[HIGH COURT OF AUSTRALIA.]

ARMSTRONG . . . . . PLAINTIFF;

AND

THE STATE OF VICTORIA AND ANOTHER DEFENDANTS.

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MELBOURNE, *May* 13, 16; *June* 9.

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

Constitutional Law (Cth.)—Freedom of inter-State trade commerce and intercourse—State Statute—Prohibition on operation of commercial goods vehicles on public highways unless licensed or operating in accordance with permit—Discretionary licensing system—Permit obtainable as of right by vehicles operating in course of inter-State trade etc.—But subject to conditions to be imposed by board "reasonably necessary" for vaguely expressed ends—No requirement of uniformity of conditions—Payment of "reasonable charge" for use of roads—No formula laid down for ascertaining—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*Transport Regulation Act* 1933-1953 (*No.* 4198—*No.* 5761) (*Vict.*), *ss.* 23-28, 34, 37, 45, 46, 49, 50—*Transport Regulation (Amendment) Act* 1954 (*No.* 5848) (*Vict.*), *s.* 2—*Acts Interpretation Act* 1930 (*No.* 3930) (*Vict.*), *s.* 2.

The *Transport Regulation Act* 1933-1953 (Vict.) set up a discretionary licensing system similar to that held not to apply to vehicles operating in the course of inter-State trade in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1955) A.C. 241; (1954) 93 C.L.R. 1. Section 23 of that Act prohibited the operation of any commercial goods vehicle on any public highway unless it was licensed by the Transport Regulation Board. Commercial goods vehicle was defined by s. 5 to mean a motor car used or intended to be used for hire or reward or for any consideration or in the course of any trade or business whatsoever, subject to an immaterial exception. Section 2 (4) of the *Transport Regulation (Amendment) Act* 1954 (Vict.) provided that, in the case of vehicles operating in the course of and for the purposes of inter-State trade etc., under a permit granted under s. 2 (1), no other licence or permit was necessary. Section 2 (1), (2), (3) provided that (1) on application by the owner as prescribed the board shall grant a permit for any commercial passenger vehicle or commercial goods vehicle to operate on a journey or journeys in the course and for the purposes of inter-State trade commerce or intercourse; (2) any such permit may be granted subject to conditions reasonably necessary for the preservation of public safety and health the regulation of traffic the preservation and maintenance of the roads and the use and enjoyment by the

public of the roads; (3) no fee shall be chargeable in respect of any such permit, but the board if authorized by the Governor in Council to collect charges under this section may require payment of a reasonable charge for the use by any vehicle operating under any such permit of the roads over which it travels and for relevant administration expenses of the board, and the amount of all such charges less administration expenses aforesaid shall be paid into the Country Roads Board Fund.

Held that ss. 23-28, 34, 37, 45, 46, 49 and 50 of the *Transport Regulation Act* 1933-1953 could not validly apply to persons operating vehicles in the course of and for the purposes of inter-State trade, and to the vehicles while so operated. *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1955) A.C. 241; (1954) 93 C.L.R. 1, applied.

Held further that s. 2 of the *Transport Regulation* (*Amendment*) *Act* 1954 was invalid. In particular (1) sub-s. (1) was invalid on the grounds: per *Dixon* C.J., *McTiernan*, *Webb* and *Kitto* JJ., that it imposed a prima facie inadmissible hindrance to inter-State trade which was not justified by the rest of the section: per *Williams* J., that it did not impose a sufficiently definite duty on the board to take the necessary steps to ensure that permits could be obtained immediately when required: per *Fullagar* J., that it was inextricably connected with sub-ss. (2) and (3) which were invalid; (2) by *Dixon* C.J., *McTiernan*, *Williams*, *Webb*, *Fullagar* and *Kitto* JJ. (*Taylor* J. *contra*) sub-s. (2) was invalid in that the wide powers and general administrative control given to the board, to be exercised by it with reference to individual cases and not necessarily by conditions known in advance and applying to the trade as a whole, were inconsistent with s. 92; (3) sub-s. (3) was invalid in that, *inter alia*, the obligation imposed was too indefinite and lacking in uniformity. *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1955) 93 C.L.R. 1, applied.

CASE STATED.

Richard Gilbert Armstrong, suing on behalf of himself and all other members of the Road Transport Development Association of Victoria who were named in a schedule annexed to the writ, brought an action in the High Court of Australia against the State of Victoria and the Transport Regulation Board. On 10th May 1955 the parties to the action concurred in stating the following case for the opinion of a Full Court, pursuant to O. 35, r. 1 of the *High Court Rules* :—1. The plaintiff and each of the persons he represents are carriers of goods by road. 2. The defendant the Transport Regulation Board is a body corporate incorporated under the provisions of the *Transport Regulation Acts* (Vict.). 3. The plaintiff and each of the persons he represents carries on and intends to continue to carry on the business of a carrier of goods by road and the plaintiff and each of such persons owns (within the meaning of the said

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Transport Regulation Acts) and operates and intends to continue to operate commercial goods vehicles for the carriage of goods for reward on journeys in the course of and for the purposes of inter-State trade, commerce and intercourse, namely, journeys between places in Victoria and places in New South Wales or South Australia and between places in New South Wales or South Australia and places in Victoria and between places in New South Wales and places in South Australia and between places in South Australia and places in New South Wales. 4. The plaintiff and each of such persons from time to time applies to the defendant the Transport Regulation Board for and has hitherto since 10th January 1955, been granted permits for the aforesaid vehicles owned by them (within the meaning of the said Transport Regulation Acts) to operate on the aforesaid journeys in the course of and for the purposes of inter-State trade, commerce and intercourse. 5. On 29th March 1955, the Governor in Council of the State of Victoria by proclamation published in the Government *Gazette* on 6th April 1955 authorized the defendant the Transport Regulation Board to collect charges under s. 2 of the *Transport Regulation (Amendment) Act* 1954. 6. As from 4th April 1955, the defendant the Transport Regulation Board has required and it intends in the future to require the payment by persons operating vehicles on journeys in the course of and for the purposes of inter-State trade, commerce and intercourse under permits issued by it (including the plaintiff and each of the persons he represents) of charges in respect of such inter-State journeys. Such charges in respect of goods generally are at the rate of six-tenths of a penny per ton mile calculated on the carrying capacity of the vehicles as specified in its certificate of registration and on the number of miles the vehicle travels over the roads of the State of Victoria and in respect of certain specified classes of goods are lower than the aforesaid charges and in respect of inter-State journeys to and from Melbourne are a specified lump-sum charge for each journey regardless of the carrying capacity of the vehicles but with different lump-sum amounts for different classes of goods. Where goods are being carried inter-State and the carriage thereof is authorized by licence issued as of right under s. 22 of the *Transport Regulation Acts* no permit is required by the defendant the Transport Regulation Board and no charge is required to be paid to the defendant the Transport Regulation Board. 7. As from 4th April 1955, the defendant the Transport Regulation Board has required and intends in the future to require that the said charges be lodged with it with each completed application form for a permit under s. 2 of

