at liberty to take or send goods from State to State (trade and commerce) and to pass from State to State upon his lawful occasions (intercourse) without let or hindrance. There is a passage in the judgment of *Higgins* J. in *W. & A. McArthur Ltd.* v. *State of Queensland* (3), which is worthy of remembrance in this connection. As to the most important point which it decided, *McArthur's Case* (4) has been overruled by *James* v. *Commonwealth* (2), and as to other points its authority is perhaps dubious today: even the examples taken by *Higgins* J. himself of invalid State legislation must be regarded as open to question. But I know of nothing which better captures the spirit of s. 92 than the short passage which I have in mind. His Honour says: "Sec. 91 is really an exception to the provision of sec. 90 as to bounties, and, when sec. 91 is seen in this aspect, sec. 92 appears in its true character, as extending the application of the principle contained in sec. 90—no more inter-State imposts (sec. 90); no more State restrictions of any kind, present or future, on inter-State trade or intercourse (sec. 92)" (5). It is now settled, of course, that the Commonwealth is bound by s. 92 equally with the States, so that for the words "State restrictions" we should, for general purposes, substitute

(1) (1950) 80 C.L.R. 432.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1920) 28 C.L.R. 530, at p. 561.
(4) (1920) 28 C.L.R. 530.
(5) (1920) 28 C.L.R., at p. 562.

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the words " border restrictions ". But, for the purposes of the present case, in which it is State legislation that is involved, the passage may be read as it stands.

Now, an import or export duty does not necessarily operate to restrict seriously or at all the trade of an importer or exporter. We are accustomed in this country to heavy protective duties, designed to an extent to deter and restrict. But a small duty, imposed for revenue purposes and readily " passed on ", may not really restrict the importation or exportation of goods by any individual importer or exporter to any appreciable extent. Nevertheless, one would suppose it quite beyond argument that the imposition of *any* duty on inter-State imports or exports would infringe s. 92. If it were imposed by a State, the matter would be covered by s. 90 : if it were imposed by the Commonwealth, it would be covered by s. 92. There would be a burden imposed, real though light. But there are other familiar methods of controlling the passage of goods across frontiers, which are in their nature necessarily restrictive. At least two of these, be it noted, are quite commonly found in customs legislation : they are to be found in the existing *Customs Act* 1901-1952 (Cth.) and regulations made under ss. 56 and 112 : see *Reg.* v. *McLennan* ; *Ex parte Carr* (1). These methods include total prohibitions, prohibitions subject to discretionary licences or exemptions, and the imposition of quotas. Each of these methods is obviously and necessarily restrictive of the trade of every person affected by it. In the first case the restriction affects every person who is capable and desirous of engaging in the trade. In the second case, the restriction affects every such person who cannot obtain a licence. In the third case the restriction affects every such person when once the quota is exhausted. Every such person so affected is simply prohibited from engaging in the trade. No valid distinction for the purposes of s. 92 can be drawn among the three methods. A famous example of a quota system—held to infringe s. 92 because it prohibited inter-State (as well as intra-State) sales in excess of the quota—is *James* v. *South Australia* (2). The correctness of the decision of this Court in that case was strongly challenged in *James* v. *Cowan* (3) and the emphatic approval of the decision (4) is not the least important feature of that vitally important case. It was in relation to this " quota system " that Lord *Atkin* used the words : " If this leaves interstate trade ' absolutely free ', the constitutional charter might as well be torn up ".

(1) (1952) 86 C.L.R. 46.
(2) (1927) 40 C.L.R. 1.
(3) (1932) A.C. 542 ; 47 C.L.R. 386.
(4) (1932) A.C., at p. 555 ; 47 C.L.R., at p. 393.

It may be mentioned here that another point strongly argued for the respondents in *James* v. *Cowan* (1) was that a law could not infringe s. 92 unless it dealt solely with inter-State trade as distinct from intra-State trade or dealt differentially with inter-State trade and intra-State trade: "discrimination", it was said, was the test. This argument also was unequivocally rejected. The same view had been previously taken in this Court. Since *James* v. *Cowan* (1) it has never been doubted that a law which is restrictive or burdensome of trade generally will be struck by s. 92 in so far as (though, of course, only in so far as) it operates on inter-State trade.

The three examples of restrictions on trade and commerce which I have taken above by no means exhaust the category of what may be held to be restrictive or burdensome for the purposes of s. 92. To illustrate this, it is necessary only to refer to *Fox* v. *Robbins* (2) and *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (3). I have taken those three examples only because they appear to be particularly clear, to be within the narrowest possible view of the scope and intendment of s. 92, and to be entirely apposite to the present case. Each represents a *kind* of restriction which is inconsistent with *any* conception of freedom of trade.

The Act in question in *McCarter* v. *Brodie* (4) and the Act in question in this case, impose restrictions *of that kind* on the trading or commercial activities of persons who transport goods, including those who transport goods from one State to another. It was once disputed that the transportation of goods from State to State constituted inter-State commerce. It was said that such transportation was an instrument whereby commerce was carried on but was not itself commerce. This view undoubtedly played a part in the earlier *Transport Cases*. One would have thought such a view untenable. In the United States the transportation of goods has been regarded as commerce—one might say commerce *par excellence*—ever since *Gibbons* v. *Ogden* (5). So has the transportation of passengers ever since *New York* v. *Miln* (6). The contrary view was rejected by this Court in *Australian National Airways Pty. Ltd.* v. *Commonwealth* (7), and the accepted view is now that expressed by *Dixon* J. in *R.* v. *Vizzard*; *Ex parte Hill* (8). His Honour there said: "There is, I think, no act or transaction which better answers the description trade, commerce, and

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1908) 8 C.L.R. 115.
(3) (1934) 51 C.L.R. 108; 677.
(4) (1950) 80 C.L.R. 432.
(5) (1824) 9 Wheat. 1 [6 Law. Ed. 23].
(6) (1837) 11 Pet. 102 [9 Law. Ed. 648].
(7) (1945) 71 C.L.R. 29.
(8) (1933) 50 C.L.R. 30, at p. 59.

