[HIGH COURT OF AUSTRALIA.]

HUGHES AND VALE PROPRIETARY LIMITED AND ANOTHER . . } PLAINTIFFS ;

AND

THE STATE OF QUEENSLAND AND OTHERS . . . . . } DEFENDANTS.

H. C. OF A. 1955.

MELBOURNE, *March* 4; *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—Validity—Prohibition of use of vehicles for carriage of goods on State roads in course of inter-State trade unless in licensed service—Power to refuse licence where official satisfied as to vaguely expressed matters—Power to impose conditions directed to vaguely expressed ends on grant of licence—Reasonable charge for use of roads—To be calculated by committee of officials—Absence of any guide as to basis of assessment—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*The State Transport Facilities Acts* 1946 *to* 1954 (*No.* 17 *of* 1946—*No.* 53 *of* 1954) (*Q.*), *ss.* 23, 24, *Pt. IV*A.

Section 23 in Pt. III of *The State Transport Facilities Acts* 1946 *to* 1954 (Q.) provides that no person shall use or permit or allow to be used on any road a vehicle for the carriage of goods unless the goods are being carried on the vehicle in accordance with the provisions of Pt. III. Section 24 sets out the cases in which it is to be lawful to use such a vehicle on a road. The list includes " (25) any vehicle approved for use in carrying on a licensed service at any time when such vehicle is carrying passengers or goods . . . under and in accordance with the terms and conditions of the license for such service ", and " (26) any vehicle permitted under this Act to be used for any purpose at any time when such vehicle is being used for such purpose under and in accordance with the terms and conditions of the permit." Section 27 provides that the Commissioner for Transport may license any person to provide a service for the carriage of goods and approve of the vehicles to be used for the purpose of carrying on that service. Part IVA of the Act provides that the provisions of the Act extend to the use on roads of vehicles for the carriage of goods in the course of inter-State trade subject to the modifications in that Part. Section 48G (2) in that Part provides that (i) the commissioner shall consider the application for an inter-State license and have regard to :—(a) character, fitness, and experience of the applicant ; (b) suitability and fitness

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of the vehicles proposed to be used for the purpose of the service to which the application relates; (c) condition and suitability of roads on which it is proposed to use those vehicles; and (d) number and type of other vehicles using those roads. (ii) The commissioner shall refuse an application for an inter-State license in any case where he is satisfied—(a) that the applicant is not of good character or has not the necessary fitness or experience; or (b) that the vehicles proposed to be used for the purpose of the service to which the application relates are not suitable, or are not fit, for use for those purposes. (iii) The commissioner may refuse an inter-State license where he is satisfied that the granting of the license would endanger public safety. (iv) Subject to pars. (i), (ii), and (iii) of this subsection the commissioner shall grant an application for an inter-State license but may—(a) impose terms and conditions reasonably necessary for the preservation of public safety, the regulation of traffic, the preservation and maintenance of roads, and the use and enjoyment by the public of roads; (b) require payment of a reasonable charge for the use by the vehicles approved for use in carrying on the licensed service in question of the roads on which those vehicles are so used. Section 48K (2) provides that the licensee shall pay a reasonable charge for the use of the roads by vehicles approved for use in carrying on the service licensed the amount of which is to be calculated by a committee in respect of each and every inter-State licence. The charge is to be payable equally by all inter-State licensees in respect of all vehicles of the same description and weight using the same roads and under the same circumstances. The amount of the charge as stated in the licence may be recovered by the commissioner as a debt, although, as provided in s. 31 (1) of the Act the licence may be of any duration up to seven years.

Held that in their application to vehicles used in a service for carrying goods in the course of inter-State trade and to persons using etc. such vehicles the provisions of s. 23 and of Pt. IVA of the Act were invalid as infringing s. 92 of the Constitution.

Hughes & Vale Pty. Ltd. v. *State of New South Wales* [*No.* 2] (1955) 93 C.L.R. 127, applied.

CASE STATED.

On 22nd December 1954 Hughes & Vale Pty. Ltd. and Keith Flynn commenced an action in the High Court of Australia against the State of Queensland, the Honourable John Edmund Duggan and Alfred James Anderson. On 3rd March 1955 the parties, pursuant to O. 35, r. 1 of the *Rules* of the *High Court* concurred in stating the following case for the opinion of a Full Court.

