[HIGH COURT OF AUSTRALIA.]

KERR . . . . . Appellant ;
Defendant,

AND

PELLY . . . . . Respondent.
Informant,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

H. C. of A. 1957.

Sydney, *Mar.* 27 ; *July* 2.

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

Vehicles—Road user—Weighing of vehicles and loads—Weighbridge—"Public" weighbridge — Direction — Power — Ordinance — Main Roads Act 1924-1954 (*N.S.W.*), *s.* 51 (1) (*f*)—*Local Government Act* 1919-1955 (*N.S.W.*), *ss.* 575-579 —*Ordinance* 30c, *cll.* 5, 6, 10, 11.

Constitutional Law (Cth.)—Freedom of inter-State trade, commerce or intercourse—Goods—Conveyed by motor vehicle from one State to another State—Use of State roads—Weight—Ascertainment—Direction by authorised officer—Weighbridge—"Public"—Power—Regulatory or prohibitory—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*Main Roads Act* 1924-1954 (*N.S.W.*), *s.* 51 (1) (*f*)—*Local Government Act* 1919-1955 (*N.S.W.*), *ss.* 575-579—*Ordinance* 30c, *cll.* 5, 6, 10, 11.

Section 51 (1) (f) of the *Main Roads Act* 1924-1954 (N.S.W.) provides, so far as material: "Upon the recommendation of the (Main Roads) board, ordinances may be made under the Local Government Act . . . for carrying this Act into effect, and in particular for and with respect to . . . (f) the weighing of vehicles and loads, the estimation of weight according to a prescribed scale for various classes of goods, the requiring of vehicles and loads to be taken to a public weighbridge for weighing, and the marking of weight on the vehicles."

Ordinance 30c adopted under the power conferred by s. 51, aided by ss. 575-579 of the *Local Government Act* 1919-1955, provides, so far as material, that a driver or person in charge of any vehicle shall, when called upon by any one of certain officers, proceed to a weighbridge or other weighing device and permit the inspection and weighing of such vehicle and goods thereon or therein.

K. was convicted upon a charge that on 18th June 1955 at Muswellbrook (N.S.W.), he being the driver in charge of a motor vehicle upon a main road, did fail to comply with a direction given by a duly authorised servant of the Commissioner for Main Roads to proceed to a weighbridge. At the time K. was proceeding in a motor vehicle with a load of wire from Newcastle (N.S.W.) to Brisbane (Q.). On appeal to the High Court,

Held (1), by *Dixon* C.J., *Webb*, *Fullagar*, *Kitto* and *Taylor* JJ. (*McTiernan* J. dissenting), that whereas the power contained in s. 51 (1) (f) of the *Main Roads Act* 1924-1954 (N.S.W.) refers to a public weighbridge, cl. 11 of Ordinance 30c refers to a " weighbridge or other weighing device " and to the extent that it does so refer it goes beyond power and cannot be supported; and (2), by the whole Court, that no considerations had been brought forward which would warrant the conclusion that the regulations connected with cl. 11 (1) were void under s. 92 of the Constitution.

APPEAL from a Court of Petty Sessions of New South Wales.

Upon an information laid by Noel Michael Pelly for and on behalf of the Commissioner for Main Roads, Sydney, New South Wales, James Donald Kerr, of Georgetown, Newcastle, New South Wales, was charged before the chief stipendiary magistrate at a court of petty sessions, Sydney, that on 18th June 1955 at Muswellbrook, New South Wales, being the driver in charge of a motor vehicle, No. AUC 564, upon a main road, namely State Highway No. 9—New England Highway, did fail to comply with a direction given by a duly authorised servant of the commissioner to proceed to a weighbridge contrary to the Act.