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intercourse between the States than the carriage of merchandise from a place in one State across the border to a place in a neighboring State".

When these things have been said, it should not be necessary to say anything more. The legislation in question stands forth as a conspicuous breach of s. 92 in its plainest and most elementary aspect. Why, then, is it that, whereas the famous Mr. James successfully claimed the protection of s. 92 in three leading cases, persons engaged in inter-State transport by land have claimed that protection in vain? Mr. James wanted to deliver dried fruits grown by him in South Australia to buyers in other States. He was told that, after he had sold a certain proportion of his crop, he could not do this. Mr. McCarter wanted to carry beer manufactured in South Australia to a buyer in New South Wales. He was told that, unless he obtained a licence, he could not do this, and, when he applied for a licence, it was refused. What is the difference between the two cases? Why was the same legal privilege conceded to James but denied to McCarter? The difficulty of answering this question is, of course, enormously increased by the fact (which I pointed out in *McCarter* v. *Brodie* (1)) that an Act having precisely the same effect as the transport legislation was held invalid by the Privy Council in *James* v. *Commonwealth* (2). It is not susceptible, in my opinion, of any real answer.

I do not intend to repeat what I said in *McCarter* v. *Brodie* (1), and it would be idle to review the cases again. I wish, however, to refer very briefly to the general development, and to mention particularly one case which I only mentioned in passing in *McCarter* v. *Brodie* (1).

I do not repent of referring to *R.* v. *Vizzard*; *Ex parte Hill* (3) as "*fons et origo malorum*". The Court which heard that case consisted of six justices. *Starke* J. and *Dixon* J. dissented. In all later cases in which he sat, *Starke* J. refused to abandon the view which he had expressed in *R.* v. *Vizzard* (3). In *O. Gilpin Ltd.* v. *Commissioners for Road Transport and Tramways (New South Wales)* (4) the doctrine of *R.* v. *Vizzard* (3) was very seriously extended, because there the plaintiff company was transporting its own goods in its own vehicle from its business establishment in one State to its business establishment in another State. Yet s. 92 did not protect it from a State enactment which prohibited it from so doing! In this case *Dixon* J. again dissented in a judgment with the whole of which I would most respectfully

(1) (1950) 80 C.L.R. 432.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1933) 50 C.L.R. 30.
(4) (1935) 52 C.L.R. 189.

agree. Though again refuting the decision in *R.* v. *Vizzard* (1) however, his Honour was of opinion that *Gilpin's Case* (2) was distinguishable from that case. In *Bessell* v. *Dayman* (3) (in which the judgment was delivered on the same day as that in *Gilpin's Case* (2)) *Dixon* J. again dissented. In *Duncan* v. *Vizzard* (4), however, he said simply that he regarded the case as " completely covered " by the decisions of the majority in the earlier cases, and he adopted the same attitude under strong protest in *Riverina Transport Pty. Ltd.* v. *Victoria* (5). In the *Airways Case* (6) provisions in a Commonwealth Act relating to the transport of goods and passengers by air, which were (to say the least) not readily distinguishable from the provisions of State Acts attacked in earlier cases, were held by a unanimous Court to be invalidated by s. 92. Inter-State carriers by air thus escaped the fate which had befallen inter-State carriers by land. I cannot myself see any sound distinction between transport by land and transport by air or between either of these and transport by sea. I hasten to add, however, that *Dixon* J. (7) based a distinction largely—in the last analysis, I think, entirely—on the fact that in the earlier cases the question had been treated as being whether the legislation attacked " obstructed, restricted, retarded or impaired, not some operations of commerce considered separately or in isolation, but the commerce between New South Wales and Victoria considered as a whole ". This was, of course, *at that time*, a legitimate ground of distinction. The point so put had been of the very essence of the argument presented by the counsel who were successful in *R.* v. *Vizzard* (1).

A word should be said at this point about the *Riverina Case* (5), because it well illustrates the dangerous potentialities of the doctrine of *R.* v. *Vizzard* (1). The Victorian Transport Regulation Board, acting on a direction from the Governor-in-Council, had granted licences to carry goods on routes within Victoria to all persons who had been providing satisfactory services before the Act of 1933 came into force. But, apart from an immaterial exception, every application for a licence which would have permitted the carrying of goods across either of Victoria's State borders was refused. The position is explained fully in the judgment of *Dixon* J. (8). I will quote one passage : " 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

(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.
(5) (1937) 57 C.L.R. 327.
(6) (1945) 71 C.L.R. 29.
(7) (1945) 71 C.L.R., at p. 90.
(8) (1937) 57 C.L.R., at pp. 360-362.

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the railways and otherwise, was licensed wherever before 29th August 1933 it had been carried on and the service or trade or a succession therein had been maintained. But, apart from carriers licensed for a twenty-mile radius, no through journey was permitted over either border. Thus, for the carriage of goods exclusively within the State a facility is widely allowed which is denied if the border is crossed " (1). The powers given by the Act were thus used to stop an existing class of inter-State commerce while permitting the same class of intra-State commerce to continue in existence. If the Act was valid, the inter-State operator was, of course, without redress. He had no means of compelling the issue of a licence, and, if he operated without a licence, he was guilty of an offence. The case shows that (as I pointed out in *McCarter* v. *Brodie* (2)) such legislation can be used to implement any kind of Government policy, however at variance with s. 92. One is tempted to say that the *Riverina Case* (3) represents the *reductio ad absurdum* of s. 92.

If *McCarter* v. *Brodie* (4) had come before the Court in this state of authority, I should certainly have recorded a protest, but I might have accepted the *Transport Cases* which preceded the *Airways Case* (5), if only as an *auto-da-fé*. In the meantime, however, the *Banking Case* (6) had been decided by the Privy Council. What was said by Lord *Porter* for their Lordships in that case appeared to me, as I have no doubt it appeared to *Dixon* J. (as he then still was), to vindicate, completely and indisputably, the view of s. 92 which had been taken throughout by *Starke* J. and *Dixon* J.—and, one may add, by many other Australian lawyers. The same view had been clearly implicit in the dissenting judgment of *Isaacs* J. in *James* v. *Cowan* (7) which received the approval of the Privy Council (8). A controversy of great importance had at last been settled. I gave my decision in *McCarter* v. *Brodie* (4) accordingly.