1. The statement of claim delivered by the plaintiffs on 22nd December 1954 was as follows:—1. The first-named plaintiff is a company duly incorporated under the laws of the State of New South Wales, and is entitled to sue in and by its corporate name. 2. The defendant, the Honourable John William Duggan is the

Minister for Transport of the State of Queensland, and, as such is the Minister responsible for the administration of *The State Transport Facilities Acts* 1946 *to* 1954. 3. The defendant, Alfred James Anderson, is the Commissioner for Transport, and, as such, is the person who, subject to the Minister, is charged with the administration of the above-mentioned Act. 4. The first-named plaintiff carries on business as a carrier of goods by road and uses the vehicles of which it is the owner for the carriage of goods on journeys from Brisbane, in the State of Queensland, to Sydney, Melbourne and Adelaide in the States of New South Wales, Victoria and South Australia respectively and from each of the said cities to any one or more of the others. The said plaintiff does not use its vehicles for the carriage of goods on intra-State journeys in any of the said States. 5. The second-named plaintiff carries on business as a carrier of goods by road and uses the vehicle of which he is the owner for the carriage of goods on journeys from Brisbane, in the State of Queensland, to Sydney, Melbourne and Adelaide in the States of New South Wales, Victoria and South Australia respectively and from each of the said cities to any one or more of the others. The said plaintiff does not use his vehicle for the carriage of goods on intra-State journeys in any of the said States. 6. This cause is one within the original jurisdiction of this Honourable Court, in that it involves the interpretation of the Constitution. The plaintiffs claim: 1. A declaration that *The State Transport Facilities Acts* 1946 *to* 1954 are beyond the powers of the Parliament of Queensland and are invalid. 2. A declaration that the following sections viz: 16 (2), 18, 19, 20, 28, 29, 35, 36, 37, 44, 56 and 58 as affected by Pt. IVA of the said Acts are beyond the powers of the Parliament of Queensland and are invalid. 3. A declaration that ss. 23, 24 (25), 56, 58 and 66 of the said Acts are beyond the powers of the Parliament of Queensland and are invalid.

2. The defence delivered by the defendants on 28th January 1955 was as follows:—As to the statement of claim herein delivered on 21st December 1954 the defendants say as follows:—1. They admit pars. 1 to 6 inclusive. 2. The roads in the State of Queensland leading from Brisbane to the borders of the said State and there connecting with roads to Sydney, Melbourne and Adelaide 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 and the mode of operation of such vehicles. 3. The widest of the said roads (apart from the Brisbane-Coolangatta road, a distance of sixty-eight

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miles) has for the greater part of its length a paved surface of not more than sixteen feet in width and some of the said roads have for substantial distances a paved surface of not more than twelve feet in width. The Brisbane-Coolangatta road has for the greater part of its length a paved surface of not more than twenty feet in width. 4. 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. 5. Motor vehicles carrying goods usually travel up hill at speeds much slower than other traffic and are an obstruction to and are capable of being a danger to other traffic using the said roads. 6. The said roads carry vehicles travelling from places in Queensland to other places in Queensland as well as vehicles travelling beyond the borders of the said State, and from time to time the said roads are in places congested. 7. It is necessary for the satisfactory operation of a service for the carriage of passengers and/or goods by road that those who manage and operate such service should be trustworthy and responsible persons. 8. The said roads in certain places require re-designing and re-constructing in order adequately to accommodate the traffic thereon. 9. The said roads require constant maintenance and repair to make good wear and tear. 10. The wear and tear on the said roads depends in part upon the number and weight of the vehicles using them and the manner in which the vehicles are driven. 11. The construction and maintenance of roads to carry vehicles of the kind referred to in par. 4 hereof is more difficult and costly than the construction and maintenance of roads to carry lighter traffic. 12. The State of Queensland 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 improvement and maintenance. 13. *The State Transport Facilities Acts* 1946 *to* 1954 (Q.) are, and each of the sections of the said Acts is, valid and the plaintiffs are not entitled to the declarations claimed or any of them.

3. The opinion of a Full Court is requested upon the following questions of law :—(a) Are any and which of the facts pleaded in pars. 2 to 12 inclusive of the defence relevant to the validity of the legislation referred to or any part of it ? (b) If yes to question (a), and if such relevant facts were proved would the plaintiffs be entitled to any and which of the declarations sought ? (c) If no to question (a), then independently of the facts so pleaded are the plaintiffs entitled to any and which of the declarations sought ?