the *Transport Regulation (Amendment) Act* 1954 to operate a commercial goods vehicle on a journey in the course of and for the purposes of inter-State trade, commerce or intercourse. 8. The defence delivered by the defendants, *inter alia*, contains the following allegations : 10. The roads in the State of Victoria which are used by commercial goods vehicles for journeys in the course of and for the purposes of inter-State trade commerce and intercourse between places in Victoria and places in New South Wales or South Australia and between places in New South Wales and places in South Australia (hereinafter called "the said roads") cannot carry present-day traffic safely without the imposition of some restrictions regarding the types and condition of vehicles and at certain times the number of vehicles using the said roads or some of them and the mode of operation of such vehicles. 11. The motor vehicles used for the carriage of goods upon the said roads are up to forty-five feet in length, up to eight feet in width, and up to about fifteen tons in weight and they carry loads up to about fifteen tons in weight and such vehicles are capable of being an obstruction and danger to other traffic using the said roads. 12. The said roads are used by vehicles travelling from places within Victoria to other places within Victoria in addition to vehicles travelling from or to places beyond the borders of the State of Victoria and from time to time the said roads are in places congested. 13. The said roads in certain places require re-designing and re-constructing in order adequately to accommodate the traffic thereon and further require constant maintenance and repair to make good wear and tear. 14. The wear and tear on the said roads depends in part upon the number and weight of the vehicles using the same and the manner in which the vehicles are driven. 15. The construction and maintenance of roads suitable for vehicles of the kind referred to in par. 11 hereof is more difficult and more costly than the construction of roads suitable only for lighter traffic. 16. The State of Victoria and the public authorities of the said State have spent large sums of money upon the said roads and will have to spend further large sums upon their maintenance and improvement. 9. The following questions of law arise and the opinion of a Full Court is requested thereon— (a) Are any and which of the facts pleaded in pars. 10 to 16 inclusive of the defence relevant to the validity of the legislation or regulations referred to in question (b) or any part thereof ? (b) If yes to question (a) and if such relevant facts were proved, then—(i) Are ss. 2 and 3 of the *Transport Regulation (Amendment) Act* 1954 (Vict.) or alternatively are sub-ss. (1), (2), (3), (4) and (5) of s. 2 thereof valid ? (ii) Have ss. 23, 24, 25, 26, 27, 28, 34, 37, 45, 46, 49, 50 and 53 of the

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Transport Regulation Acts (Vict.) or any of them any application to persons operating commercial goods vehicles for the carriage of goods for reward by road on journeys in the course of or for purposes of inter-State trade commerce or intercourse or to persons driving such vehicles or to such vehicles ? (iii) Is reg. 1 or alternatively are sub-regs. (a), (b) and (c) of reg. 1 of Pt. VIA of the *Transport Consolidated Regulations*—Additional Regulations promulgated under the *Transport Regulation Acts* (Vict.) valid ? (c) If no to question (a) then independently of the facts so pleaded—(i) Are ss. 2 and 3 of the *Transport Regulation (Amendment) Act* 1954 (Vict.) or alternatively are sub-ss. (1), (2), (3), (4) and (5) of s. 2 thereof valid ? (ii) Have ss. 23, 24, 25, 26, 27, 28, 34, 37, 45, 46, 49, 50 and 53 of the *Transport Regulation Acts* (Vict.) or any of them any application to persons operating commercial goods vehicles for the carriage of goods for reward by road on journeys in the course of or for purposes of inter-State trade commerce or intercourse or to persons driving such vehicles or to such vehicles ? (iii) Is reg. 1 or alternatively are sub-regs. (a), (b) and (c) of reg. 1 of Pt. VIA of the *Transport Consolidated Regulations*—Additional Regulations promulgated under the *Transport Regulation Acts* (Vict.) valid ?

J. D. Holmes Q.C. (with him *C. I. Menhennitt*), for the plaintiff. Section 23 of the *Transport Regulation Acts* 1933-1953 (Vict.) contained a prohibition on movement, including inter-State movement. That section could not apply to the plaintiff, when operating vehicles in the course of and for the purposes of inter-State trade, consistently with *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 1]* (1). Whether or not sub-ss. (2) and (3) of s. 2 of the *Transport Regulation (Amendment) Act* 1954 (Vict.) are valid, the necessity to apply for a permit is a restriction on trade. If the trader does not comply with proper conditions he will commit an offence. If charges can properly be made in respect of his journey he can be required to make appropriate returns of what his journeys have been so that tax can be levied. To make him halt, assuming he is coming in to the State or to make him otherwise delay his journey is a restriction which is not justifiable. Section 2 (1), apart from any other submission, is invalid on that ground. Only the board has authority to grant permits. The power of delegation would not extend to the granting of permits. The provision in s. 2 (1) for the granting of a permit is of imperfect obligation. The board is not obliged to be available at all times. [He referred to *Wilcox Mofflin Ltd.* v. *State of New South Wales* (2).] Any permit can be revoked by

(1) (1955) A.C. 241 ; (1954) 93 C.L.R. 1.

(2) (1952) 85 C.L.R. 488, at pp. 521, 522, 533, 537, 543, 544.

the board under s. 49 of the Act for non-compliance with conditions contained in it. What is destroyed on revocation is the right to continue inter-State trade. The condition may be one of a trifling character for which a penalty could be imposed. The expressions used in sub-s. (2) are too wide. The conditions should be stated in the legislation so that one can see whether or not they are regulatory. They should be uniform, applying to all inter-State traders. There can be no charge for the use of the road. Assuming some charge can be made, sub-s. (3) does not make such a charge. The power given is a power to collect what is called a reasonable charge, but that is not defined and no criterion is given of reasonableness. The rates set out in par. 6 of the stated case show variations. If different rates can be fixed according to goods carried at some point someone must pay more because someone else pays less. Reasonable charges for the use of the roads can thus be made an instrument for co-ordination of road and rail transport.

H. A. Winneke Q.C., Solicitor-General for the State of Victoria (with him *J. E. Starke* and *K. A. Aickin*), for the defendants. According to the decision in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1) the *Transport Regulation Act* 1933-1953 validly applied to vehicles in intra-State trade, but not to vehicles in inter-State trade. Since the 1954 *Amendment Act* inter-State traders became no more subject to the provisions of the 1933-1953 Act than before. The permit system embodied in the 1954 Act and the conditions authorized by sub-s. 2 are authorized constitutionally because they are of a regulatory nature only and therefore not an infringement of the immunity which s. 92 confers on the inter-State trader. The power granted by sub-s. (2) is limited in that the conditions must be of a kind which can be described as being for the preservation of public safety or health or the regulation of traffic, and they must be reasonably necessary for this purpose. [He referred to *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (2).] The legislation should be construed as authorizing nothing more than conditions which would not hinder or prevent or fetter the inter-State trade of people engaging in inter-State trade. Sub-section (3) is justified on the principles enunciated in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (3). Roads are a facility provided by the State. [He referred to *Hughes*

(1) (1955) A.C. 241; (1954) 93 C.L.R. 1.
(2) (1955) A.C., at pp. 292, 297-298; (1954) 93 C.L.R., at pp. 24-25.
(3) (1955) A.C., at pp. 298-299; (1954) 93 C.L.R., at pp. 25-26.

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& Vale Pty. Ltd. v. *State of New South Wales* [*No.* 1] (1).] It is conceded that ss. 23, 24, 25, 26, 27, 28, 34 and 37 of the 1933-1953 Act are inapplicable to persons operating vehicles in the course of inter-State trade. Sections 45, 46, 49, 50 and 53 have only a qualified application to such persons.

C. I. Menhennitt, in reply. It is not possible to read down under s. 2 of the *Acts Interpretation Act* 1930 (Vict.) s. 2 (2) or (3) of the 1954 Act so as to authorize only the imposition of conditions or charges compatible with s. 92. [He referred to *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Industrial Lighting Regulations*) (2); *Bank of New South Wales* v. *The Commonwealth* (3); *R.* v. *Burgess*; *Ex parte Henry* (4).] The facts referred to in question (a) of the case are not relevant to the issue of validity.