It is of some importance to remember that the view of s. 92 which formed the basis of the *Transport Cases* before *McCarter* v. *Brodie* (4) was of the very essence of the argument against the banks in the *Banking Case* (6). When once it was held that the banks were engaged in inter-State commerce within the meaning of s. 92, no way of escape from s. 92 appeared except by means of that view. The refutation of the propositions which Lord *Porter* (9)

(1) (1937) 57 C.L.R., at pp. 361, 362.
(2) (1950) 80 C.L.R. 432, at p. 499.
(3) (1937) 57 C.L.R. 327.
(4) (1950) 80 C.L.R. 432.
(5) (1945) 71 C.L.R. 29.
(6) (1950) A.C. 235 ; (1949) 79 C.L.R. 497.
(7) (1930) 43 C.L.R. 386.
(8) (1932) A.C., at p. 561 ; 47 C.L.R., at p. 398.
(9) (1950) A.C., at pp. 305, 306 ; 79 C.L.R., at pp. 635, 636.

refuted was taken as leading automatically to the conclusion that inter-State banking was protected by s. 92. When once it is held (as it must be held) that those who carry goods from State to State are engaged in inter-State commerce, the same refutation must inevitably lead to the same conclusion.

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

With regard to the first ground, I simply refer to what I said in *McCarter* v. *Brodie* (3), adding a reference to the important case of *Melbourne Corporation* v. *Barry* (4). I gave a number of examples of "regulation". Section 92 protects individuals (like Mr. James), and any individual who finds himself prohibited from crossing a State border is entitled to invoke its protection.

With regard to the second ground, I speak with all respect, but it is, to my mind, not really a ground at all. In the last resort I can find no real foundation for it except expediency. The question of expediency is itself one of a highly controversial character, and I am not able to regard the reference to political and economic problems in the judgment of their Lordships in the *Banking Case* (5) as an invitation to treat questions of expediency as decisive or even important in such a case as the present. I would not, of course, deny that a constitution must be interpreted against a political, social and economic, background, but this cannot mean that it is proper to give to a particular provision one meaning where bankers and air-line operators are concerned and another meaning where carriers by land are concerned. The two questions

(1) (1950) 80 C.L.R. 432.
(2) (1945) 71 C.L.R. 29.
(3) (1950) 80 C.L.R., at pp. 495-499.
(4) (1922) 31 C.L.R. 174.
(5) (1950) A.C. 235, at p. 310; (1949) 79 C.L.R., at p. 639.

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which always arise when s. 92 is invoked are (1) whether the acts for which immunity is claimed possess the character of inter-State trade, commerce or intercourse, and (2) whether the law from which immunity is claimed possesses, so far as it affects those acts, the character of an interference with freedom. The policies or interests of States, considered as separate political units, cannot assist in providing an answer to either question. Section 92 embodies an Australian policy which is paramount.

When s. 92 spoke in 1900 of commerce and intercourse "by internal carriage", it meant, of course, *inter alia*, commerce and intercourse by means of public highways. At the same time, nobody has ever doubted that State legislation may, consistently with s. 92, control the use of its highways in a variety of ways, even though those highways are used for inter-State commerce and intercourse. A State Parliament may make a law providing for a maximum width of tyres, for a maximum weight to be carried by any vehicle, and for all sorts of purposes of the kind which I described in *McCarter* v. *Brodie* (1). But the Act in question here cannot be justified as an exercise of any such power. It is in no way concerned with roads or the use of roads as such. Its object and character are even clearer than those of the Victorian Act considered in *McCarter* v. *Brodie* (2). It is aimed at journeys which are "competitive with the railways". Graduated charges are imposed based on the mileage over which a vehicle is competitive with the railways. The Act deals with transport by air as well as transport by road. The State is conceived as a person having an interest in a large industry, in which it should be able to protect itself against competition, including inter-State competition and competition in inter-State trade. Therein is the whole substance of the legislation. It is no way conditioned by the fact that the State maintains, or has the function of maintaining, public highways.

I am well aware that the fact that the State is protecting, or trying to protect, its railways against competition is put as an argument in favour of the validity of the legislation. It is said that "it is simply an exercise of the sovereign rights of the States to co-ordinate traffic by rail or road, and to confine the use of the roads to particular persons and vehicles". But it is not a matter of right but of power, and the legislative powers of the States are subject to s. 92. A State may prohibit, wholly or to any extent it pleases, the intra-State carrying of goods or passengers. But it must leave free the carrying of goods or passengers from another State into

(1) (1950) 80 C.L.R., at pp. 495, 496. (2) (1950) 80 C.L.R. 432.

its own territory and from its own territory into another State. The sentence quoted has no bearing on the question whether s. 92 is being infringed. The use of the word " co-ordinate " is merely a reversion to the discredited volume theory of s. 92. It seems indeed to me to be a most extraordinary thing to say that the fact that the legislation is protective, or intended to be protective, of the railways takes it outside s. 92. To begin with, " the matter depends upon the effect of the legislation, not upon its purpose " (per Lord *Sumner* in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1), quoted by *Isaacs* J. in *James* v. *Cowan* (2)). And, when the effect of the legislation is seen to be restrictive of the inter-State commerce of individuals (like Mr. James), to say : " Yes, but we wanted to protect a State industry, and the protection would only be about seventy-five per cent effective if we did not restrict inter-State commerce " is surely not to meet the argument based on s. 92 but to drive it home and clinch it. No legislation could have been more " well-intentioned " than the *Dried Fruits Act* 1924-1925 (S.A.).

In the light of this survey (which has been longer than I had hoped) this case must be decided. It is, of course, in general, a very bad thing that decided cases should not be followed. That proposition can hardly be over-emphasised. But the position in this case is very exceptional. One cannot ignore the grave potentialities of the views which prevailed in *McCarter* v. *Brodie* (3), and it is difficult to put on one side one's conviction that those views are inconsistent with three decisions of a superior tribunal.