The facts as found by the magistrate briefly were as follows:

On 18th June 1955, the defendant left Newcastle about five o'clock a.m., driving a motor vehicle with a load of annealed chain wire to Brisbane for his employer, the Newcastle Haulage & Transport Co. Pty. Ltd. That company had arranged to obtain the wire from the manufacturer, Rylands Brothers, and deliver to Bennett Chain Pty. Ltd. at Brisbane. At about ten o'clock a.m. the defendant was stopped on State Highway No. 9—New England Highway, not more than one and one-half miles from Muswellbrook Railway weighbridge, by a duly authorised officer of the Commissioner for Main Roads. The weighbridge is about four hundred yards from the highway. The officer directed the defendant to drive his vehicle to the weighbridge at Muswellbrook to check the weight on the axle. The officer showed the defendant his authority, and informed him that he had authority under Ordinance 30c to so direct him, and that failure to obey the direction constituted a breach of the ordinance and rendered him liable to prosecution. The defendant said " I refuse ", and he did not comply with the direction given.

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The motor vehicle then being driven by the defendant had an 8-wheel tandem axle at the front and a tandem axle at the back, with two tyres on the front axle and four tyres on the third and fourth axle. The distance between the tandem axles was 4′ 6″ and 4′ 3″. Tare of the vehicle was 8 tons 6 cwt. 2q.

The weighbridge is in the railway goods yard, and a driver of a vehicle of similar size to the vehicle driven by the defendant must drive on to the weighbridge extremely carefully, otherwise he might damage the tyres of the vehicle on the guide rails.

The defendant proceeded to Brisbane, Queensland, arriving there on 20th June 1955, and delivered the chain wire to Bennett Chain Pty. Ltd.

The defendant was convicted and fined £5, ordered to pay costs and in default was sentenced to thirty-three days imprisonment with hard labour.

From that decision the defendant appealed to the High Court.

The material provisions of the relevant statutes and Ordinance 30c are sufficiently set out in the judgments hereunder.

J. D. Holmes Q.C. (with him *G. D. Needham*), for the appellant. Section 51 (1) (b)-(e), (g) of the *Main Roads Act* 1924-1954, and that part of par. (f) which contains the words " the requiring of vehicles and loads to be taken to a public weighbridge for weighing " are invalid in that each provision, or, alternatively, some one or more of them, gives a power to make an ordinance which may so burden inter-State trade as to be in breach of s. 92 of the Constitution. The section confers a power to make an ordinance with respect to the prevention of damage or potential damage, or of the doing things likely to injure main roads. Under the power so given the ordinance can provide that the road cannot be used at all, that is prohibit the use of any road. Neither " damage " or " injury " is defined and any vehicle using the roads would cause damage or injury to a road. So that it is a power under which in point of construction the Order in Council could give the commissioner power to prohibit any traffic at all. That brings s. 51 within the same class of legislation as was dealt with in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1). Although it is called an ordinance it is a regulation—it is a power to make regulations and it is a power expressed in terms which permit the making of regulations which would be in breach of s. 92. That being so this provision is beyond power. The ordinance on the basis that it is within the powers of s. 51 can be used, not to achieve the result of preservation of main roads or

(1) (1955) 93 C.L.R. 127, at p. 167.

prevention of damage to main roads but in furtherance of any trade purpose which the State has in mind. That field was discussed by *Fullagar* J. in *McCarter* v. *Brodie* (1) in that part of the judgment approved by the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (2). The exercising of the various powers under cll. 5 and 6 of the ordinance must be a burden upon trade. It is not a " s. 92 point " exactly or at all. The ordinance itself is *ultra vires* s. 51. It is an ordinance which gives power to the commissioner to be exercised in relation to matters quite unrelated to the question of damage to roads at all. The ordinance clearly steps outside State powers, outside s. 51, because it is not confined to the subject matters in s. 51. Clause 13 is invalid not by reason of s. 92, or anything of that kind, because it gives the power to exempt, and no such power is given by s. 51. The clause is inseverable and vitiates the whole ordinance. Clauses 5 (2) and 6 (6) are not severable because they are obviously dealing, amongst other things, with matters certainly concerned with damage in the ordinary sense, or the special sense, to roads. If one were to endeavour, one would have to sever not by taking out cl. 5 (2) (a) but some parts of cl. 5 (2) (a), and that would not be a permissible result here where the ordinance sets out a total scheme. Argument is not submitted anent cl. 7. Clause 10 (1) (a) on the face of it is invalid. It is a general power to stop vehicles for the purpose of weighing them, and can in terms be exercised as frequently as the officials along the road choose to exercise it. If exercised in that manner it would be an intolerable burden to inter-State trade, and would be an even greater burden than that which the Court held invalid in *Armstrong* v. *State of Victoria* (3). Also, the power in par. (b) can be exercised with repetition as frequently as the officials desire. It is not a question of power being abused, each such exercise could be made *bona fide*. The use of the word " route " in this type of legislation was considered by the Privy Council in *Kelani Valley Motor Transit Co. Ltd.* v. *Colombo-Ratnapura Omnibus Co. Ltd.* (4). It makes the point that the weighbridge does not at any stage have to be on the road so long as it is on the route which is being travelled. Clause 10 and cl. 11—which is subsidiary or corollary to cl. 10—are in breach of s. 92. The power taken in cl. 10 (b) and cl. 11 to require a driver to drive the vehicle to a weighbridge or weighing device is *ultra vires* s. 51 (1) (f) of the *Main Roads Act* 1924-1954 (N.S.W.). The power conferred by par. (f) is the making