Cur. adv. vult.

June 9.

The following written judgments were delivered:—

DIXON C.J., MCTIERNAN* AND WEBB JJ. This is a special case stated by the parties for the opinion of the Full Court. It is stated in an action brought by the plaintiff Armstrong on behalf of himself and a large number of persons and companies who are enumerated in a list and who, it is alleged, have the same interest. They all carry on business as carriers of goods by road. They all own what are called by the *Transport Regulation Acts* (Vict.) "commercial goods vehicles". They use these vehicles for the carriage of goods for reward on journeys in the course of and for the purposes of inter-State trade, commerce and intercourse. This arises from the fact that they carry goods between places in Victoria and places in New South Wales or South Australia. The traffic is carried on both into Victoria and out of Victoria.

The substantial purpose of the action is to obtain declarations of right to the effect that the provisions of the *Transport Regulation* (*Amendment*) *Act* 1954 (No. 5848) are invalid and that the provisions of Pt. II of the *Transport Regulation Act* 1933-1953 which might otherwise be applicable cannot apply to the inter-State businesses of the plaintiff and the parties he represents.

At the time of the decision of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (5) the *Transport Regulation Acts* (Vict.) were administered upon the footing that they

(1) (1955) A.C., at p. 305; (1954) 93 C.L.R., at p. 31.
(2) (1943) 67 C.L.R. 413, at pp. 418, 419, 423, 424, 428.
(3) (1948) 76 C.L.R., at p. 372.
(4) (1936) 55 C.L.R. 608, at p. 676.
(5) (1955) A.C. 241; (1954) 93 C.L.R. 1.

* See *addendum*, (1955) 93 C.L.R., at p. 183.

applied alike to the carriage of passengers or goods across the State boundaries and to journeys confined to the State itself. As we are not concerned in this case with passenger vehicles we may neglect the provisions dealing with them. It is enough to speak of commercial goods vehicles. That expression is defined to mean a motor car which is used or intended to be used for carrying goods for hire or reward or for any consideration or in the course of any trade or business whatsoever, subject to an exception in favour of primary producers (s. 5 of Act No. 4198 as amended by No. 5220 and No. 5761). The Acts set up a Transport Regulation Board for purposes described as securing the improvement and co-ordination of means of and facilities for locomotion and transport and carrying into effect the objects and purposes of the legislation (s. 2 of No. 4100 as amended by No. 5562). The board administers a licensing system which applies to commercial goods vehicles, subject to a list of exceptions. No more need be said of the exceptions than that in some cases they relate to the operations of a vehicle within a limited radius of a city, in others to the nature of the business for which the vehicle is used and in yet others to the nature of the goods carried. The exceptions are in short not material to this case. Subject to the exceptions there is a prohibition against the operation of any commercial goods vehicle on any public highway unless it is licensed by the board (s. 23 of No. 4198). It is an offence for the driver or owner of such a vehicle to operate it on a highway unless it is licensed (s. 45 of No. 4198 as amended by No. 5761). The board has a wide discretion to grant or to refuse an application for a licence and to attach conditions to a licence if it grants one (ss. 26-30 of No. 4198 as amended by Nos. 4298, 5217 and 5220). An annual licensing fee of two pounds is to be paid but what is more important is the requirement of another annual fee calculated upon the load capacity of the vehicle ; it is at an annual rate determined by the board not exceeding ten shillings per hundred-weight of the load capacity (s. 7 of No. 5220 as amended by No. 5569). There is a special power enabling the board by means of a permit to authorize a licensed vehicle to operate temporarily in a manner not specified in its licence (s. 32 of No. 4198 as amended by s. 4 of No. 5761).

It is hardly necessary to say that the decision of the Privy Council meant that the foregoing provisions could not, consistently with s. 92 of the Constitution, have any application to vehicles engaged in the carriage of goods into or out of Victoria from or to some other State. Victorian law includes a general " severability provision " which would bring about the same exclusion of inter-State transportation as resulted in the case of the New South Wales legislation

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under the decision of the Privy Council: s. 2 of the *Acts Interpretation Act* 1930 (No. 3930). The impossibility, by reason of the decision, of the *Transport Regulations Acts* applying to inter-State journeys of commercial goods or passenger vehicles was recognized by the legislature of Victoria, which at once enacted the *Transport Regulation (Amendment) Act* 1954, the validity of which is now attacked.

The provisions of that statute are brief and at first sight they wear an appearance of simplicity and perhaps moderation. But it is an appearance that hardly survives close examination. The plan of the Act is to make a separate provision for commercial passenger or goods vehicles operating on a journey or journeys in the course and for the purposes of inter-State trade commerce or intercourse. On the application as prescribed by the owner of such a vehicle the board is required to grant a permit for the vehicle so to operate: s. 2 (1). No other licence or permit under the *Transport Regulation Acts* is then required in respect of the commercial passenger or goods vehicle in so far as it is operating in the course and for the purposes of inter-State trade commerce or intercourse while the permit is in force: s. 2 (4). An amendment is made in the provision which makes it an offence to drive or operate a commercial passenger or goods vehicle unless it is licensed as such by adding as an alternative unless it is authorized by permit so to operate: s. 2 (5) (a). The result is that the owner of an inter-State vehicle need not have a licence if he obtains a permit; in default of a permit he must have a licence and is subject to the old provisions. No doubt if his vehicle is used both for intra-State and inter-State carriage he must have a licence, but if he obtains one that will suffice for both purposes. Though the board is bound by sub-s. (1) of s. 2 to grant a permit for an inter-State journey or journeys to an owner of a commercial goods vehicle on an application by him as prescribed the board may impose conditions. The authority to do this is contained in sub-s. (2) which is as follows:—"Any such permit may be granted subject to conditions reasonably necessary for the preservation of public safety and health the regulation of traffic the preservation and maintenance of the roads and the use and enjoyment by the public of the roads." It will be seen that the question of attaching conditions to a permit is treated as one to be determined in each individual case, although no doubt this would not prevent the board's adopting a policy more or less uniform of imposing conditions in a set form suitable for typical cases. The question of imposing charges upon inter-State transportation is dealt with by sub-s. (3). It also confers a power on the board exercisable in each individual

case. Sub-section (3) is as follows :—" No fee shall be chargeable in respect of any such permit, but the Board if authorized by the Governor in Council to collect charges under this section may require payment of a reasonable charge for the use by any vehicle operating under any such permit of the roads over which it travels and for relevant administration expenses of the Board, and the amount of all such charges less administration expenses aforesaid shall be paid into the Country Roads Board Fund."

It is unnecessary to repeat what has been said in giving reasons for the conclusion that consistently with s. 92 of the Constitution no valid operation can be given to the provisions adopted in the *State Transport (Co-ordination) Amendment Act* 1954 (No. 48) (N.S.W.) with respect to the carriage of goods by motor vehicle between New South Wales and other States : *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 2]* (1). The reasons given in that case contain a discussion of principle that forms the starting point for this judgment, which should be read as if those reasons were incorporated in it.

