[HIGH COURT OF AUSTRALIA.]

ARMSTRONG AND OTHERS . . . PLAINTIFFS;

AND

THE STATE OF VICTORIA AND OTHERS DEFENDANTS.

[No. 2.]

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MELBOURNE, *May* 14, 15, 16, 17;

SYDNEY, *Aug.* 30

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

Constitutional Law (Cth.)—Freedom of inter-State trade, commerce and intercourse—State statutes—Validity—Provision that owners of certain vehicles having more than a specified load capacity shall pay towards compensation for wear and tear caused to public highways in Victoria a charge at the rate prescribed in the schedule—Charge of one-third of a penny per ton of sum of tare weight of vehicle and forty per cent of load capacity per mile of public highway travelled in Victoria—No indication in statute of how charge of one-third of penny arrived at—Provision for charge to be applied only to maintenance of public highways—daily record of journeys of vehicle along public highways in Victoria required to be kept by owner and for forwarding by him within fourteen days of end of each month record of previous month and amount of moneys owing by way of charges in respect of that month—Absence of discrimination between vehicles engaged in intra-State and inter-State trade—Use of evidence in determining validity—Validity of statute imposing charge in application to vehicles engaged in inter-State trade—Statute providing for payment of substantial registration fee on registration of vehicles—Including vehicles engaged exclusively in inter-State trade—Fee quantified by reference to power and weight of vehicle, commercial use and possession of certain types of tyres—Payment enforced by penalising use on highway of unregistered vehicle—Validity—The Constitution (63 & 64 *Vict. c.* 12) s. 92—*Commercial Goods Vehicles Act* 1955 (*No.* 5931) (*Vict.*), *ss.* 25-33—*Motor Car Act* 1951 (*No.* 5616) (*Vict.*), *ss.* 6, 17.

Part II of the *Commercial Goods Vehicles Act* 1955 (Vict.) requires the owner of every commercial goods vehicle of load capacity exceeding four tons and not engaged in conveying certain specified classes of goods to pay as a contribution towards compensation for wear and tear caused to public highways in Victoria a charge calculated in accordance with the fourth schedule of the Act; that schedule provides that the charge to be paid in respect of every such vehicle shall be one-third of a penny per ton of the sum of—(a) the tare weight of the vehicle; and (b) forty per cent of the load capacity of the

vehicle—per mile of public highway along which the vehicle travels in Victoria. The proceeds of the charge imposed are to be paid to the credit of a special account and applied solely for the maintenance of public highways.

Held by *Dixon* C.J., *McTiernan*, *Williams* and *Fullagar* JJ., *Webb*, *Kitto* and *Taylor* JJ. dissenting, that the provisions of the Part do not infringe s. 92 of the Constitution and validly apply to vehicles used exclusively in inter-State trade.

Hughes & Vale Pty. Ltd. v. *State of New South Wales* [No. 2] (1955) 93 C.L.R. 127, at pp. 171-179, 190-195, 208-211, followed.

Section 3 of the *Motor Car Act* 1951 (Vict.) defines " motor car " as meaning any vehicle propelled by internal combustion etc. and used or intended to be used on any highway. Section 6 provides that every motor car shall be registered by the Chief Commissioner of Police and by sub-s. (4) that a fee as provided for in the second schedule shall be paid on the registration of or the renewal of the registration of a motor car etc. The second schedule provides that for a motor car used for carrying goods for hire or in the course of trade (with certain exceptions) the fees shall be certain amounts for each power-weight unit, varying according to the number of wheels and the types of tyres etc. It also provides a method of determining the power-weight units. These fees were substantial, in some cases exceeding £100 per annum. By s. 17 of the Act it was provided that if a motor car was used on a highway without being registered as required the driver should be guilty of an offence, unless he could make out one of certain defences, none of which is presently material.

Held by *Dixon* C.J., *McTiernan*, *Williams*, *Webb*, *Kitto* and *Taylor* JJ., *Fullagar* J. dissenting, that by reason of s. 92 of the Constitution, these provisions cannot validly apply to vehicles used on Victorian roads but exclusively in the course of inter-State trade and commerce.

Willard v. *Rawson* (1933) 48 C.L.R. 316, discussed.

ACTION directed to be argued before the Full Court.