(1) (1950) 80 C.L.R. 432, at pp. 483-500.
(2) (1955) 93 C.L.R., at pp. 23 et seq.
(3) (1955) 93 C.L.R. 264.
(4) (1946) A.C. 338.

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of ordinances for " the requiring of vehicles and loads to be taken to a public weighbridge for weighing " but cll. 10 (b) and 11 provide for the vehicles to be taken to a weighbridge. The term " public weighbridge " is a term known in the law of this State : see *Weights and Measures Act* 1915, s. 6. So far as cll. 10 and 11 deal with the taking to a weighbridge they are outside the power given by s. 51.

R. Else-Mitchell Q.C. (with him *K. S. Jacobs* and *D. A. Staff*), for the respondent. The argument submitted on behalf of the appellant involves a concession that provisions can be made consistently with s. 92 in ordinances or regulations of this character to restrict the operation of vehicles on public highways where they exceed certain loading limits and weights prescribed in cll. 5 and 6 of this ordinance. Once that concession is made it must follow that s. 92 does not prevent reasonable measures being taken and provided for the policing of the law so made : *Deacon* v. *Grimshaw* (1). Again on that assumption it must be conceded that the existence of some power to relax provisions so made will not vitiate the law itself. The provisions of cll. 10 and 11 are reasonable. To be required to proceed to a point not further than three miles from the point of interception is not an undue burden (*McCarter* v. *Brodie* (2)). Any purported attempt to exercise the power as a source of irritation and frustration to inter-State traders by stopping them at every point on the highway would be quite plainly an invalid exercise passing outside the scope of the power that is conferred and would infringe s. 92 (*Sydney M.C.* v. *Campbell* (3) ; *Wilcox Mofflin Ltd.* v. *State of New South Wales* (4) ; *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (5)—where it was said that " The burden or obstruction must be real "—and *Consolidated Press Ltd.* v. *Lewis* (6)). The power conferred upon the commissioner under cl. 12 is exercisable under cll. 5 (2) and 6 (6). Broadly, administrative discretion may result in some inconsistency with s. 92. The cases in which wide administrative discretion has been held invalid, have been cases where the discretion has simply been created for the purpose of relaxing a prohibition which is substantially absolute in terms : *James* v. *Cowan* (7) ; *Australian National Airways Pty. Ltd.* v. *The Commonwealth* [*No.* 1] (8) ; *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* (9) ; *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (10). Provisions

(1) (1955) 93 C.L.R. 104, at pp. 106, 107, 109.
(2) (1950) 80 C.L.R., at pp. 496-499.
(3) (1925) A.C. 338 ; (1924) 7 L.G.R. 69.
(4) (1952) 85 C.L.R. 488, at p. 522.
(5) (1955) 93 C.L.R., at p. 160.
(6) (1956) 95 C.L.R. 550, at p. 601.
(7) (1932) A.C. 542 ; 47 C.L.R. 386.
(8) (1949) 71 C.L.R. 29.
(9) (1953) 87 C.L.R. 49.
(10) (1955) 93 C.L.R. 127.

such as cll. 5 (1) and 6 (1) are valid provisions which do not impose a burden. Clause 13 confers a very wide power of exemption.