In considering whether s. 2 of the *Transport Regulation (Amendment) Act* 1954 (Vict.) can be supported as a valid enactment the first step is to determine exactly what it does and what is its practical operation. The attack upon the validity of the provision that it makes depends in no small degree upon the contention that if it is administered according to its terms it must operate as a real hindrance in the practical conduct of the transportation of goods by road into and out of Victoria. Sub-section (1) appears to confer upon an applicant for a permit in respect of a commercial goods or passenger vehicle an absolute right to receive a permit to operate the vehicle on a journey or journeys in the course and for the purpose of inter-State trade or commerce. It may be that it should be read as qualified by the requirement that the motor vehicle should be either registered under s. 6 of the *Motor Car Act* 1951-1953 (Vict.) or should be exempt from such registration under regulations made pursuant to s. 20 of that Act. But that is not a material qualification. What is material is that the substance of the thing which the permit allows may be so changed by conditions imposed under sub-s. (2) that the permit is not really what the applicant sought. The purpose of sub-s. (1) in requiring a permit seems to be to enable the board to impose conditions under sub-s. (2). It was suggested that the purpose was to establish the identity of the motor vehicle. No doubt that may be a secondary purpose. For it would facilitate the exaction of the charge which sub-s. (3)

(1) (1955) 93 C.L.R. 127.

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authorizes the board to impose. Indeed a possible interpretation of the somewhat indefinite provision made by sub-s. (3) is that it means that the requirement that a charge must be paid shall take the form of a condition of the permit. But except for the purpose of checking the entry of the vehicle into or its departure from the State and the nature and extent of the journey undertaken so that the charge may be calculated and collected, there seems to be no point in thus identifying the vehicle. For traffic purposes the registration of a motor vehicle under s. 6, or under the law of a State or Territory recognized under regulations made pursuant to s. 20, of the *Motor Car Act* seems ample and it is always considered to suffice : see s. 13. It will be noticed that under sub-s. (1) the permit must be for a specific journey or journeys. That means that the applicant for a permit must be able to say in advance with some exactness what journey or journeys he will make and no doubt by what route. The route as well as the destination of a vehicle entering will be most material to the assessment of the charge. No doubt more often than not this necessity will occasion the applicant little difficulty. But it is not every man who drives a vehicle laden with goods into Victoria in the course of his business who knows in advance when he crosses the border where and by what route he will have occasion to go. If sub-s. (1) is to be administered according to its terms a permit covering a period of time irrespective of the journeys to be made does not seem to be really practicable. But in any case there must be many traders or carriers crossing the South Australian or New South Wales border into Victoria who must then and there seek a permit and cannot proceed without it upon their journeys except in breach of the law laid down by the *Transport Regulation Acts*. To whom does such a man apply for a permit ? Section 2 supplies no ready answer to the question. It simply says that on his application the Transport Regulation Board shall grant the permit. The legislation gives the board an authority to delegate any powers of an administrative or machinery nature to a municipal council or an Urban District Transport Committee (s. 14 (1) (f) of Act No. 5559). But, although the board may make use of the services of officers and employees of the Victorian public service and of certain public authorities (s. 14 of No. 4100 as amended by No. 4751) there is no other power to delegate such a function as that of granting permits and determining the conditions to be attached. There are many bridges over the Murray River and there are some roads crossing the boundary between the two States east of that river. The boundary between South Australia and Victoria is a very long one and may

be crossed by a commercial goods vehicle at very many points indeed. What does s. 2 intend that a trader coming to the border shall do ? It may be true enough that the provision is now being so administered as to cause no substantial delay either to the plaintiff or to any of the list of people on whose behalf he sues. At all events so it was suggested on behalf of the State. But that seems to mean that the provision is administered with latitude and the suggestion can have no bearing upon its necessary legal operation upon inter-State transportation in the course of business, if that subject is considered at large. Plainly there must be a communication with the board or some lawfully authorized delegate of the board empowered to exercise the discretion given by sub-s. (2) to impose conditions and perform the duty of issuing a permit with the conditions attached. Inter-State transportation by road is not necessarily an operation to be planned far in advance or to be conducted in a leisurely manner. It seems sufficiently obvious that if s. 2 is administered according to its terms there must be many cases in which it will amount to a hindrance that is prima facie inadmissible. Although perhaps not in so marked or stringent a form, the same kind of hindrance must be experienced by Victorian vehicles going into New South Wales or South Australia. Sub-section (2) does anything but justify such a hindrance. No doubt the matters to which the conditions it authorizes may be directed or at all events some of them may read as the kind of things that may be regulated without any necessary impairment of the freedom of inter-State trade consisting in the carriage of goods by road. But there is no attempt made to authorize a regulation of the traffic for any of the purposes stated by subordinate legislation so that the conditions under which traders may proceed are known to them. It is all left to piecemeal administrative control. Uniformity, the establishment of reciprocal duties, the need of the antecedent existence of conditions governing the conduct of business, these are things which the sub-section disregards. When it speaks of conditions reasonably necessary for the preservation of public safety and health and the regulation of traffic and the preservation and maintenance of the roads, it may seem to be dealing with things that need regulating. But the fact is that they are very fully regulated by the *Motor Car Act* 1951-1953 and the regulations made thereunder. If Pt. IV of that Act is examined it will be found that the equipment of motor vehicles is regulated, that there are careful restrictions upon their width, height, length and weight, that the nature and condition of the tires is dealt with and that very specific directions are given as to such matters as trailers, the

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limits of speed in relation to weight and tires and what exceptions may be made by permit. Needless to say, a complete code of traffic regulations has been made. There is in truth little real room for the piecemeal imposition of obligation with reference to these matters which sub-s. (2) appears to contemplate. Indeed it becomes clear that under these headings sub-s. (2) must serve as a means of imposing special or particular obligations and restrictions in the case of individual vehicles or journeys rather than as a power for effecting an organized control of inter-State traffic. What follows raises further difficulties, " the use and enjoyment by the public of the roads ". These, however, are very wide words. The power which arises under them is so extensive that its limits can hardly be defined. It was suggested that a restrictive construction should be given to the words but it is not easy to see either what the restriction is or why the restriction should be imposed as a matter of interpretation. The grammatical construction of this part of sub-s. (2) seems to be that a permit may be granted subject to conditions reasonably necessary for the use and enjoyment by the public of the roads. The expression " conditions reasonably necessary for " express purpose and it needs no argument to show that a condition the purpose of which is the use and enjoyment by the public of the roads may be almost of any description which is relevant to the use and enjoyment by any section of the public. Even under the words " conditions reasonably necessary for the preservation of public safety and health " the board obtains so large a power that it is difficult to say that its exercise is necessarily consistent with the freedom of inter-State traffic. Safety and health are relative terms. Doubtless the character of the goods, the possibility of their harmful use or of their developing some noxious tendency may all be taken into account. The words " reasonably necessary " do not deprive the board of a discretion to determine the conditions nor make the validity of the conditions imposed in a given case a matter to be determined simply by the objective test of their reasonable necessity. To be invalid they must be " beyond the bounds of reason and so outside the power " : per *Isaacs* J. in *Gibson* v. *Mitchell* (1).