J. D. Holmes Q.C. (with him *G. D. Needham*), for the plaintiffs. Section 23 of *The State Transport Facilities Acts* 1946 *to* 1954 (Q.) prohibits the use of vehicles on the road in the course of inter-State trade, unless licensed. The scheme of the legislation is in principle, though not in detail, the same as the *State Transport (Co-ordination) Act* 1931-1954 (N.S.W.). Section 48G (2) (ii) of the Act directs the commissioner to refuse a licence where he is satisfied that the applicant is not of good character, or has not the necessary fitness or experience, or that the vehicles proposed to be used for the purpose of the service to which the application relates, are not suitable or fit for use for those purposes. Those are not regulatory conditions. If fish are not fit for human consumption through being carried in an unsuitable vehicle there are laws to deal with the situation. Yet this section is wide enough to cover it. Under s. 48G (2) (iii) the commissioner "may" refuse an application for an inter-State licence where he is satisfied that the granting of the licence would endanger public safety. If conditions were prescribed with respect to matters which could be justified on some ground of public safety, they might be regulatory but the legislature cannot deal with the matter as it has here. Under s. 48G (2) (iv) (b) the commissioner may require payment of a reasonable charge for the use by the vehicle of the roads. As to that we put the argument for the plaintiff in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1). Under s. 48K (2) the committee is not given any guidance as to how it is to work out a reasonable charge.

D. I. Menzies Q.C. (with him *K. A. Aickin*), for the defendants. The Act deals with the regulation of motor transport services, not with vehicles or with the people who drive or own vehicles in isolation. Looking at ss. 23 and 24 as a whole it is apparent that the scheme of the Act is that Parliament has set out what and the purposes for which a person may use a vehicle upon a roadway. It includes among these the carrying on of any licensed transport system. Then s. 23 operates upon the residue, and prohibits the use of motor vehicles on the road for uses other than those which s. 24 permits. By s. 31 the licence is for not more than seven years, "to provide and carry on a service for the carriage of passengers, or goods, or both passengers and goods." Section 24 (25) provides that it is lawful to use a vehicle on the roads where it is approved for use in carrying on a licensed service at any time when such vehicle is carrying passengers, or goods, or both passengers and goods under and in accordance with the terms and conditions of

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the licence for such service. Section 24 (26) provides that it is lawful to use any vehicle permitted under the Act to be used for any purpose at any time when the vehicle is being used for such purpose under and in accordance with the terms and conditions of the permit. The commissioner's attention is directed to the matters set out in s. 48G (2) (i) for the purpose of determining whether a licence will be granted, and for the additional purpose of determining what conditions will be imposed upon the applicant in the event of a decision to grant a licence. They are all matters which are relevant to the regulation of an inter-State transport service. Lack of experience would be proper ground for the refusal of a licence in certain circumstances. Applicants might resort to unfair business practices to make up for lack of competence. Where the commissioner requires a charge and stipulates the amount thereof in the licence, the only way in which it could be calculated in the event of a licensee refusing to pay would be by action. It is not an offence to operate without a charge having been paid. The question of the reasonableness of the charge would always be open to the court. The discretion conferred upon the commissioner by s. 48G (2) of the Act both with respect to the granting or refusing of a licence and to the imposition of conditions is strictly confined. It is not an arbitrary discretion or a discretion which allows him to go outside the proper field of transport regulation. We adopt generally the submissions made on behalf of the State of Queensland in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1). The facts pleaded are relevant to the propositions advanced there. The place of facts in determining questions under s. 92 has been discussed in a number of cases. [He referred to *James* v. *The Commonwealth* (2); *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (3); *McCarter* v. *Brodie* (4).] The facts pleaded by the defence are relevant to the question in issue. The full significance of the passage in the judgment of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (5) is merely that a prohibition of inter-State trade cannot be justified because the State owns the roads on which the trade is carried on. It has no bearing on the question whether or not those who use the roads should pay a reasonable charge for the facility which enables them to carry on their trade.