[FULLAGAR J. referred to *Country Roads Board* v. *Neale Ads Pty. Ltd.* (1).]

In the course of administration some power as that conferred by cl. 13 is essential. The question is rather not whether there should be some such power but whether it is possible to circumscribe it. When dealing with the situations that do arise in relation to public roads it is difficult to circumscribe the power in every circumstance. No matter what anticipations are made the whole field of potential special cases cannot be covered. Those are matters urged in support and in justification of treating it only as an ancillary position. Alternatively, if that view be not accepted by the Court, then all that should be done is to sever it off and to leave the administrative authority in the position, perhaps, of allowing the passage of heavy vehicles in the special circumstances that arise although it has no authority to do so and allowing transporters to take the risk on those situations. It is a necessary safety valve for the special cases. In no sense does the ordinance impose restrictions that are capable of being used in the way in which the restrictions were considered in *Armstrong* v. *State of Victoria* (2). This is one of the matters of general law involved in the regulation of traffic and is one of the type of provisions which in *Armstrong* v. *State of Victoria* (2) was held already existed and additional legislative provision therefor was unnecessary. The distinction between that case and this case is clear. The regulation- or ordinance-making power is a power to make ordinances for carrying the Act into effect and in particular for and with respect to the prevention of damage to main roads. Ordinance 30c is within that power. Paragraphs (d) and (e) of s. 51 (1) do deal with regulation in terms. Even on the basis of *Country Roads Board* v. *Neale Ads Pty. Ltd.* (1) and *Swan Hill Corporation* v. *Bradbury* (3) this ordinance is justified and with it the directions as to weighing and the provisions of cl. 13 enabling exemption in certain cases. It is possible, as a matter of State law, that cl. 8 is outside s. 51 (1) (d). If the six heads be taken together an even stronger case for each provision of the ordinance can be made out. The powers to make ordinances conferred by s. 51 (1) of the *Main Roads Act* 1924-1954 are not to be restricted in their exercise to the making of ordinances directing vehicles to be taken to public weighbridges alone. That would involve a very narrow and restrictive view of a power to make ordinances for the purposes

(1) (1930) 43 C.L.R. 126.
(2) (1955) 93 C.L.R. 264.
(3) (1937) 56 C.L.R. 746.

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set out in s. 51 (1). Alternatively, the weighbridge or weighing device mentioned in cll. 10 and 11 is a weighbridge in the same sense as the power is granted, that is a public weighbridge. Some significance is to be drawn from s. 51 (4) which, added in 1936 after the making of the ordinance, proceeded on the basis that the provision in par. (f) of s. 51 (1) had been a valid exercise of the power. Alternatively to the view that the powers conferred in s. 51 enabled a direction to be made in respect of a weighbridge at large, if there were any doubt then the presumption in favour of validity should be made (*Widgee Shire Council* v. *Bonney* (1)) and it would be proper to treat the ordinance as extending only to directions to take the vehicle to a public weighbridge or a public weighing device. A public weighbridge is one to which either the public can have access or which is publicly owned and either construction is adequate. The question of power looked at from the point of view of the *Main Roads Act* 1924-1954 is clear and concluded in favour of the respondent. Powers to make ordinances are to be found in ss. 277, 575-579 of the *Local Government Act* 1919-1955 (N.S.W.) and s. 51 (1) of the *Main Roads Act* provides that ordinances may be made under the *Local Government Act*. Powers in s. 576 of that Act extend the scope of the ordinance-making power. Those powers must be regarded as an elaboration of the matters mentioned in s. 51 (1) of the *Main Roads Act*. Section 530 of the *Local Government Act* was, presumably, introduced for the purpose of getting over all the difficulties raised by *Melbourne Corporation* v. *Barry* (2) and *Swan Hill Corporation* v. *Bradbury* (3). Any distinction that has been made in those cases, and cases of that character, which might vitiate a provision such as cl. 13 of this ordinance could have no application to the *Local Government Act* 1919-1955 (N.S.W.). Those matters provide an added reason why it should be held that this ordinance in detail is not invalid on any ground of State law. If any part of the ordinance is invalid for any of the reasons advanced on behalf of the appellant it would be appropriate to sever out the primary provisions; these include cll. 5 (1), 6 (1), 10 and 11. If the matter be looked at on the basis of the intention of the ordinance-making authority, it must be assumed that the primary purpose was the prescription of the specific limits in cll. 5 (1) and 6 (1) and not the incidental matters of allowing special cases to be dealt with and of prescribing special limits for individual cases. On that basis there are left sufficient valid provisions in the ordinance which would have created an offence of which the appellant was guilty.