Whilst it is plain enough that the freedom of inter-State trade commerce and intercourse guaranteed by s. 92 is compatible with the regulation of inter-State transport upon the roads in very many particulars, it is not easy to understand how when you have a power to deal with individual cases like that which is given by s. 2 (1) and (2), a power possessing as it does the characteristics that have

(1) (1928) 41 C.L.R. 275, at p. 279.

been described, it can be treated as an administrative authority that must be so restrained in its exercise that it will be consistent with freedom of inter-State trade. This does not mean that there can never be a discretion reposed in any regulating authority to give directions in relation to particular cases. What it means is that a general administrative control involving the exercise of a discretion with respect to each integer of the particular variety of inter-State transport separately and as an individual case is at variance with the general conception of the kind of regulation which is consistent with freedom. Moreover it necessarily involves a delay on each occasion when a permit is sought and consideration is given to the particular circumstances. It is a control which even if in its actual exercise it be sufficiently uniform, yet is exerted by a machinery which is hardly consistent with the free flow of the traffic.

When you turn to sub-s. (3) further difficulties appear. There is one matter in which the charge authorized by sub-s. (3) goes beyond what is allowable. The charge may be not only for the use of the roads by the vehicle but for the relevant administration expenses of the board. The word " relevant " is a relative term. Relevant to what ? Presumably relevant to the journey. Does it mean that the overhead expenses of administration are to be apportioned according to the mileage travelled ? It is difficult to know what the conception is. But the notion of charging expenses of administering a government department against inter-State trade is one which cannot be conceded. It is one thing to allow of a charge for the use of a physical thing ; it is another to impose a charge as a contribution to the cost of administering any function of government or any department of government. This is a matter dealt with in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1). But independently of this objection the power given by sub-s. (3) to impose a charge involves many difficulties. Subsection (3) is expressed in an indefinite manner. It does not appear when the board may require the payment of a reasonable charge. Is it to be done on the occasion when the permit is granted ? May it be done afterwards and, if so, within what time ? What is meant by a reasonable charge ? Reasonable is a relative expression involving some standard. What is the standard ? It seems to be objective and not a matter to be determined by the judgment of the board. Does it mean that if the reasonableness of the charge is challenged and on that ground payment is resisted, the board must sue for the amount ? If so does this operate to submit the

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quantum of the charge to a court for its assessment ? If that be the case a person engaging in an inter-State journey with a commercial vehicle carrying goods cannot know what he is required to pay, what pecuniary obligation he is incurring or when it may be exacted. It is one thing to say that inter-State transport may be required " to pay its way " in respect of the use of the roads by submitting to a known mileage charge. It is another thing that a man carrying goods by road from one State to another must submit to an indefinite obligation which may be enforced in respect of an unknown amount pursuant to a demand which may or may not be made. The latter involves a deterrent to inter-State trade of a much more real character. It is true that the charge is to be for the use by the vehicle of the roads over which it travels. According to the special case the board in practice requires that the amount of the charge be lodged with the application for the permit. Moreover the special case discloses that in fact the board has fixed a flat rate which it applies generally subject to a list of goods charged for at a lower rate. No doubt to do this is not unlawful under the terms of sub-s. (3) but it cannot affect the meaning of the provision. Whenever the board applies its tariff it is in contemplation of law deciding a charge for an individual case. It may desert the practice. As has already been pointed out, what roads an inter-State commercial goods vehicle will use cannot be known with certainty in advance, even if the tariff may be known. Many uses of a commercial goods vehicle in the course of business between New South Wales or South Australia and Victoria may involve deliveries at a number of places and they may be far apart. How is all this to be assessed on an individual basis and by whom ?

Much of the foregoing may perhaps be said to involve considerations operating practically rather than legally to restrict trade, but after all the conduct of inter-State trade is a practical matter and when legal restraints are actually imposed if, because of the uncertainty of their pecuniary effect, the practical difficulty of fulfilling the conditions they prescribe and of ascertaining their character in advance, they are calculated to operate as a deterrent to many kinds of transactions, it cannot be true that inter-State trade remains free.

But the truth is that sub-s. (1) of s. 2 considered with sub-s. (4) and with s. 23 of Act No. 4198 imposes the necessity of obtaining a permit as a legal restraint and when the purpose and consequences of this are scrutinized as they are stated in sub-ss. (2) and (3) it is revealed as an unjustifiable impairment of freedom of inter-State trade incompatible with s. 92.

For the reasons which have been given, the apparent simplicity of s. 2 conceals some real impediments to the conduct of inter-State trade and it is inconsistent with freedom of trade commerce and intercourse among the States.

This conclusion has been arrived at independently of the correctness or otherwise of certain facts which are alleged by the defence and relate to the roads of Victoria, the traffic which they bear and the need of regulating it, including traffic from and to other States. The allegations contain little more than statements of general considerations of which judicial notice may be taken. They do however include matters of opinion such as the ability of some highways to carry present day traffic without the imposition of restrictions in regard to the types and conditions of vehicles and the times at which they operate. It is not easy to say that such considerations and possibilities should not be taken into account in deciding the question whether provisions of the kind contained in the *Transport Regulation Acts*, including that of 1954, validly apply to inter-State trade. But it is not often that the validity of a public general statute depends upon specific facts outside judicial notice and therefore the subject of allegation and proof. Certainly the provisions of the *Transport Regulation (Amendment) Act* 1954 are not of a description which could be affected by the proof of specific facts.

The questions framed by the parties and submitted in the case stated are in part directed to the relevance of the allegations in question. But to decide the action it is enough, in answer to all questions in the case stated, to declare that s. 2 of the *Transport Regulation (Amendment) Act* 1954 is void and that ss. 23-28, 34, 37, 45, 46, 49 and 50 of the *Transport Regulation Acts* (Vict.) are inapplicable to the plaintiff and the parties whom he represents while operating his or their respective vehicles in the course of and for the purposes of inter-State trade and to the vehicle while so operated.

WILLIAMS J. The special case asks a number of questions relating to the constitutional validity of certain sections of the *Transport Regulation Acts* (Vict.) and of the *Transport Regulation (Amendment) Act* 1954 (Vict.). The *Amendment Act* was passed after the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 1]* (1) had held that the licensing provisions of the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.) offended against s. 92 of the Constitution and that these provisions were

(1) (1955) A.C. 241; (1954) 93 C.L.R. 1.

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inapplicable to the appellant in that case while operating its vehicles in the course of and for the purposes of inter-State trade or to the vehicles while so operated. The decision of the Privy Council related to the New South Wales Act only, but it is clear from the judgment of their Lordships, and in particular from the opinion there expressed that *McCarter* v. *Brodie* (1) was wrongly decided, that the corresponding provisions of the Victorian *Transport Regulation Acts* also offended against s. 92 and were inapplicable to persons and vehicles engaged in the inter-State carriage of goods. The sections of the *Transport Regulation Acts* which it is admitted so offended are those referred to in the questions in the special case other than s. 53 which confers power on the Governor in Council to make regulations with respect to a number of matters. We were asked by both parties not to express an opinion upon the validity of this section in relation to inter-State trade, commerce and intercourse. The sections other than s. 53 referred to in these questions are ss. 23, 24, 25, 26, 27, 28, 34, 37, 45, 46, 49 and 50. The sections of the *Amendment Act* 1954 which are challenged are ss. 2 and 3, but nothing was said about s. 3 and it can be disregarded. The *Acts Interpretation Act* 1930 (Vict.) contains in s. 2 a similar reading down provision to that contained in s. 15A of the *Acts Interpretation Act* 1901-1950 (Cth.) and s. 3, sub-s. (2) of the *State Transport (Co-ordination) Act* (N.S.W.), so that by virtue of s. 2 of the Victorian Act the sections of the *Transport Regulation Acts* would continue to be operative with respect to intra-State trade. To fill the gap that existed with respect to inter-State trade the *Amendment Act* of 1954 was passed. That Act, when compared with the corresponding Acts of New South Wales and Queensland, has the merit of simplicity. Section 1 provides that it shall be read and construed as one with Pt. II of the *Transport Regulation Act* 1933. Section 2, sub-ss. (1), (2), (3) and (4) are in the following terms :—" (1) On application by the owner as prescribed the Board shall grant a permit for any commercial passenger vehicle or commercial goods vehicle to operate on a journey or journeys in the course and for the purposes of inter-State trade commerce or intercourse. (2) Any such permit may be granted subject to conditions reasonably necessary for the preservation of public safety and health the regulation of traffic the preservation and maintenance of the roads and the use and enjoyment by the public of the roads. (3) No fee shall be chargeable in respect of any such permit, but the Board if authorized by the Governor in Council to collect charges under this section may require payment of a reasonable charge for the use