On 29th March 1956 an action was commenced in the High Court of Australia wherein the following were plaintiffs, namely Richard Gilbert Armstrong on behalf of himself and other named members of the Road Transport Development Association of Victoria; Patrick Joseph Martin on behalf of himself and other named members of the Interstate Division of the Victorian Road Transport Association, Arthur Edward Nilson on behalf of himself and other named members of the Long Distance Road Transport Association of Australia, the Australian Hauliers' Federation and the Australian Road Transport Federation. The defendants were the State of Victoria, the Transport Regulation Board of the State of Victoria, and Selwyn Havelock Porter who was sued personally and as representing all other officers and all members of the Police Force of Victoria.

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The plaintiff sought declarations as follows:—(1) that Pt. II of the *Commercial Goods Vehicles Act* 1955 (Vict.) or alternatively ss. 26-33 inclusive thereof and the fourth and fifth schedules thereto or alternatively parts of such sections and schedules were contrary to s. 92 of the Constitution and beyond the powers of the Parliament of the State of Victoria and invalid; (2) alternatively to (1) that the said Part or the said sections or parts thereof had no application to owners of commercial goods vehicles while such vehicles were travelling along public highways in Victoria in the course of or for the purposes of inter-State trade commerce or intercourse or to persons driving such vehicles or to such vehicles whilst so travelling; (3) that ss. 6 and 17 (*a*) (*b*) and (*d*) of the *Motor Car Acts* 1951-1956 (Vict.) or alternatively sub-ss. (1), (2), (3), (4) and (5) of s. 6 and sub-ss. (*a*) (*b*) and (*d*) of s. 17 or alternatively parts thereof were contrary to s. 92 of the Constitution and beyond the power of the Parliament of the State of Victoria and invalid. (4) alternatively to (3) that the said sections or the said sub-sections or parts thereof had no application to owners, operators or drivers of commercial goods vehicles used on highways in Victoria exclusively in the course of or for the purposes of inter-State trade commerce or intercourse. Certain consequential relief by way of injunctions was also sought.

The action was heard by *Taylor* J. who, after taking evidence, directed pursuant to s. 18 of the *Judiciary Act* 1903-1955 that the case be argued before the Full Court upon the evidence before him.

The relevant statutory provisions and the nature of the evidence before *Taylor* J. appear sufficiently from the judgments of the Court hereunder.

J. D. Holmes Q.C. (with him *C. I. Menhennitt* Q.C.), for the plaintiffs.

J. D. Holmes Q.C. Section 26 of the *Commercial Goods Vehicles Act* 1955 (Vict.) is invalid or alternatively cannot validly apply to the plaintiffs' vehicles while being operated in the course of inter-State trade. The judgments of *Kitto* J. and *Taylor* J. in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1) are correct: see per *Kitto* J. (2); per *Taylor* J. (3). Alternatively if a charge is permissible the section does not satisfy the tests laid down by the other Justices in that case. The act does not reveal the basis of the computation of the charge which, it is submitted,

(1) (1955) 93 C.L.R. 127.
(2) (1955) 93 C.L.R., at pp. 222 et seq.
(3) (1955) 93 C.L.R., at pp. 238-240.

is essential, since the Court must be able to determine whether the Act conforms to the Constitution. [He referred to *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1); *Hughes & Vale Pty. Ltd.* v. *State of Queensland* (2); *Armstrong* v. *State of Victoria* (3). The words in the Act "towards compensation for wear and tear" are surplus in that if they had been omitted the Act would have had precisely the same meaning and operation. The test whether a charge is or is not a tax is in the ultimate description of it. [He referred to *City of Halifax* v. *Nova Scotia Car Works Ltd.* (4); *Parton* v. *Milk Board (Vict.)* (5). The Court cannot know how the fixed charge has been arrived at or what it includes. The legislature having fixed the amount it is submitted that evidence would not be admissible to determine whether the amount was reasonable. The Act is also objectionable in that one flat rate has been fixed for all types of roads and all types of vehicles and that the charge is permanent. Wear and tear on roads varies with a variety of different circumstances including types of roads, weather conditions, vehicles, tyres etc. If a statute is valid at the time of enactment it cannot subsequently become invalid by reason of changed conditions. [He referred to *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (6).] If a charge is permissible it should have been confined to relevant highways. [He referred to *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (7); *Armstrong* v. *State of Victoria* (8).] The fact that the charge is not related to the actual weight including load of the vehicle on the road but is fixed on the assumption that the vehicle is forty per cent loaded shows that the charge is not based on actual wear and tear of the road. The onus is on the defendants to show that the charge is a permissible one and not simply a tax. If evidence is admissible then the evidence in the present case when examined shows that the rate prescribed does not comply with the test of being reasonable compensation for wear and tear on the relevant highways. The notion that a State may impose a charge for the use of the roads as a facility provided by it has been rejected by the Privy Council in the *Hughes & Vale Case* [No. 1] (9). There is no room in the face of s. 92 for any doctrine that road transport must pay its way or must contribute a reasonable sum for going on its way. There is