I have already observed that the ground of the *Transport Cases* was shifted in *McCarter* v. *Brodie* (3). But no true *ratio decidendi* emerged as the view of the majority. Two views emerged. The first was that the legislation in question was merely " regulatory " and therefore permitted by s. 92. That it was " regulatory " of the volume of commerce I would concede. But it was prohibitive of the commerce of every individual who was not allowed to engage in the commerce. It should not be forgotten that Lord *Atkin* (4) said : " The Constitution is not to be mocked by substituting executive for legislative interference with freedom ". At this point, however, I am not so much concerned with the correctness of the view in question as with its far-reaching character. Absolute prohibition is said to be contrary to s. 92. But, if prohibition subject to discretionary exemption or licensing is " regulation ",

(1) (1929) A.C. 260, at p. 268.
(2) (1930) 43 C.L.R. 386, at p. 421.
(3) (1950) 80 C.L.R. 432.
(4) (1932) A.C., at p. 558; 47 C.L.R., at p. 396.

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

The second view was that the States, because they provided facilities for transport, must have power to control the use of those facilities in any manner thought fit. This view is possibly even more far-reaching. The argument cannot really be made to depend on the fact that the States own the railways. The supposed practical exigencies of the situation might be precisely the same if the railways were owned by a private corporation. If that were so, the argument would not be less open or be more or less cogent. Further, the argument cannot really be made to depend on the fact that it is railways that are in question. If State legislation protective of State-owned railways falls outside s. 92, why should State legislation protective of any other State-owned industry fall within it? Or, for that matter, legislation protective of any other privately owned industry? For it may be just as much in the interests of a State, considered as a separate body politic, to protect a privately owned industry within its borders. The argument can hardly stop short of saying that, wherever a real State interest is involved, there is immunity from s. 92. I find it impossible to foresee where it will lead, and I would repeat what I said in *McCarter* v. *Brodie* (1). If it all comes back to "co-ordination", well and good. But that depends, as I have said, on the discredited "volume" theory.

I must weigh in the scale in addition my opinion that the majority decision in *McCarter* v. *Brodie* (2) is inconsistent with *James* v. *South Australia* (3) (which was approved in *James* v. *Cowan* (4)), with *James* v. *Cowan* itself, with the decision on the Commonwealth Act in *James* v. *Commonwealth* (5) and with the conclusion and the reasons for the conclusion in the *Banking Case* (6).

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

In my opinion, the demurrer should be allowed.

(1) (1950) 80 C.L.R. 432, at p. 499.
(2) (1950) 80 C.L.R. 432.
(3) (1927) 40 C.L.R. 1.
(4) (1932) A.C. 542; 47 C.L.R. 386.
(5) (1936) A.C. 578; 55 C.L.R. 1.
(6) (1950) A.C. 235; (1949) 79 C.L.R. 497.

KITTO J. In *McCarter* v. *Brodie* (1), the Court held, by a majority, that certain provisions of the *Transport Regulation Acts* 1933-1947 (Vict.) were not in conflict with s. 92 of the Commonwealth Constitution. The present case is concerned with provisions of the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.), which so nearly resemble the Victorian provisions considered in *McCarter* v. *Brodie* (1) that if that case is to be accepted as rightly decided a similar decision must be given now. We have therefore to decide whether we ought to apply *McCarter* v. *Brodie* (1), either because we agree with it or because we consider that its authority should be accepted whether we agree with it or not.

The question which confronted the Court in *McCarter* v. *Brodie* (1) was, in essence, whether there is a conflict between, on the one hand, the insistence of s. 92 of the Commonwealth Constitution that trade commerce and intercourse among the States shall be absolutely free, and, on the other hand, a statutory denial of the right of a person to operate a commercial goods vehicle on the public highways of a State in the absence of a licence issued by a State authority having power to grant or refuse a licence at discretion. It is a similar question which confronts the Court now. If *McCarter* v. *Brodie* (1) had not been decided I have no doubt what my opinion would have been. I should have thought that the Privy Council's exposition of s. 92 in *Commonwealth* v. *Bank of New South Wales* (2) made the conclusion logically inevitable that such a statutory denial, to the extent to which it applied in respect of operating a vehicle in the course or for the purposes of inter-State trade commerce or intercourse, was in flat contradiction of s. 92 and for that reason inoperative. I have read and re-read the judgments delivered in *McCarter* v. *Brodie* (1), and I am bound to say, with the most sincere respect for the learned judges who formed the majority of the Court in that case, that I cannot see any answer to the reasoning contained in the dissenting judgments of *Dixon* and *Fullagar* JJ. To those judgments must now be added the judgment which my brother *Fullagar* has just delivered in this case, a judgment with which I desire to express my respectful and complete agreement. I shall have to refer in a moment to the views expressed in the majority judgments in *McCarter* v. *Brodie* (1) but for the present it is enough to say that if I am to follow *McCarter* v. *Brodie* (1), it must be for the reason most strongly pressed upon us in argument, that the case is one for the application of the maxim *stare decisis*.

(1) (1950) 80 C.L.R. 432.

(2) (1950) A.C. 235; (1949) 79 C.L.R. 497.

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I fully appreciate the wisdom of the view which *Latham* C.J., speaking for the Court, expressed in *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (*Thomas' Case*) (1), when he said that continuity and coherence in the law demand that, particularly in this Court, which is the highest court of appeal in Australia, the principle of *stare decisis* should be applied, save in very exceptional cases. This was said without reference to constitutional cases, the Chief Justice remarking that it may be that considerations are present in those cases, where Parliament is not in a position to change the law, which do not arise in other cases. Even in constitutional cases, however, it is obviously undesirable that a question decided by the Court after full consideration should be re-opened without grave reason.