(1) (1907) 4 C.L.R. 977, at pp. 983 et seq.
(2) (1922) 31 C.L.R. 174.
(3) (1937) 56 C.L.R. 746.

J. D. Holmes Q.C., in reply. All that sub-s. (4) of s. 51 of the *Main Roads Act* does is to give evidentiary value to the weight ascertained from some weighing device if in fact it is ascertained. The trial judge in the case of *Ex parte Cullen*; *Re Pelly* (1) was wrong. His Honour did not give due consideration to the particular expression used in the phrase in par. (f) which in the other paragraphs was preceded by general provisions and expressions. He should have treated the matter as in *Ex parte Stephens* (2). A special provision was made in s. 51 as to the type of weighbridge to which the driver of a vehicle may be required to proceed; that is a public weighbridge. The mere fact that a weighbridge is one to which the public have access does not make it a public weighbridge. Clause 10 (1) and a corresponding provision in cl. 11 are wholly void because they go outside the statute. Alternatively, possibly those provisions are capable of being severed, or in the case of cl. 10 (1) (b) read down, and thus leave the matter as one of fact. Section 530 of the *Local Government Act* 1919-1955 has nothing to do with this case. The ordinance has to be looked at set against s. 51 of the *Main Roads Act* and those provisions of the *Local Government Act* which are referred to in s. 51. The power to do a thing is a power to do it from time to time. On the general question of abuse see *Melbourne Corporation* v. *Barry* (3) and *Rider* v. *Phillips* (4).

Cur. adv. vult.

July 2.

The following written judgments were delivered:

DIXON C.J., FULLAGAR, KITTO AND TAYLOR JJ. This is an appeal by the defendant from a conviction by a magistrate exercising federal jurisdiction. The offence of which the defendant was convicted is that created by cl. 11 of Ordinance 30c adopted by the Governor in Council under the power conferred by s. 51 of the *Main Roads Act* 1924-1950, aided by ss. 575-579 of the *Local Government Act* 1919, as amended.

Clause 11 of the ordinance provides that a driver or person in charge of any vehicle shall, when called upon by any one of certain officers, proceed to a weighbridge or other weighing device and permit the inspection and weighing of such vehicle and any goods therein or thereon. The provision extends to obeying signals to stop and certain other directions.

The facts constituting an offence under cl. 11 were established against the defendant but his answer was that he was engaged in

(1) (1956) 2 L.G.R.A. 31.
(2) (1876) 3 Ch. D. 659, at p. 660.
(3) (1922) 31 C.L.R., at pp. 200, 201.
(4) (1884) 10 V.L.R. (L.) 147.

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inter-State trade commerce and intercourse and was therefore outside the scope of the regulation. It is not necessary to consider this contention in detail. It is enough to say that the argument by which it was supported fell into two parts. One part dwelt upon the possibility of the abuse of the power given by cl. 11 by frequent directions at various points on an inter-State journey which would in the aggregate constitute a serious impairment of the inter-State transaction. To this particular argument it is enough to say that if such a use of the power were made in any given case it would amount to an interference with trade commerce and intercourse which would be void; but the possibility of an attempt being made to use the authority conferred by cl. 11 for such a purpose does not itself invalidate the authority: see *Wilcox Mofflin Ltd.* v. *State of New South Wales* (1).