(1) (1955) 93 C.L.R. 127, at p. 144.
(2) (1936) A.C. 578, at p. 631; 55 C.L.R. 1, at p. 59.
(3) (1955) A.C. 241, at pp. 306, 308; (1954) 93 C.L.R. 1, at pp. 32, 34.
(4) (1950) 80 C.L.R. 432, at pp. 477, 496, 497.
(5) (1955) A.C. 241, at p. 305; (1954) 93 C.L.R. 1, at p. 31.

J. D. Holmes Q.C., in reply. The only issue is whether the legislation is valid or not. The facts pleaded in the defence are not relevant to that issue.

Cur. adv. vult.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN* AND WEBB JJ. This is a special case stated by the parties submitting certain questions for the opinion of the Court. The substantial matter for determination is how far *The State Transport Facilities Acts Amendment Act* of 1954 (Q.) is efficacious in giving to s. 23 of *The State Transport Facilities Acts* 1946 *to* 1954 a valid application to the use of vehicles for the carriage of goods in the course of inter-State trade. Section 23 (1), which has not itself been amended by the *Amendment Act* of 1954, provides that a person shall not use or permit or allow to be used on any road (that is, of course, in Queensland) a vehicle for the carriage of passengers or goods or both unless they are being carried under and in accordance with a provision of the material part of the Act. What this means appears from the ensuing section which likewise remains unamended. Section 24 provides that it shall be lawful to use upon a road any vehicle afterwards specified in the section at any time when such vehicle is being used solely for a purpose thereinafter specified in relation to such vehicle. A vehicle is defined by s. 7 so that it includes any mechanically propelled vehicle except a tram or a train. There follow in s. 24 some thirty categories defining the allowable uses of vehicles either by reference to the class of vehicle, the character filled by the owner, the purpose, the occasion, the conditions or the licence or permission of the authorities. The most material categories for present purposes are expressed in pars. (25) and (26). Paragraph (25) specifies any vehicle approved for use in carrying on a licensed service at any time when such vehicle is carrying passengers or goods or both under and in accordance with the terms and conditions of the licence for such service. The reference to the licensing of services and the approval of vehicles relates to s. 27, another provision which stands unamended. Section 27 says that, subject to the Act, the Commissioner for Transport may (i) license any person to provide and carry on a service for the carriage of passengers or goods or both, and (ii) approve of the vehicles to be used for the purpose of carrying on that licensed service. Paragraph (26) of s. 24 specifies any vehicle permitted under this Act to be used for any purpose at any time

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

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when such vehicle is being used for such purpose under and in accordance with the terms and conditions of the permit. The reference here is to s. 56 (1) which authorizes the commissioner to permit the use of a vehicle for a purpose specified by him. The provision goes on to enable him to attach terms and conditions to the issue of a permit.

Various provisions of the Act in the form it took before the amendment combined to invest the commissioner with a very large measure of control over motor transport services and the use of motor vehicles whether for passengers or goods. The control extended not only over the manner in which such services should be conducted or the vehicles should be used, but over the right to use the roads at all for such services or vehicles. The basis of the control was of course the general prohibition contained in s. 23 of any use of the roads by motor vehicle except under and in accordance with a provision of the Act. It is almost unnecessary now to say that all this could have no valid operation over vehicles engaged in inter-State trade commerce or intercourse. That having been made clear by the judgment of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1) given on 17th November 1954, the Parliament of Queensland passed on 10th December 1954 the Act No. 53 of that year entitled *The State Transport Facilities Acts Amendment Act* 1954 in order to deal specially with inter-State transportation. The plan adopted by the *Amendment Act* was to introduce into the principal Act a new Part, Pt. IVA, the purpose of which is to exclude modify and amend the provisions of the Act in its application to the use of motor vehicles in inter-State commerce. The Part contains twenty-one sections, the first of which s. 48A, says that the provisions of the *State Transport Facilities Act* extend to the use on roads of vehicles for the carriage of passengers or goods or both in the course of inter-State trade subject to the modifications enacted in that Part.

The real question in the case is whether, as a result of these modifications the operation of s. 23 on an inter-State goods transportation service is consistent with s. 92 of the Constitution. In dealing with this question we are concerned only with services for the carriage of goods as distinguished from other uses of motor vehicles for the purpose of trade, commerce and intercourse among the States. It is not so much the distinction between goods services and passenger services that matters ; it is the distinction between transport services and other uses of vehicles for inter-State carriage.