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

by any vehicle operating under any such permit of the roads over which it travels and for relevant administration expenses of the Board, and the amount of all such charges less administration expenses aforesaid shall be paid into the Country Roads Board Fund. (4) Notwithstanding anything in the *Transport Regulation Acts* no other licence or permit under those Acts is required in respect of any commercial passenger vehicle or commercial goods vehicle in so far as it is operating in the course and for the purposes of inter-State trade commerce or intercourse if there is in force in respect of such vehicle a permit under this section authorizing such operation." Sub-section (5) provides for certain consequential amendments to ss. 45, 46 and 48 of the *Transport Regulation Act* 1933 as amended by any Act. The important substantive provisions of s. 2 are contained in sub-ss. (1), (2) and (3). Sub-section (1) requires the board to grant a permit as of right to the owner of any commercial passenger vehicle or commercial goods vehicle to operate on a journey or journeys in the course of and for the purposes of inter-State trade, commerce or intercourse. Sub-section (4) provides that no other licence or permit under the *Transport Regulation Acts* is required for such vehicles in so far as they are operating in the course of or for the purposes of inter-State trade, commerce or intercourse. There could be no objection, in my opinion, to a State requiring the owners of vehicles engaged in inter-State trade, commerce or intercourse to apply for a permit which would serve as a notification to State officials that the vehicles were so engaged provided an organization was set up to issue such permits expeditiously so that the inter-State movement of the vehicles would not be unduly delayed. It was contended that sub-s. (1) imposed by implication a duty on the board to ensure that this was done and that if the board failed in its duty an inter-State operator could apply for a mandamus to compel the board to act expeditiously. It is not only legislation but also executive action which can offend against s. 92. In the well-known passage from *James* v. *Cowan* (1) Lord *Atkin* delivering the judgment of the Privy Council said that the Constitution is not to be mocked by substituting executive for legislative interference with freedom. Probably a mandamus would lie in such circumstances but the duty of the board to act expeditiously and its power to delegate its authority for the purpose is indefinite and left to implication instead of being adequately defined. An owner or driver of a commercial passenger or commercial goods vehicle which operates on any public highway is guilty of an offence under s. 45 of the *Transport Regulation Acts*, unless the vehicle is

(1) (1932) A.C. 542, at p. 558; (1932) 47 C.L.R. 386, at p. 396.

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licensed or authorized by permit so to operate under Pt. II of the Act. Sub-section (1) of s. 2 of the *Amendment Act* certainly provides for the grant of a permit to an applicant as of right, but the sub-section does not appear to me to impose a sufficiently definite duty on the board to take the necessary steps to ensure that such permits can be immediately obtained so as to prevent unreasonable delay occurring in the inter-State journey because of the necessity of obtaining a permit to make it lawful. In other words the sub-section does not contain sufficient regulation of the subject matter to make the necessity to obtain a permit compatible with the freedom of movement guaranteed by s. 92.

Sub-section (2) provides that a permit may be granted subject to conditions reasonably necessary for the preservation of public safety etc. This sub-section only authorizes the imposition of conditions that are in fact reasonably necessary for the purposes set out. The sub-section does not expressly state who is to decide in the first instance what these conditions are to be but the permits are to be granted by the board so that it must be the board which is authorized so to decide. In *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1) I expressed my opinion as to the kind of regulation of inter-State traffic which could be compatible with s. 92. It must be regulation which controls the operations of the trade in those respects in which it is desirable that it should be controlled so that it may be conducted in an orderly and proper manner in the public interest. The subjects upon which conditions could be imposed under sub-s. (2) are subjects in respect of which inter-State traffic might require to be controlled. But the constitutional flaw in the sub-section is that it authorizes the board to attach different conditions to each permit. This is not, in my opinion, a system of regulation which is compatible with s. 92. Regulations which can be compatible with s. 92 must not be regulatory of the trade of each individual but must form part of a uniform legislative scheme regulating the operations of the trade as a whole. The individual trader must be left free to engage in the trade subject to compliance with these regulations. It does not appear to be possible, consistently with accepted principles of applying reading down sections, to read down the provisions of sub-s. (2) so that they will not offend against s. 92. To bring the sub-section within the field of compatibility, it would be necessary to read it so as to authorize the board to exercise delegated legislative power to promulgate a set of uniform conditions relating to one or more of the enumerated subjects applicable to all permits so as to control

(1) (1955) 93 C.L.R. 127.

the operations of the trade as a whole in one or more of these respects. But the plain intent of the sub-section is to authorize the board to impose such conditions as it considers reasonably necessary for one or more of these purposes upon the grant of each particular permit and therefore to attempt to regulate the trade of each particular trader. The inter-State operator would not know what conditions were to be imposed until he applied for his permit. Conditions sought to be imposed on the ground that they were reasonably necessary for the preservation and maintenance of the roads the inter-State operator desired to use might be such that an operator would find that he had approached the border with a vehicle that was too broad or heavy for the purpose. The position would then arise that the operator would be entitled to a permit as of right but the condition of his permit would prevent him from proceeding with his journey until he could obtain another vehicle. Not only must any conditions sought to be imposed be uniform, they must also be published and made available to the public, so that inter-State operators will know in advance the pre-requisites of a successful application for a permit. It is obvious that most, if not all, of the regulation of inter-State trade, commerce and intercourse, so far as it relates to the control of movement on the roads in the interests of public safety and the preservation and maintenance of the roads, must be regulation which applies equally to intra-State and inter-State trade so that the field for additional regulation of inter-State traffic in these respects must be strictly limited, if it exists at all. There could, however, be regulations which could be reasonably necessary to protect health which might have to be imposed on movement across the border from time to time, but such regulations to be compatible with s. 92 would have to be of a general nature and made known to the public. It could obviously be a serious burden upon anyone desiring to exercise his right to enter Victoria from another State, whether for the purposes of trade, commerce or intercourse, not to know in advance the conditions, if any, subject to which he could obtain a permit to do so. Sub-section (2), in my opinion, also offends against s. 92 and is invalid.

Sub-section (3) remains for consideration. For the reasons stated in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1) I am of opinion that a State is entitled to make a reasonable charge for the use of the roads over which a vehicle travels in inter-State trade. The difficulty about sub-s. (3) is, however, its lack of definition of the manner in which the reasonable charge is

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to be estimated and collected. A charge for the use of the roads can be imposed because it compensates the State for the provision of a facility without which the inter-State carrier could not carry on his trade. This authorizes the State to include in the regulation of that facility a charge that provides reasonable compensation for its use, but provisions relating to the imposition of the charge, like any other regulation of a subject matter which can be compatible with s. 92, must be authorized by legislation which does not simply authorize the imposition of a reasonable charge, but also prescribes a formula in accordance with which the charge is to be calculated and provides for the publication of a scale of charges so that the inter-State operator will know in advance what sum he has to pay to obtain a permit and the basis of the calculation. For this is only another way of saying that he must know for what he is being charged.