The main part of the argument, however, under s. 92 was that cl. 11 forms part of a general regulation of the use of inter-State vehicles in carrying loads of goods which is calculated to interfere with the freedom assured by s. 92. This is not an occasion to discuss or decide generally the validity of such a regulation of traffic as is contained in an ordinance of the character of that now in question namely No. 30c, for, as will appear, there are reasons arising under the terms of the power conferred by State law which entitle the defendant to succeed before any consideration of s. 92 is reached. But it is proper to say that in the argument that was presented to us no considerations were brought forward which would warrant the conclusion that the regulations connected with cl. 11 (1) were void under s. 92. The reasons why the prosecution must fail as a matter of State law are of a commonplace and unimportant kind, depending as they do on nothing but a failure to frame the clause in accordance with the subordinate power under which it was adopted. But as the defendant relied on the point, and it seems a good one, we must give effect to it. Clause 11 (1) refers to a weighbridge or other weighing device. The power under which the clause is made part of the ordinance is restricted to requiring a vehicle to proceed to a public weighbridge. The power is contained in s. 51 (1) (f) of the *Main Roads Act* 1924-1954. So far as material that power is as follows:—"Upon the recommendation of the (Main Roads) board, ordinances may be made under the Local Government Act . . . for carrying this Act into effect, and in particular for and with respect to . . . (f) the weighing of vehicles and loads, the estimation of weight according to a prescribed scale

(1) (1952) 85 C.L.R. 488, at p. 522.

for various classes of goods, the requiring of vehicles and loads to be taken to a public weighbridge for weighing, and the marking of weight on the vehicles." The presence in this power of the words " the requiring of vehicles and loads to be taken to a public weighbridge for weighing " makes it impossible to construe the expression in the earlier part of par. (f), which refers generally to the weighing of vehicles and loads, as in itself authorising a clause which requires vehicles to be taken to a weighbridge that is not a public weighbridge or to be taken to another weighing appliance.

Section 18 of the *Interpretation Act* of 1897 provides that where an Act confers power to make, grant or issue certain instructions, including ordinances, the expressions used in any such instrument shall, unless the contrary intention appears, have the same meanings respectively as in the Act conferring the power. Unfortunately the expressions in the power contained in the Act and in cl. 11 of the ordinance are not the same. The power refers to a public weighbridge and the clause of the ordinance refers to a weighbridge or other weighing appliance. It seems to be an unavoidable conclusion that so much of cl. 11 as relates to weighbridges and weighing appliances goes beyond the power and accordingly cannot be supported. It may be added that the power of municipal councils to establish a public weighbridge is contained in s. 480 of the *Local Government Act*, and the meaning of the expression in s. 51 of the *Main Roads Act* is not open to doubt.

It follows that the prosecution must fail on this ground. Because s. 92 of the Constitution was relied upon, the matter became one within the federal jurisdiction of the magistrate. An appeal lies to this Court accordingly under s. 39 (2) (*b*) of the *Judiciary Act* 1903-1955. Once the appeal is here it must be decided according to law, whether State or federal law. It is therefore necessary on the grounds stated to allow the appeal and set aside the conviction.

McTIERNAN J. I would dismiss this appeal.

I am of opinion that it is not beyond the power to make ordinances which is given by s. 51 of the *Main Roads Act* 1924-1954 to provide, as in Ordinance 30c, cl. 11 (1), that the driver or person in charge of a vehicle shall comply with an order " to proceed to a weighbridge or other weighing device ". There is power conferred by par. (f) of s. 51 (1) of the *Main Roads Act* 1924-1954 to make ordinances for and with respect to the weighing of vehicles and loads. That grant of power contemplates weighing by " a weighbridge or other weighing device ". Such weighbridge or weighing device may be " public "

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or not. This power to make ordinances with respect to " the weighing of vehicles and loads " extends to creating, by ordinance, the obligation of driving to any weighbridge or other weighing device in order that the vehicle and load may be weighed. To the power to make ordinances with respect to the weighing of vehicles and loads, s. 51 (1) (f) adds the power to make ordinances with respect to " the requiring of vehicles and loads to be taken to a public weighbridge for weighing ". Under this power, an ordinance may be made creating an obligation for the vehicle to be taken to a " public weighbridge ", and to no other weighbridge. This power is not exercised by Ordinance 30c, cl. 11 (1). The ordinance-making authority has seen fit to make an ordinance authorising an officer, competent under cl. 11 (1), to direct the vehicle to proceed to any weighbridge or weighing device, whether public or private. This conclusion is in accordance with the decision of *Collins* J. in *Ex parte Cullen* ; *Re Pelly* (1).