I must turn therefore to inquire whether the decision in *McCarter* v. *Brodie* (2) is one which we should regard as open to review. By the decision I mean the actual decision in the case, that the Victorian statutory provisions there in question did not conflict with s. 92 of the Constitution. Of course, if in reaching that conclusion a majority of the Court had laid down a principle the application of which would produce a reconciliation between s. 92 and the application to inter-State transport of the provisions attacked in the present case, it would be necessary to consider whether there was any justification for re-examining not only the actual decision but also the principle so laid down. However, I do not find that in *McCarter* v. *Brodie* (2) there was a majority of the Court in favour of any such principle. Again, if a majority of the Court in that case had construed the Privy Council's judgment in the *Banking Case* (3) as intended to indicate approval either of the reasoning or of the actual decisions in the *Transport Cases*, it would be necessary to consider whether there was any justification for questioning the reading so given to their Lordships' language; but I do not find that a majority of the Court did understand their Lordships to have intended any such approval. (In my references to the *Transport Cases* I do not include *Willard* v. *Rawson* (4), for I agree with what *Fullagar* J. said concerning that case in *McCarter* v. *Brodie* (5).) It may be as well to elaborate these points a little before going further.

The judgment of *Latham* C.J. contains much with which the plaintiffs in the present case would not wish to quarrel, and it demolishes some contentions which they do not need to advance

(1) (1949) 77 C.L.R. 493, at p. 496.
(2) (1950) 80 C.L.R. 432.
(3) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(4) (1933) 48 C.L.R. 316.
(5) (1950) 80 C.L.R., at pp. 499, 500.

and do not in fact advance. His Honour did not treat the case as one in which the *Transport Cases* should simply be followed, either because of their inherent authority or because of any approval of them by the Privy Council; on the contrary, he treated the case before the Court as depending upon a consideration of the question, apart from the authority of the *Transport Cases*, whether the challenged Victorian provisions were regulatory or prohibitive. The answer given, like the question, related to the Acts in their entirety; and the conclusion reached was that the Acts were truly described as regulation Acts. His Honour recognized that the provisions chiefly complained of required a person to hold a licence before he could operate a commercial goods vehicle upon the highways of the State; that they applied to such a person even though he was engaged in inter-State trade and commerce; that no person had a right to obtain a licence; and that a licence could be granted or refused at discretion, though the discretion was not unlimited or arbitrary. But his Honour considered that a licensing system, even one possessing these characteristics, must be regarded as a system of regulation. "Perhaps the most common method of regulating trade", his Honour said (1) "is by a licensing system, e.g. in the case of intoxicating liquor, drugs, slaughtering of stock, dealing in marine stores, &c. In each case some authority has the duty of determining whether an application for a licence shall be granted or refused. Such licences are generally subject to conditions relating to the manner of carrying on the trade and these conditions frequently involve the payment of a fee. It is such a system which the *Transport Regulation Act* applies. The Act has all the characteristics of a system of regulation". I understand his Honour's judgment to mean that a prohibition applying to inter-State trade and commerce (or at least to the inter-State transportation of goods), if it is subject to a discretionary power to grant exemption as part of a licensing system, is to be regarded as no more than regulation and as therefore leaving inter-State trade commerce and intercourse absolutely free; and that it is nothing to the point that the discretion to grant or refuse licences is absolute within the ambit provided by the general scope and object of the Act. *McTiernan* J. concurred, but *Williams* and *Webb* JJ. gave no support to this far-reaching doctrine.

In addition to agreeing with the Chief Justice, *McTiernan* J. thought that *R.* v. *Vizzard*; *Ex parte Hill* (2), received some support from the *Banking Case* (3), and was right in its result.

(1) (1950) 80 C.L.R., at p. 461.
(2) (1933) 50 C.L.R. 30.
(3) (1950) A.C. 235; (1949) 79 C.L.R. 497.

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Webb J., on the other hand, thought that *Vizzard's Case* (1) might have been weakened by the *Banking Case* (2), but he considered that it had not been disposed of as an authority. Although he thought it difficult to see how the legislation under discussion could be regarded as essentially regulatory and not prohibitive or restrictive of inter-State trade, he decided in favour of upholding the legislation because of *Vizzard's Case* (1), and *Riverina Transport Pty. Ltd.* v. *Victoria* (3), which followed it.

Williams J. was not satisfied that the *Transport Cases* were wrongly decided, and he was not prepared to overrule them. But he did not treat them as authorities to be automatically followed. He considered the legislation in question for himself, and reached the conclusion that it was regulatory because it did not prevent individuals carrying on the business of land transport among the States without a licence, but only prevented individuals plying their vehicles on the public roads of the States without a licence. The fact that the roads are, in a broad sense, State-provided was the crucial factor in his Honour's view. "I am of opinion", he said (4), "that a State must have a wide power to regulate the use of the facilities which it provides for trade and commerce, so that the public funds invested in such facilities, in this case the railways, shall not be jeopardised by undue competition brought about solely by the provision of another facility by the State"; and he repeated (5) what he had said in *Australian National Airways Pty. Ltd.* v. *Commonwealth* (6): "it is simply an exercise of the sovereign rights of the States to co-ordinate traffic by rail or road, and to confine the use of roads to particular persons and vehicles. If the choice of these persons and vehicles has no relation to their passage across the border, but the legislation operates without discrimination with respect to all persons and vehicles desirous of using the roads, such legislation is not aimed or directed at inter-State commerce but at regulating, maintaining and co-ordinating a number of utilities for trade, commerce, and intercourse, State and inter-State, provided by the State". No other member of the Court espoused this view. *Webb* J. expressly declined to accept it, and *Latham* C.J. and *McTiernan* J. made no comment upon it.

It will be seen that the four learned Judges who formed the majority of the Court in *McCarter* v. *Brodie* (7) were not unanimous in the view that *Vizzard's Case* (1) or any other of the *Transport*

(1) (1933) 50 C.L.R. 30.
(2) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(3) (1937) 57 C.L.R. 327.
(4) (1950) 80 C.L.R., at p. 477.
(5) (1950) 80 C.L.R., at p. 478.
(6) (1945) 71 C.L.R. 29, at p. 109.
(7) (1950) 80 C.L.R. 432.