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

For the provisions of the legislation appearing *ex facie* to apply to the use of motor vehicles upon inter-State journeys in the course of other businesses or vocations or indeed for any other purpose seem to be somewhat different even if their validity may be no less open to suspicion.

Both the plaintiffs carry on business as carriers of goods by road. They use vehicles of which they respectively are owners for the carriage of goods on journeys between Brisbane, Sydney, Melbourne and Adelaide, that is from each of those cities to one or more of the others. The plaintiffs do not use their vehicles on intra-State journeys in any of the States of which these are the capital cities. Sections 23, 24 (25) and 27 in combination mean that the plaintiffs cannot exercise their trade in Queensland unless they obtain from the commissioner licences to provide and carry on services for the carriage of goods. A licensing system of this kind can be valid only if the conditions which by law govern the grant of a licence are such that the requirement that a licence shall be obtained involves in substance no impairment of the freedom of trade, commerce and intercourse among the States.

The same considerations apply as are discussed in our decision in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1) concerning the validity of the provisions of the *State Transport Co-ordination Act* 1931-1954 (N.S.W.) that relate to inter-State trade. There is a general similarity between those provisions and the material provisions of the Queensland *State Transport Facilities Acts* 1946 *to* 1954 but they are not identical. The Queensland law requires a licence for the carrying on of the inter-State carrying service called an inter-State licence ; otherwise it is an offence to use the vehicles on the roads. Under the constitutional law of the United States governing such matters, the fact that it is the service, or business that is licensed, as distinguished from the vehicles or the use of the roads, would not be considered immaterial, particularly with reference to the validity of the imposition of a charge as a condition of the licence. A State cannot tax or burden the privilege of carrying on inter-State commerce. But as this enactment is framed it seems to be rather a matter of form than substance, so far at all events as concerns s. 92. The application for the inter-State licence is made to and is dealt with by the Commissioner for Transport. He provides the form of application which must contain or be accompanied by such particulars as he may require reasonably, having regard to the circumstances of the application. The applicant must furnish particulars of the vehicles he proposes

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to use for the purposes of the service: s. 29 and s. 48F. The commissioner must approve the vehicles to be so used, which must be insured in accordance with *The Motor Vehicles Insurance Acts* 1936 *to* 1945 and registered in accordance with *The Main Roads Acts* 1920 *to* 1943 and Regulations. The commissioner must consider the application for the inter-State licence and have regard to certain matters. He is directed to do so by par. (i) of sub-s. (2) of s. 48G, where the considerations are set out as follows:—"(a) character, fitness, and experience of the applicant; (b) suitability and fitness of the vehicles proposed to be used for the purpose of the service to which the application relates; (c) condition and suitability of roads on which it is proposed to use those vehicles; and (d) number and type of other vehicles using those roads".

It will be seen that the qualities covered by the words "character, fitness, and experience" give a very wide scope to the commissioner. He may reject an applicant for no very definite or tangible reason. How are the words to be applied to incorporated companies or even firms? There is less uncertainty perhaps about the fitness or suitability of the vehicles for the service but when that is combined with the condition and suitability of the roads the resulting standard is not very certain. It leaves the judgment of the commissioner very much at large in assessing the desirability of the service from the point of view of his administration and no doubt of the administration of the Commissioner of Main Roads. The reference to the number and type of vehicles using the road suggests that the crowding of the road, the weight of traffic borne by it, and the tendency of types of vehicle to impose more wear and tear are elements which may govern the grant of a licence. The power to refuse for such a reason might well mean in a given case that inter-State trade was turned off the road to make room for intra-State vehicles. A power of excluding vehicles from a road in favour of others may be necessary in some circumstances but the conditions in which it arises need defining and moreover in such a way that discrimination against inter-State trade is not within the authority conferred.