Sub-sections (4) and (5) of s. 2 of the *Amendment Act*, which are dependent upon the constitutional validity of the three preceding sub-sections, or at least of sub-s. (1), must also be invalid.

It follows from what I have said that, in my opinion, sub-ss. (1), (2) and (3) of s. 2 of the *Amendment Act* offend against s. 92 of the Constitution, not because a State could not require an inter-State carrier to obtain a permit to use its roads or to pay a reasonable sum for the use of the roads over which it is intended the vehicle shall travel or could not attach appropriate regulatory conditions to the permits, but because, if a State chooses to exercise its power to regulate these matters, the regulations must be such that they will not unduly burden the freedom of the inter-State carrier to use the State roads guaranteed by s. 92. This freedom would be unduly burdened if the inter-State carrier could be seriously delayed in obtaining a permit, if the permit could be made subject to conditions unknown to him in advance and applying to him as an individual instead of to the trade generally, and if he could be made liable to the payment of charges in order to obtain the permit, the amount of which only became known to him when he applied for the permit.

The special case states that the defence delivered by the defendants contains a number of paragraphs containing allegations relating to the general condition and suitability of the Victorian roads, or some of them, for use by large and heavy motor vehicles and other facts relating to the construction, use and preservation of the roads. The questions ask whether any and which of these facts are relevant to the validity of the legislation or regulations referred to in the questions. In my opinion these facts, whilst they could be material

in deciding whether a law intended to be a regulation of inter-State trade, commerce or intercourse was regulatory or something more, and in deciding whether a charge for the use of the roads of a State on an inter-State journey was a reasonable charge, are not relevant in deciding whether the legislation or regulations that are impeached offend in principle against s. 92. The regulations impeached are pars. (a), (b) and (c) of reg. 1 of Pt. VIA of the *Transport Consolidated Regulations*—additional regulations promulgated under the *Transport Regulation Acts* (Vict.). These regulations which were gazetted on 7th January 1955 relate to the granting of permits under s. 2 of the Amendment Act and need not be discussed because they can have no operation if that section is invalid.

The questions asked in the special case should be answered (a) No : (b) (i), (ii) and (iii) do not arise : (c) (i) sub-ss. (1), (2), (3), (4) and (5) of s. 2 of the *Transport Regulation* (*Amendment*) *Act* 1954 are invalid ; (ii) omitting s. 53, which we are asked not to include in our answer, No ; (iii) inoperative.

FULLAGAR J. In my opinion s. 2 of the *Transport Regulation* (*Amendment*) *Act* 1954 (Vict.) is inconsistent with s. 92 of the Constitution, and is therefore invalid. The provisions in question are very much simpler than those of the New South Wales Act which has been held invalid in the *Hughes & Vale Case* [*No.* 2] (1) but the two cases appear to me to be indistinguishable in substance.

The effect of sub-s. (1) of s. 2, read with sub-s. (4) and with the provisions of the Principal Act, is to require an inter-State operator of a commercial goods vehicle to hold a " permit ". If he does not, he is guilty of an offence against s. 32 of the Principal Act, because it is only if he has a permit that he is exempt from the requirement of holding a licence. If sub-s. (1) stood alone, however, he would be able to obtain a permit as of right. It may be that the requirement of a permit, obtainable as of right, could be held not to infringe s. 92 if it were found to be mere machinery for the attainment of a legitimate end. But it is unnecessary to consider this question, because sub-s. (1) is qualified in a radical way by sub-s. (2), which authorizes the Transport Regulation Board to attach conditions to the permit. Breach of any condition imposed would be an offence against s. 46 of the Principal Act. The board is not left entirely at large with regard to the conditions that may be imposed, but it is obvious that a very large element of discretion is reposed in the board, and that a permit might be made subject to conditions

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drastically restrictive of the freedom protected by s. 92. The truth is that to give authority to a person or body of persons to lay down conditions on which trade or commerce may be carried on is not, in any relevant sense, to regulate trade or commerce. It is an *a fortiori* case if, as here, the conditions may vary from individual trader to individual trader.

Sub-section (3) of s. 2 seems to me to suffer from what is essentially the same vice as sub-s. (2). It seems clear enough that the board, if authorized by the Governor in Council, may require payment of the charge as a condition of the granting of a permit. It may be conceded that the State may, consistently with s. 92, impose a charge " for the use of roads " or by way of contribution to the upkeep and maintenance of roads. But sub-s. (3) does not impose a charge or contribution. It leaves the whole matter to the discretion of the board subject only to the requirement that the charge must be " reasonable "—itself a matter prima facie very difficult of ascertainment. And there is no requirement of uniformity. A charge may be imposed in one case and not in another, or a relatively heavy charge in one case and a relatively light charge in another. There is no prescribed standard, and sub-s. (3) could be used, just as sub-s. (2) could be used, to place a heavy burden on any particular class of inter-State trade which it was desired to discourage or prevent. I do not suppose that this was the object of those who framed sub-s. (3), but I think that that is the position in fact.

But there are, I think, two other vices in sub-s. (3). In the first place it authorizes the making of a charge upon inter-State traders which is not made or authorized in the case of intra-State traders. This must, I think, be fatal. And, in the second place, it authorizes a charge " for the relevant administration expenses of the Board ". Whatever the word " relevant " may mean, I do not think that the State may lawfully cast upon an inter-State trader or traveller any part of the expense of administering an ordinary function of government. The justification, and the only justification, for allowing a charge in respect of the use of roads lies, to my mind, in the fact that the user of the roads derives a special and direct benefit from the roads over and above the benefit derived by the community as a whole. Something in the nature of a service is provided for him specially. He derives no such special and direct benefit from the performance of governmental functions in general.

Sub-sections (1) and (4) of s. 2 are inextricably connected with sub-ss. (2) and (3), and the four sub-sections must be held, in my

opinion, to be invalid as a whole. Sub-section (5) is merely consequential and can have no operation in the absence of the first four sub-sections.

I agree with the order proposed.

KITTO J. Subject only to what I have said as to charges in the case of *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1), I agree in the judgment which has been delivered by the Chief Justice.