Cases had received the approval of the Privy Council; nor were they unanimous in thinking that the transport cases were correctly decided, that is to say that discretionary licensing legislation of the kind in question is in truth only regulatory; and those who considered that such legislation is regulatory were not agreed upon any one reason for that conclusion. Hence it appears to me that there is no proposition which can be regarded as the *ratio decidendi* of *McCarter* v. *Brodie* (1) (see *Long* v. *Chubbs Australian Co. Ltd.* (2)) and the case stands, as does *Vizzard's Case* (3), and the *Riverina Case* (4) also, as a bare decision that statutory provisions such as were there in question do not infringe s. 92. It will also be noticed that in respect of every reason given for holding the legislation to be consistent with s. 92 there was a majority of the Court consisting of judges who either dissented from that reason or refrained from supporting it.

It would be difficult, I should think, to find a case in relation to which the cry *stare decisis* would sound more hollow. But there is a much more serious comment to be made. As I see the matter, the appeal to the maxim in support of *McCarter* v. *Brodie* (1) is neither more nor less than an invitation to refuse to be bound by repeated pronouncements of the Privy Council. Three times their Lordships have spoken on s. 92, and it seems to me that we are thrice bound to overrule *McCarter* v. *Brodie* (1). I accept it as conclusively demonstrated by the judgments of *Dixon* and *Fullagar* JJ. in *McCarter* v. *Brodie* (1) and the judgment of *Fullagar* J. in this case that it was never possible to reconcile the *Transport Cases* with *James* v. *Cowan* (5), or with the actual decision in *James* v. *Commonwealth* (6), except upon grounds which, since the *Banking Case* (7), must be admitted to be untenable; and, although the judgment in the *Banking Case* (7) did not in terms overrule the *Transport Cases*, I should have thought, with all respect to those who take a different view, that it wrote their epitaph in characters too plain to be missed or to be mistaken.

I take it to be self-evident that statutory provisions such as we have here to consider operate directly and immediately to restrict trade and commerce among the States, and that they must be held incompatible with s. 92 unless it is true to say that their character is that of regulation. The sole problem therefore is whether these provisions are in truth no more than regulatory. If the Privy

(1) (1950) 80 C.L.R. 432.
(2) (1935) 53 C.L.R. 143, at pp. 151, 152.
(3) (1933) 50 C.L.R. 30.
(4) (1937) 57 C.L.R. 327.
(5) (1932) A.C. 542; 47 C.L.R. 386.
(6) (1936) A.C. 578; 55 C.L.R. 1.
(7) (1950) A.C. 235; (1949) 79 C.L.R. 497.

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Council had made no pronouncement as to what is not included in the conception expressed by the word regulatory as used in this connection, it might have been possible (though I do not say it should have been done) to treat the actual decision in *McCarter* v. *Brodie* (1) as a precedent for assigning such legislation to the category of regulation, without embarrassing the whole subject by committing the Court to any particular reason, or even with a protestation that this type of case is anomalous. But since the *Banking Case* (2) the proposition that simple prohibition is not regulation, long treated as unquestionable, is binding in law as well as in logic upon the courts of this country in their deliberations upon s. 92. I have looked in vain in the judgments on this matter for any ground upon which an acknowledgment that simple prohibition is not regulation can be reconciled with a decision that a simple prohibition subject to a discretionary power to grant exemptions can be regarded as regulation. And it is surely beyond argument that a prohibition is none the less simple because someone has a power, which he may exercise or refuse to exercise at discretion, to restore the freedom which that prohibition denies. If, as I am convinced, this is not open to judicial doubt, neither is it open to judicial exception. Yet in truth we are asked in this case to do none other than to say that an exception has been made in favour of transport legislation by the decision in *McCarter* v. *Brodie* (1). It may be, for all I know, that such an exception would be expedient; but if so it should be made by amendment of s. 92 by constitutional means. The section cannot be amended by the Court, and I am not prepared to hold that it has been amended by *McCarter* v. *Brodie* (1).

In my opinion the only decision we can give in this case consistently with acceptance of the Privy Council's authority is that the licensing provisions of the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.), in their application to trade commerce and intercourse among the States, are repugnant to s. 92 of the Constitution and inoperative.

I should therefore allow the demurrer.

TAYLOR J. This suit raises questions concerning the validity of the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.) and of certain charges imposed upon the plaintiff as a licensee of public motor vehicles within the meaning of that Act. For the purposes of the demurrer, it is admitted that the plaintiff carries

(1) (1950) 80 C.L.R. 432.

(2) (1950) A.C. 235; (1949) 79 C.L.R. 497.

on business as a carrier of general merchandise and operates between Sydney in the State of New South Wales and Brisbane in the State of Queensland, and that it is the owner of a number of motor vehicles in respect of which it holds licences under s. 12 of the Act to operate those vehicles as public motor vehicles within the meaning of the Act. These licences are issued subject to special conditions, and, whilst operations of a limited nature are authorised thereby, the conditions require *inter alia* that in respect of any journey which is wholly or partly competitive with the railways or tramways the licensee shall pay to the Commissioner for Road Transport and Tramways for the full competitive distance three pence per ton or part thereof of the aggregate of the weight of the vehicle unladen and of the weight of loading the vehicle is capable of carrying for each and every mile or part thereof travelled by the vehicle along a public street. The effect of a licence containing a similar condition with respect to operations extending beyond those primarily authorised by the licence was considered in *Duncan* v. *Vizzard* (1). With respect to operations not authorised by the plaintiff's licences it has been the practice of the defendant Director of Transport and Highways and his predecessors to issue permits for particular approved journeys upon payment of charges at the rates referred to above. Some point was made that no authority for the issue of permits for the carriage of goods is conferred by the Act, but it is, I think, unnecessary in this case to deal with this submission.

The Act in the form in which it has existed from time to time and other comparative legislation has been the subject of consideration many times in this Court. On the most recent occasion in *McCarter* v. *Brodie* (2), it was conceded by the appellant, who challenged the validity of the *Transport Regulation Act* 1933-1947 (Vict.), that the decision in *R.* v. *Vizzard*; *Ex parte Hill* (3) and other cases which followed it were decisive against the appeal. But it was argued that since the decision of the Judicial Committee of the Privy Council in *Commonwealth* v. *Bank of New South Wales* (4) those decisions were no longer supportable. In the result the legislation, which in many respects was similar to the legislation in question in this case, was held to be valid.