Paragraph (ii) of sub-s. (2) provides that the commissioner shall refuse an application in any case where he is satisfied that the applicant is not of good character or has not the necessary fitness or experience or that the vehicles proposed to be used for the purposes of the service are not suitable or are not fit for such purposes. Then the third paragraph empowers the commissioner to refuse the inter-State licence if he thinks that the granting of a licence would endanger public safety. It is not easy to limit this

expression to any particular degree of risk. One would suppose that the paragraph was pointed at the overcrowding of the roads and the use of vehicles that were too heavy or of excessive dimensions. It might cover some of the ground of par. (i) (*c*) and (*d*). But it is not really an objective test: it gives an indefinite, not to say, elastic criterion depending very much on the attitude or approach of the commissioner. Paragraph (iv) falls into two parts. First it says "subject to paragraphs (i), (ii) and (iii) of this subsection the commissioner shall grant an application for an inter-State licence." Paragraphs (ii) and (iii) expressly authorize a refusal and it is perfectly clear that the words "subject to" mean, in reference to those paragraphs, that they are paramount. Paragraph (i) does not in terms say that the application may be refused on the grounds it enumerates. But the words "subject to paragraph (i)" give it the same paramountcy and the section must mean that the matters it sets out must be considered as possible grounds for refusing to license the service. As pars. (ii) and (iii) cover so much of the ground comprised in par. (i), the point may not be so important as it might at first appear. But it seems clear enough that he may refuse an application for any reason that appears to the commissioner to fall within any one of the subjects mentioned in pars. (i), (ii) and (iii). If it could be shown that he had misconstrued the provisions and acted on a ground which was in truth extraneous he might be directed on mandamus to reconsider the application. But except in that not very likely event the applicant would have no remedy. The second part of par. (iv) goes on to say "but (the Commissioner) may—(*a*) impose terms and conditions reasonably necessary for the preservation of public safety, the regulation of traffic, the preservation and maintenance of roads, and the use and enjoyment by the public of roads; (*b*) require payment of a reasonable charge for the use by the vehicles approved for use in carrying on the licensed service in question of the roads on which those vehicles are so used." It is almost unnecessary to say that the conditions which the commissioner considers reasonably necessary for any one of the objects mentioned may be very restrictive and may form a real impediment to carrying on the trade. Yet it may be impossible to say that the imposition of the condition was beyond his power. The requirement that a charge should be paid by the licensee for the use of the roads raises the same question that was discussed with reference to s. 18 (4) (b) of the *State Transport Co-ordination Act* 1931-1954 (N.S.W.) in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1). It is unnecessary to go over the same

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ground again. In the Queensland Act the charge is governed by s. 48K (2) and there are important differences from the provisions of the New South Wales sub-sections. The exaction is described as " a reasonable charge for the use by the vehicles approved for use in carrying on the service licensed under an inter-State licence of the roads on which those vehicles are used under the authority of the licence ". Otherwise there is no guidance as to the shape it is to take or the basis of its assessment. The " amount of the charge " however is to be " calculated " in respect of each and every inter-State licence by a committee. The committee consists of the Under Secretary of the Treasury, the Commissioner of Main Roads, and the Commissioner for Transport or their deputies. The charge is payable by the licensee and " the amount as stated in an inter-State license of that charge, and of any and every instalment thereof, shall become due and payable, and shall be paid, to the commissioner at the time and in the manner stated in the license, and any unpaid amount may be recovered by the commissioner as a debt." It would seem that a specific " amount " is to be stated in the licence, yet the licence may be of any duration up to seven years (s. 31 (1)), and is renewable subject to the same grounds of objection as an original application (s. 48I). Further, it is provided by s. 48K (2) (ii) that the charge shall be payable equally by all inter-State licensees in respect of all vehicles of the same description and weight using the same roads and under the same circumstances. It may be possible to construe these provisions in a way that makes a mileage or ton mileage rate permissible, but at all events it is clear that a charge may be fixed which has no relation at all to the actual use of the roads. There is little doubt that it must be specified in the licence and it is by no means clear that it may be varied during the currency of the licence. The quantum is subject to no limitation except what the commissioner thinks to be reasonable. For once the " amount " is named in the licence it is fixed and supplies the measure of liability. What method of arriving at the charge will be employed is left entirely to the committee. The authority to make exaction cannot be justified on the grounds which form the subject of discussion in the New South Wales case (1). Under s. 37 as modified by s. 48M approval of the vehicles must be obtained. Having regard to the views which have already been expressed in this and the New South Wales case (1) it is enough to say that, assuming par. (i) of s. 48M is sufficiently definite, the test laid down by par. (ii) may possibly be open to objection as involving

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a subjective judgment on the part of an administrative agency according to a standard that is too vague.