TAYLOR J. The *Transport Regulation* (*Amendment*) *Act* 1954 (Vict.), which is under attack in this case, is free from some of the vices which the corresponding New South Wales legislation exhibits. As in the case of the *State Transport* (*Co-ordination*) *Amendment Act* 1954 (N.S.W.), the Victorian Act makes special provision with respect to vehicles which are operated in the course of and for the purposes of inter-State trade. This provision is partly in addition to and partly in substitution for the provisions of the earlier legislation which purported to apply, without distinction, to all commercial goods vehicles as defined. Section 23 of the earlier Act provides that a commercial goods vehicle shall not operate on any public highway unless such vehicle is licensed. With an immaterial exception the expression " commercial goods vehicle " is defined to mean any motor car (together with any trailer, fore-car, side-car or other vehicle or device, if any, attached thereto) which is used or intended to be used for carrying goods for hire or reward or for any consideration or in the course of any trade or business whatsoever. In terms this prohibition still applies to all commercial vehicles including those operated for the carriage of goods on journeys from and to the State of Victoria to and from other States. But by the Act of 1954 this prohibition is relaxed by the provisions of s. 2 (1) thereof which, upon application being made for the same, requires the granting of a permit for any commercial passenger vehicle or goods vehicle to operate on a journey or journeys in the course of and for the purposes of inter-State trade, commerce and intercourse. If there is in force such a permit for any such journey no other licence or permit is required, notwithstanding any other provision of the Act. Apart from one difficulty which arises upon the submission that the board is not required or authorized to delegate its functions to grant such permits so as to make permits readily available, it may be said that this provision, standing alone, removes the vice inherent in the leading provision requiring the

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holding of a licence as a condition precedent to the use of a vehicle in the commercial carriage of goods from one State to another. But, although it is obligatory upon the board to grant a licence to any applicant, such a licence may be granted subject to conditions. Permissible conditions are those which are " reasonably necessary for the preservation of public safety and health, the regulation of traffic, the preservation and maintenance of the roads and the use and enjoyment by the public of the roads ". Further, s. 2 (3) provides that the board, if authorized by the Governor in Council to collect charges under that sub-section, may require payment of a reasonable charge for the use by any vehicle operating under any such permit of the roads over which it travels and for relevant administration expenses of the board. The amount of all such charges less administration expenses aforesaid are to be paid into the Country Roads Board fund. The board has been so authorized by the Governor in Council, and it has required the plaintiff, and the other persons on behalf of whom this suit was brought, to pay charges calculated at rates varying with the class of goods carried and with the particular journeys made.

It will be seen that pursuant to the last-mentioned sub-sections conditions of the specified nature may be attached to any permit and that " reasonable " charges may be " collected ". The latter may be collected, not expressly as a condition of granting a permit, but for the use by any vehicle " *operating under any such permit* " of the roads over which it travels and for relevant administration expenses of the board. It should, of course, be observed that the prohibition above referred to will remain operative unless and until a permit (or a licence under the discretionary provisions of the earlier legislation) has been obtained. The validity of the 1954 Act must, in some considerable measure, depend upon the extent of the authority to impose conditions and must be determined by inquiring whether this authority extends beyond the ambit of those matters which may properly be said to constitute " regulation ". In addition the question arises whether the provision authorizing the collection of " reasonable " charges offends against s. 92.

For reasons which I expressed in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1), I am satisfied that the provisions of s. 2 (3) are invalid. It is unnecessary to express those views again in this case, or to refer, again, to the difficulties which the word " reasonable " raises in this context, or to the difficulties which result, in this connection, from the creation of an authority to make charges differing from person to person or journey to journey

(1) (1955) 93 C.L.R. 127.

or differing according to the class of goods carried. It is sufficient, it seems to me, to say that the authority given by s. 2 (3) to collect such charges offends against s. 92.

The provisions of s. 2 (2) require further consideration. I have little doubt that traffic rules which are reasonably necessary for the preservation of public safety and for the regulation of traffic do not offend against s. 92. But such rules are generally promulgated in a code applicable to traffic generally and are not made the subject of individual prescription. Such a code exists in the State of Victoria and there would seem to be little purpose in creating a special power for use in individual cases. Nevertheless, I am not prepared to say that this constitutes a reason for saying that the earlier part of the sub-section is invalid. It is true that the exercise of the power which is conferred may result in the imposition of restrictions on one operator and not on another. But, by this portion of the sub-section, no condition may be imposed upon any operator unless it is reasonably necessary for the preservation of public safety and health, the regulation of traffic and the preservation and maintenance of the roads. In my opinion the authority created by these words is limited to prescribing conditions directly related to the manner in which use may be made of the roads and I have some conception of the meaning of the expression " reasonably necessary " in this context. So limited I am not able, as at present advised, to see why any condition conforming to the specified character should be regarded as offending against s. 92. So far, I have deliberately omitted any reference to the concluding portion of s. 2 (2)—" the use and enjoyment by the public of the roads ". There is some vagueness about this expression and if the word " public " is to be taken to denote members of the public other than the operators of vehicles of the class to which the Act applies, it must be rejected for, on this view, it would authorize the imposition of special burdens on such operators in the interests of other road users. On the whole, however, I am prepared to regard it as a reference to the public generally and on this basis I am not prepared to say that it is not a legitimate provision.

Having dealt with sub-ss. (2) and (3) of s. 2 it is necessary to return to the provisions of sub-s. (1) and to the submission based upon the circumstance that the Act does not contain any provision requiring or authorizing the delegation of the board's authority to issue permits. Road traffic enters the State at many points and at all hours of the day and night and, although it may be possible in many cases for permits to be obtained before the commencement of an inter-State journey, it is probable that

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frequently applications will be made for them at points on the border. At all events there appears to be no justification for requiring an application for a permit to be made at any earlier stage. Now, if the legislation of the State requires the holding of a permit as a condition of the continuance of an inter-State journey, it is, I should think, incumbent upon the State to provide a method or system whereby such permits may be obtained without undue delay. But if the board is the sole authority which may issue them it is not only conceivable but inevitable that a substantial proportion of vehicles operating in the course of inter-State trade and commerce will be subjected to undue and intolerable restraints and delays. Such a result is, in my opinion, the effect of the relevant provisions of the legislation in its present form. I can quite understand that all forms of licensing systems must inevitably result in some delay being caused and that the extent to which such delays will be occasioned will frequently depend upon the substance of the matters to be considered by the licensing authority. But, in the present case, an applicant is entitled to the issue of a permit as a matter of right and there are in existence rules for the regulation of motor traffic generally. The reservation of a power to prescribe additional conditions in particular cases is one which may be required to be exercised only rarely and the delays which, it seems to me, will be inevitable are out of all proportion to the purpose to be served by the licensing system and cannot be regarded as a feature which is merely incidental to an otherwise legitimate system. No doubt this is an objection which can readily be overcome but the legislation, by the creation of an unduly cumbersome system, must operate to cause delays which, in the circumstances, must be regarded as a substantive and substantial impediment to trade and commerce among the States.

It is unnecessary to refer specifically to the matters of fact set out in pars. 10 to 16 inclusive of the statement of defence. None of these is relevant upon the question of the validity of the Act.

For the reasons given the questions raised by the special case should be answered as follows :—(a) None of the facts referred to are relevant to the validity of the legislation or regulations referred to in question (b). (b) It is unnecessary to answer this question. (c) (i) Section 2 of the *Transport Regulation (Amendment) Act* 1954 is invalid. (ii) Sections 23, 24, 25, 26, 27, 28, 34, 37, 45, 46, 49 and 50 of the *Transport Regulation Acts* (Vict.) have no application to persons whilst operating commercial goods vehicles exclusively for the carriage of goods for reward by road on journeys in the course

of and for the purposes of inter-State trade, commerce and intercourse, or to persons driving such vehicles. (iii) Regulation (1) of Pt. VIA of the *Transport Consolidated Regulations* is invalid.

In answer to the question submitted by the special case declare that s. 2 of the Transport Regulation (Amendment) Act 1954 (Vict.) is invalid and that ss. 23 to 28, 34, 37, 45, 46, 49 and 50 of the Transport Regulation Acts (Vict.) are inapplicable to the plaintiff and the parties whom he represents while operating his or their respective vehicles in the course of and for the purposes of inter-State trade commerce or intercourse and to the vehicle while so operated.

Costs of the special case to be paid by the defendants.

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

Solicitor for the defendants, *Thomas F. Mornane,* Crown Solicitor for the State of Victoria.

R. D. B.