(1) (1955) 93 C.L.R., at pp. 175 et seq., 195, 211.
(2) (1955) 93 C.L.R. 247, at pp. 257-259.
(3) (1955) 93 C.L.R. 264, at pp. 284, 286.
(4) (1914) A.C. 992, at pp. 997 et seq.
(5) (1949) 80 C.L.R. 229.
(6) (1945) 71 C.L.R. 161, at p. 180.
(7) (1955) 93 C.L.R., at pp. 175-176, 194.
(8) (1955) 93 C.L.R., at pp. 278, 286.
(9) (1955) A.C. 241, at p. 305; (1954) 93 C.L.R. 1, at p. 31.

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no distinction to be made against road transport simply on the basis that the State provides the road. The benefits which flow from the existence of the roads in the course of trade are not benefits that flow one way. They are not benefits which flow only to the road transports; they are benefits which flow to the State. That is not a legal conception, but the only legal conception that is open, it is submitted, is that rejected by the Privy Council in the *Hughes & Vale Case* [No. 1] (1). Section 6 of the *Motor Car Act* 1951 (Vict.) provides that every motor car, as defined by the Act used or intended for use on any highway in Victoria, shall be registered: see also s. 17. Regulation 59 of the *Motor Car Regulations* 1952 contains an exemption in respect of vehicles registered in other States. The position is no different from that which this Court dealt with in *Nilson* v. *State of South Australia* (2). [He referred also to *Pioneer Tourist Coaches Pty. Ltd.* v. *State of South Australia* (3); *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (4).]

C. I. Menhennitt Q.C. Even on the assumption that some charge in respect of wear and tear caused to the roadway is permissible, when the provisions of Pt. II of the *Commercial Goods Vehicles Act* are examined in the context of the whole of that Act and of the *Transport Regulation Act* 1955 they are revealed as simply imposing taxes designed for the purpose of protecting the railways against competing road transport. That conclusion flows primarily from the nature of the exemptions. Section 25 (*b*) exempts from charges vehicles carrying perishable goods and livestock. Section 7 dealing with vehicles engaging in intra-State trade provides that one of the matters to be considered by the licensing authority is the availability of existing services. That includes railway services; see *Victorian Railway Commissioners* v. *McCartney and Nicholson* (5). Section 4 makes provision for the granting of certain licences as of right. This includes licences to persons engaged in carrying perishable goods or livestock. [He referred to *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 1] (6); *McCarter* v. *Brodie* (7).] The exemption provided by s. 25 (a) of vehicles with a carrying capacity of under four tons corresponds with a class of vehicles exempted from the obligation to obtain licences by s. 4 (1) (*f*)

(1) (1955) A.C. 241; (1954) 93 C.L.R. 1.
(2) (1955) 93 C.L.R. 292, at pp. 302, 303.
(3) (1955) 93 C.L.R. 307, at p. 315.
(4) (1955) 93 C.L.R., at pp. 181, 196, 213, 215 et seq., 244 et seq.
(5) (1935) 52 C.L.R. 383, at pp. 389, 392, 396.
(6) (1955) A.C., at pp. 295, 301 (1954) 93 C.L.R., at pp. 22, 27.
(7) (1950) 80 C.L.R. 432, at p. 448.

of the Act. Under the *Transport Regulation Act* every passenger vehicle which operates in Victoria must satisfy the Transport Regulation Board that it is a service which is justified having regard to the existence of other alternative services: see ss. 19, 21, 28. There is no provision similar to Pt. II of the *Commercial Goods Vehicles Act*. There is no obligation for fees received to be used for road maintenance. So that when the two Acts are examined the overall position is that there is exempted from the obligation to pay charges three very substantial classes of services, all of which are revealed by the Act to be services which are essential, and which are not competitive, and which Parliament has declared should be permitted to operate despite the existence of the railways. So that the description of the charge as being compensation for wear and tear caused to public highways is in truth not a proper description. This is borne out by the evidence which shows that of over one half of a million motor vehicles in Victoria including 136,000 trucks and buses, the charge is confined to some 24,000 vehicles. The legislation discriminates against a class of transport operators, including inter-State operators. The charge is in truth a tax. [He referred to *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1).] The figures adduced by the defendant in evidence are demonstrably unreal and show that the figure of .33d. per ton mile fixed by the Act is in excess of a reasonable figure even if any charge is permissible.