However, from what has been said already it follows that the operation of s. 23 (1) is not qualified or controlled by Pt. IVA in such a way as to make it possible to regard it as attempting no invasion or impairment of the freedom of inter-State transport as a form of trade, commerce and intercourse among the States. Section 56 and s. 48Q enable the commissioner to give a permit for the use of a vehicle specified by him. But in effect the same provisions govern his refusal of a permit and the conditions he may attach to a permit as apply in the case of a licence. These provisions therefore do not advance the matter.

The statement of defence contains a number of paragraphs setting up the inadequacy of Queensland roads to carry present day traffic without placing restrictions upon the use of them by certain types of vehicle, upon the number of vehicles to use them at certain times and so on. The narrowness of bitumen strip is one point made; the size of certain transport vehicles is another; the congestion of the roads at times is a third point. Then there are certain very general allegations relating to matters of obvious public knowledge such as wear and tear, the difficulty and costs of construction and maintenance and so on. In one sense a court must take into consideration all matters of such a description in forming a conclusion as to the operation of a law as a mere regulation of traffic not impairing freedom of inter-State trade. But the kind of thing set out in this defence is not for the most part a matter of allegation and proof. In the present case to take them into account is by no means enough to sustain the enactment. The question in the case stated directed to this subject may be ignored. It is enough to declare that the provisions of s. 23 and of Pt. IVA of *The State Transport Facilities Acts* 1946 *to* 1954 have no valid application to vehicles which are being used in a service for carrying goods in the course of inter-State trade and do not apply to the plaintiffs or either of them in so far as they use or permit or allow to be used on any road such a vehicle.

WILLIAMS J. The relevant provisions of the Queensland Acts have been set out in the joint judgment. The Act passed by the Parliament of Queensland in an attempt to fill the legislative void with respect to the regulation of the inter-State carriage of goods in Queensland flowing from the application of the decision of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1) to the existing Queensland legislation is the *State*

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Transport Facilities Amendment Act of 1954. This Act amends *The State Transport Facilities Act* 1946 *to* 1951 in a manner which in substance bears a definite similarity to the manner in which the *State Transport (Co-ordination) Act* 1931-1952 (N.S.W.) was amended by *The State Transport (Co-ordination) Amendment Act* 1954, although there are many differences in detail. The similarities and differences between the Queensland and New South Wales Acts have been analyzed and discussed in the joint judgment. It is clear from this analysis that the new Queensland Act of 1954 suffers from constitutional disabilities, in relation to s. 92, of the same inherent character as those displayed by the New South Wales Act. When the principles embodied in the decision of this Court in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1) are applied to the Queensland Act it immediately appears, I think, that *The State Transport Facilities Amendment Act* of 1954 will not suffice to endow *The State Transport Facilities Acts* 1946 *to* 1954 with constitutional validity in relation to vehicles which are being used in a service for carrying goods in the course of inter-State trade.

Accordingly I agree with the proposed order.

FULLAGAR J. This matter comes before the Full Court on a special case stated, under O. 35, r. 1, of the *Rules* of this Court, by the parties to an action. The statement of claim in the action alleges that each of the plaintiffs carries on the business of a carrier of goods by road by means of motor vehicles, and that it engages exclusively in the carriage of goods on inter-State journeys. A declaration is claimed that *The State Transport Facilities Act* 1946 *to* 1954 (Q.) or certain specified sections thereof, are invalid. The defence admits the facts alleged in the statement of claim, and proceeds to make certain allegations of fact which it is not necessary to set out in full. The substance of them may be stated by saying that the road system of Queensland which carries traffic to and from other States is very defective, that its maintenance (to say nothing of its improvement) is a very costly matter, that goods-carrying vehicles are mostly heavy vehicles which cause more wear and tear than lighter vehicles and are apt to cause congestion of traffic on unduly narrow highways, and that persons who operate services for the carriage of goods or passengers ought to be trustworthy and responsible persons. The case stated does no more than set out the pleadings, and the questions which it asks are (a) whether the facts pleaded in the defence are relevant to the validity of the legislation attacked, (b) whether, if such of those facts as are

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relevant are established, the plaintiffs will be entitled to any of the declarations sought, and (c) whether, independently of the facts so pleaded, the plaintiffs are entitled to any of the declarations sought.