Sub-section 4 of s. 51, inserted therein by s. 20 of Act No. 40 of 1936, would appear to proceed upon the footing that the provision, with which this case is concerned, of cl. 11 (1) of Ordinance 30c was valid. Sub-section 4 involves legislative ratification of the provision, if ratification were necessary.

I agree that there is nothing in cl. 11 (1) of the ordinance contrary to s. 92 of the Constitution.

WEBB J. This is an appeal from the judgment of a court of petty sessions in Sydney given on 20th October 1956 whereby the appellant was convicted that on 18th June 1955 at Muswellbrook in New South Wales he being the driver in charge of a motor vehicle upon a main road did fail to comply with a direction given by a duly authorised servant of the Commissioner for Main Roads to proceed to a weighbridge, and was fined £5. The complaint was made under Ordinance 30c made under the *Main Roads Act* 1924-1954 and also under the *Local Government Act* 1919. Section 51 (1) of the *Main Roads Act* provides as follows:—" 51. (1) Upon the recommendation of the board, ordinances may be made under the Local Government Act, 1919, but subject to the Metropolitan Traffic Act, 1900, for carrying this Act into effect, and in particular for and with respect to—(a) the preservation of trees and vegetation on main roads ; (b) the prevention of damage to main roads ; (c) the prevention of the doing of things likely to injure main roads ; (d) the regulation of the weight of vehicles using main roads and

(1) (1956) 2 L.G.R.A. 31.

the loads on such vehicles ; (e) the regulation of the use of vehicles likely to injure main roads ; (f) the weighing of vehicles and loads, the estimation of weight according to a prescribed scale for various classes of goods, the requiring of vehicles and loads to be taken to a public weighbridge for weighing, and the marking of weight on the vehicles ; and (g) the restriction of traffic or of any specified class of traffic to protect main roads from injury."

Then the power to make regulations requiring vehicles and loads to be taken to a weighbridge for weighing is confined to a public weighbridge. If par. (f) of sub-s. (1) of s. 51 did not contain the words " the requiring of vehicles and loads to be taken to a public weighbridge, for weighing " there would have been power to make cll. 10 and 11 which are not confined to public weighbridges. However, the legislature, having directed its mind to the question under what conditions vehicles should be taken to a weighbridge, confined the requirement to a public weighbridge. It follows, I think, that we should not hold there was power under the opening words of par. (f) namely " the weighing of vehicles and loads " to make such a regulation as cll. 10 and 11. Support for this view is found in the decision of this Court in *R.* v. *Wallis* (1) and more particularly in the judgment of *Dixon* J. (2). See also *British Medical Association* v. *The Commonwealth* (3).

I think then that cll. 10 (1) (b) and 11 (1) are *ultra vires*.

The regulations were also attacked as being prohibitory of inter-State trade and contrary to s. 92 in that as regards cll. 10 and 11 they authorised the stoppage among other things of inter-State vehicles and the directing of the driver to proceed up to three miles in any direction to a weighbridge. It is not now necessary to decide this point ; but I would not be prepared to hold that such a provision, which is directed to ensuring the maintenance and safety of roads and bridges, is invalid or inapplicable to inter-State traders because of the inconvenience to which they might necessarily be put. Indeed it seems to me that such provision is essential for the proper conduct of trade, whether intra-State or inter-State. It is an example of what is clearly permissible according to the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (4), where their Lordships agree with *Fullagar* J. that the limiting of the weight of loads on public highways, like the rule of the road, is something that nobody would doubt as being generally applicable without infringing s. 92 and that in such matters of regulation a

(1) (1949) 78 C.L.R. 529.
(2) (1949) 78 C.L.R., at pp. 549, 550.
(3) (1949) 79 C.L.R. 201, at p. 292.
(4) (1955) 93 C.L.R. 1, at p. 24.

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very wide range of discretion must be attributed to the legislative body.

I would quash the conviction.

Appeal allowed with costs. Conviction of the defendant-appellant quashed.

Solicitors for the appellant, *H. V. Harris, Wheeler & Williams*, Newcastle, by their agents *Kevin Ellis & Price.*

Solicitor for the respondent, *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.