In the present case the Court is, in effect, asked to reconsider the decision in *McCarter* v. *Brodie* (2) and the general effect of the decision of the Judicial Committee upon the decisions in the earlier

(1) (1935) 53 C.L.R. 493.
(2) (1950) 80 C.L.R. 432.
(3) (1933) 50 C.L.R. 30.
(4) (1950) A.C. 235; (1949) 79 C.L.R. 497.

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Transport Cases. This is a course which I am most reluctant to pursue and if the views expressed in *McCarter* v. *Brodie* (1) had established some common principle, I would hesitatingly regard myself as bound to apply it. But the Court was divided and the reasons of the majority do not appear to me to establish any clear or common principle concerning the proposition which, in this case, has given me the most concern.

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

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

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

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

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

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

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

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

(1) (1950) 80 C.L.R. 432.

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

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

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

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

(g) the construction and equipment of the vehicle and its fitness and suitability for a license;

Provided that the certificate of registration and the certificate of airworthiness of an aircraft issued under the Air Navigation Regulations or a registration of any motor vehicle other than aircraft under any other Act of the State may be accepted as sufficient evidence of suitability and fitness of the vehicle.

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

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

No person is permitted to operate a motor vehicle unless the vehicle is licensed under the Act (s. 12) unless it is being operated under and in accordance with an exemption from the requirement of being licensed granted under s. 19 or a permit granted under s. 22 of the Act. The power to grant exemptions and the power to issue permits are in the complete discretion of the board. I should add that the powers conferred by these sections upon the board —which is the State Transport (Co-ordination) Board—are now, by statute, exerciseable by the defendant Director of Road Transport and Highways.

In view of the decision of the Judicial Committee in *Commonwealth* v. *Bank of New South Wales* (1), these outstanding sections of the Act have caused me considerable concern. I regard the decision in that case as establishing beyond question that any direct, as distinct from remote or merely consequential, interference with or restriction upon inter-State trade, *which is*

(1) (1950) A.C. 235; (1949) 79 C.L.R. 497.

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not justifiable as regulation of such trade, is a violation of s. 92. It is not to the point that any such interference or restriction may leave unimpaired the total volume of trade from State to State or, that it is not the purpose of the legislation to create interference with or impose restrictions upon inter-State trade as such, or that the legislation is not "directed against" or not "aimed at" inter-State trade. As the Judicial Committee pointed out "in whatever sense the word 'object' or 'intention' may be used in reference to a Minister exercising a statutory power, in relation to an Act of Parliament, it can be ascertained in one way only, which can best be stated in the words of *Lord Watson* in *Saloman* v. *Saloman & Co.* (1) 'in a Court of Law or equity what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to indicate, either in express words or by reasonable and necessary implication'. The same idea is felicitously expressed in an opinion of the English law officers, *Sir Roundell Palmer* and *Sir Robert Collier*, cited by *Isaacs* J. in *James* v. *Cowan* (2): 'It must be presumed that a legislative body intends that which is the necessary effect of its enactments: the object, the purpose, and the intention of the enactment, is the same'. The same learned judge adds 'by the necessary effect', it need scarcely be said, these learned jurists meant the necessary legal effect, not the ulterior effect, economically or socially. It was because Section 20 of the Dried Fruits Act of South Australia operated according to the natural meaning of its words to authorise a direct restriction upon the manner in which *James* could dispose of his product by an inter-State transaction that it offended Section 92, not because some other extraneous purpose, object or intention was ascribable to the South Australian legislature". These views of the Judicial Committee led, immediately, to the conclusion that s. 46 (1) of the *Banking Act* 1947, which provided that a private bank should not after the commencement of the Act carry on banking business in Australia, except as thereinafter required by the section, was invalid. Nor can I see that the decision would have been otherwise if the section had in substance provided that a private bank should not carry on banking business in Australia unless it was the holder of a licence which might be granted or withheld at the absolute discretion of a licensing authority. For if the legislature itself may not, without infringing s. 92, assert a right, at its absolute discretion, to permit or prohibit banking, it is, to me, inconceivable that it may, without infringing s. 92, confer such a right upon a subordinate body. This, of course,

(1) (1897) A.C. 22, at p. 38.

(2) (1932) A.C. 542; 47 C.L.R. 386.

is very far from saying that trade and commerce may not be made the subject of regulation either through the medium of a licensing system or otherwise; nor does it deny the proposition that regulation may include partial prohibition or prohibition *sub modo*.

In the view of the majority in *R.* v. *Vizzard*; *Ex parte Hill* (1) the difficulties which have on many occasions arisen with respect to licensing systems did not, in that case, unduly obtrude themselves. The establishment of a licensing authority with arbitrary powers is an irrelevant consideration if the test to determine whether legislation infringes s. 92 is whether the "real intention" (in the sense in which that expression has been used) is to interfere with freedom of trade, commerce and intercourse between the States (per *Gavan Duffy* C.J. (2)); or whether "on the whole" inter-State trade is benefited or burdened; or whether the legislation is "designed for the purpose of preventing, hindering, limiting or obstructing, trade, commerce or intercourse among the States" (per *Evatt* J. (3)); or whether it is "designed for the express purpose of restricting or prohibiting" such trade, commerce or intercourse. These and similar tests make the existence or non-existence of a collateral fact, and not a consideration of the legislation and its legal effect, the criterion for determining questions of validity.

Dissenting members of the Court in *Vizzard's Case* (1) and like cases, expressed the view that a legislative prohibition against trading, including inter-State trading, except pursuant to a licence which might be arbitrarily refused, constitutes an infringement of s. 92. Upon a consideration of the observations of the Judicial Committee, not only in relation to the legislation under consideration in *Commonwealth* v. *Bank of New South Wales* (4), but also with respect to the decisions in *James* v. *South Australia* (5) and *James* v. *Commonwealth* (6) this conclusion is, I think, irresistible and should be adopted by this Court. It was, of course, of the very essence of the decision in *Gratwick* v. *Johnston* (7) and appears to me to have been a substantial basis for the decision in *Australian National Airways Pty. Ltd.* v. *Commonwealth* (8). Further, it seems to me that this was the opinion entertained by a majority of the Court in *McCarter* v. *Brodie* (9). It was clearly the view of the dissenting members of the Court and *Latham* C.J., with whose reasons *McTiernan* J. expressed his agreement, took

(1) (1933) 50 C.L.R. 30.
(2) (1933) 50 C.L.R., at p. 47.
(3) (1933) 50 C.L.R., at p. 77.
(4) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(5) (1927) 40 C.L.R. 1.
(6) (1936) A.C. 578; 55 C.L.R. 1.
(7) (1945) 70 C.L.R. 1.
(8) (1945) 71 C.L.R. 29.
(9) (1950) 80 C.L.R. 432.