The attack on the Queensland *Transport Acts* is based on s. 92 of the Constitution. The legislation in question was amended in substantial respects by Act No. 53 of 1954. Before those amendments were made it followed a pattern identical in substance and effect, though differing in many details, with that of the *State Transport* (*Co-ordination*) *Act* 1931-1952 (N.S.W.) which was the subject of the decision of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (1). The scheme of the Act centres round ss. 23 and 24. Section 23, which occurs in Pt. III of the Act, provides that no person shall use or permit or allow to be used on any road a vehicle for the carriage of passengers or goods unless the passengers or goods, as the case may be, are being carried upon that vehicle in accordance with a provision of Pt. III of the Act. Section 24 then sets out the cases in which it is to be lawful to use a vehicle on a road for the carriage of passengers or goods. The list of lawful users is a long one, but most of them are of a special and limited character. The list, however, includes:— "(25) any vehicle approved for use in carrying on a licensed service at any time when such vehicle is carrying passengers or goods . . . under and in accordance with the terms and conditions of the licence for such service", and "(26) any vehicle permitted under this Act to be used for any purpose at any time when such vehicle is being used for such purpose under and in accordance with the terms and conditions of the permit". Part IV of the Act contains elaborate provisions relating to licences, and Pt. VI of the Act provides for "permits" to use vehicles for special purposes and for limited periods. The granting of a licence or a permit is a matter of absolute discretion, fees are chargeable in either case, and conditions may be imposed in either case. A breach of a condition is an offence.

It is obvious that the Act, as it stood before 1954, is covered by the decision of their Lordships in the *Hughes & Vale Case* [*No.* 1] (1) and that s. 23, so far as it purports to apply to persons or vehicles engaged at the relevant time exclusively in inter-State commerce, is invalid. It is also obvious that the amendments made by the Act of 1954 had for their object the creation of a licensing system which should apply in respect of inter-State commerce and should not be open to objection under s. 92. The plan followed, however,

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is exactly the same in substance as that followed in the *State Transport Co-ordination (Amendment) Act* 1954 (N.S.W.). It consists in setting up a separate licensing system in relation to the inter-State carriage of passengers and goods while leaving standing the old system in relation to intra-State carriage. The two systems are parallel and are similar in all respects, the only difference being that the amending Act introduces, in respect of inter-State licences, what are, or purport to be, certain relaxations and modifications of the conditions on which a licence may be granted and of the conditions which may be attached to a licence if a licence is granted. It has been held in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 2]* (1) that the New South Wales Act of 1954 is not effective to alter the position in any way, and that the prohibition placed on the carriage of passengers or goods without a licence, so far as it purports to apply to inter-State carriage, contravenes s. 92 and is invalid. It seems very clear that the Queensland Act of 1954 is equally ineffective to alter the position in any way. No distinction can be drawn between the two Acts, and what has been said in the *Hughes & Vale Case [No. 2]* (1) is equally applicable to the present case.

I agree with the order proposed.

KITTO J. I agree in the joint judgment delivered by the Chief Justice, subject to the views I have expressed as to charges in the case of *Hughes & Vale Pty. Ltd.* v. *State of New South Wales [No. 2]* (1).

TAYLOR J. The reasons which led me to the conclusion that the *State Transport (Co-ordination) Amendment Act* 1954 (N.S.W.) was invalid lead me also to the conclusion that *The State Transport Facilities Acts* 1946 *to* 1954 (Q.) cannot validly operate with respect to vehicles whilst engaged in trade or commerce among the States. The provisions of the latter Acts have been analyzed in the reasons expressed in the joint judgment and it is unnecessary that this should be done again. It is sufficient for me to say that I agree with what has been said concerning the meaning and operation of those Acts and with the order proposed.

In answer to the questions submitted by the special case declare that the provisions of s. 23 and Pt. IVA of The State Transport

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Facilities Acts 1946 *to* 1954 (*Q.*) *have no valid application to vehicles which are being used in a service for carrying goods in the course of inter-State trade and do not apply to the plaintiffs or either of them in so far as they use or permit or allow to be used on any road such a vehicle.*

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

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

Solicitor for the defendants, *H. T. O'Driscoll*, Crown Solicitor for the State of Queensland, by *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

Solicitor for the State of New South Wales, *F. P. McRae*, Crown Solicitor for the State of New South Wales, by *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

R. D. B.