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the view that the licensing authority under the Victorian Act did not have an unlimited and arbitrary discretion to grant or refuse licences. His Honour referred to *Victorian Railways Commissioners* v. *McCartney* (1) and said: "The Court has already expressly held with respect to this Transport Regulation Act that the ambit of the discretion of the board is governed by the general scope and object of the enactment". I understand from these and other relevant observations of his Honour that if the licensing authority had been invested with an unlimited and arbitrary discretion, a conclusion that the legislation infringed s. 92 would have been inevitable, for such legislation could not be regarded as regulatory. If this be so, legislation of this character must infringe s. 92 unless the discretion to refuse a licence is limited to or confined within the ambit constituted by those matters which should properly be regarded as regulatory of the trade or commerce concerned. For, I can see no relevant distinction between an arbitrary discretion and one, which though not capable of being exercised on any grounds at all, authorises the licensing authority to travel outside the field of regulation. This is the very activity which is denied to the legislature itself and that being so, any enactment purporting to authorise a subordinate authority to do so must be invalid.

In my opinion, s. 17 of the Act under review in this case, even if it does not confer a complete and arbitrary authority to grant or refuse licences, does confer an authority to refuse licences on grounds other than those which may properly be regarded as regulatory of the trade or commerce concerned. The licensing section under review in *McCarter* v. *Brodie* (2) was, in some minor respects, different and its history had led the High Court in *Victorian Railways Commissioners* v. *McCartney* (1) to express the view that the Transport Regulation Board had taken into consideration matters which were not proper for it to consider in relation to applications for licences. Though it was held that the board's discretion was not complete and arbitrary, it does not follow that the limits to the discretion, discoverable upon an examination of the general scope and object of the enactment would, of necessity, prevent a collision with s. 92. In this case, however, we are concerned with the *State Transport (Co-ordination) Act* (N.S.W.) and, for the moment with s. 17 of that Act, and I am unable to see any grounds upon which it could be fairly claimed that the director's discretion under that section to grant or refuse licences is subject to any saving

(1) (1935) 52 C.L.R. 383.

(2) (1950) 80 C.L.R. 432.

limitation. The direction in sub-s. (3) concerning the particular matters to be considered by the director in no way detracts from the provision in the same sub-section that he shall consider all such matters as he may think necessary or desirable, or from the plain words of sub-s. (4). But even if these latter provisions should be construed subject to the particular matters specified in sub-s. (3) and some limitation of the discretion thereby ascertained, the conclusion could not be otherwise. An examination of these matters suggests to my mind that they were prescribed for consideration, primarily, in relation to the co-ordination of transport within the State and without regard to the provisions of s. 92, and, clearly, they embrace matters which, on my view of the authorities, cannot form any basis for the regulation of inter-State trade. As *Fullagar* J. said in *McCarter* v. *Brodie* (1), when speaking of the legislation then under consideration: "The truth is that it is possible to regard such legislation as regulatory with respect to trade and commerce if, but not unless, we regard s. 92 as referring not to the trading and commercial activities of individuals but to a totality or general volume or flow of trading and commercial activities. A simple prohibition, or a prohibition subject to discretionary exemption, of the trade of an individual may be regarded as regulatory of the general flow or volume of trade. It cannot possibly be regarded as regulatory of the trade of the individual who is simply not allowed to carry on his trade at all. The view that s. 92 does not protect an individual trader but has regard only to a general volume of inter-State trade could hardly have been more emphatically rejected by the Privy Council, and it must now, I would think, plainly be regarded as unsound. And, without it, the view that the Victorian *Transport Regulation Act* is merely regulatory, so far as it affects inter-State trade and commerce, cannot stand".

The views which I have expressed do not, of course, mean that the Act or any part of it, is wholly invalid. Section 3 (2) of the Act provides that it shall be read and construed so as not to exceed the legislative power of the State to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power it shall, nevertheless, be a valid enactment to the extent to which it is not in excess of that power. This is, as *Starke* J. said in *R.* v. *Vizzard*; *Ex parte Hill* (2): "a legislative declaration that the Act shall operate on so much of its subject matter as Parliament might lawfully have dealt with and

(1) (1950) 80 C.L.R. 432, at pp. 498, 499.

(2) (1933) 50 C.L.R., at p. 56.

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so as not to exceed the legislative power . . . It excludes, I think, from its operation any interference or control of trade and commerce obnoxious to the provisions of sec. 92 of the Constitution". A similar provision, in not dissimilar circumstance, was considered by the Court in *Cam & Sons Pty. Ltd.* v. *Chief Secretary New South Wales* (1) and the majority of the Court took a similar view with respect to the effect of such a provision.

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

Demurrer to the defence overruled.

Solicitors for the plaintiff, *Higgins de Greenlaw & Co.*, Sydney, by *Henderson & Ball.*

Solicitor for the defendants, *F. P. McRae*, Crown Solicitor for the State of New South Wales, by *F. G. Menzies*, Crown Solicitor of the State of Victoria.

Solicitor for the intervener, the Commonwealth of Australia, *D. D. Bell*, Crown Solicitor for the Commonwealth of Australia.

Solicitor for the intervener, the State of Victoria, *F. G. Menzies*, Crown Solicitor for the State of Victoria.

Solicitor for the intervener, the State of Queensland, *H. T. O'Driscoll*, Crown Solicitor for the State of Queensland, by *F. G. Menzies*, Crown Solicitor for the State of Victoria.

R. D. B.

(1) (1951) 84 C.L.R. 442.