H. A. Winneke Q.C. Solicitor-General for the State of Victoria (with him *D. I. Menzies* Q.C. and *K. A. Aikin*), for the State of Victoria. The plaintiffs must establish, in order to succeed, that the charge imposed or the method of collection or both render their trade unfree, within the meaning of s. 92. It is submitted that the charge imposed by the Act is merely an attempt by the State to obtain from users of the heavier class of commercial vehicles some compensation for the special damage which they do to the roads. It is the kind of charge which was indicated to be permissible by *Dixon* C.J., *McTiernan*, *Williams*, *Webb* and *Fullagar* JJ. in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (2). On analysis the Act does not claim full compensation for the damage done but only a contribution towards that compensation. The *Commercial Goods Vehicles Act* 1955 proceeds on entirely different lines from the *Transport Regulation Act* 1954 held not to apply to vehicles used in the course of inter-State trade in *Armstrong* v. *State of Victoria* (3). To begin with, the present Act is a general

(1) (1955) 93 C.L.R., at pp. 170, 172.
(2) (1955) 93 C.L.R. 127.
(3) (1955) 93 C.L.R. 264.

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law of the State of Victoria which takes in all operators who use Victorian roads with heavy commercial vehicles. It does not prescribe a specific code applicable to inter-State transport operators. The judgments of this Court above referred to establish that a charge imposed as a real attempt to fix a reasonable recompense for wear and tear caused to the road is not inconsistent with s. 92 of the Constitution. The real point of difference in the Court is that the Judges who held that a charge might validly be imposed did so on the basis that there was a real difference between a charge imposed on an individual for a particular service which he actually uses and a charge of a general kind imposed on a taxpayer irrespective of whether he uses the service provided or not. [He referred to *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1); *Armstrong* v. *State of Victoria* (2); *South Australian Harbors Board* v. *South Australian Gas Co.* (3).] Under s. 30 of the Act the whole of the proceeds of the charge are to be devoted to the maintenance of public highways. The method of collection set out in ss. 27, 28 and 29 of the Act involves no interference with the actual journey of an inter-State transport operator. The rate of charge, being fixed by the Act, is known to the operator before he commences his journey and the total charge for the journey can be easily calculated. The charge bears on its face the marks of moderation. It is based on only forty per cent of the load capacity of the vehicle. Independently of evidence the Act itself establishes the constitutional validity of the charge. Firstly, the Act shows that the charge is related to the actual use of the road and to the wear and tear caused. The deliberate expression of the view of the legislature as to the nature of the charge is not to be lightly disregarded. Secondly, the exemptions provided by the Act do not affect the true nature of the charge as it is otherwise disclosed by the Act. If there is power to impose a charge it must carry with it the power to make exemptions provided that the charge paid by those who are liable is not thereby loaded. The Act is not a railway protection Act. There are many thousands of vehicles of a capacity of less than four tons which are competing with the railways. No adverse inference can be drawn from the exemption of vehicles carrying perishable goods and livestock. Large quantities of such goods and livestock are carried by the railways. Nor can any inference be drawn from the exclusion of commercial passenger vehicles which are dealt with in Pt. II of the *Transport Regulation*

(1) (1955) 93 C.L.R., at pp. 177-179, 190 et seq., 208 et seq.
(2) (1955) 93 C.L.R., at pp. 273, 276, 277, 282, 283, 285, 286.
(3) (1934) 51 C.L.R. 485, at pp. 490, 491, 499, 501, 503-505.

Act. Such vehicles pose separate problems. In fixing a charge it is impossible to regard the roads of the State except as one general network which every operator, intra-State or inter-State, is entitled to use at will. If, on its face, the Act satisfies the constitutional requirements, the onus would be on the plaintiffs to show that in some way the Act so operates as to render their trade unfree. [He referred to *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1).] The *Motor Car Act* 1952 which exempts from the necessity of registration vehicles registered in other States contains identical relevant provisions to those declared valid by this Court in *Willard* v. *Rawson* (2).

D. I. Menzies Q.C. (with him *J. McI. Young*), for the defendants the Transport Regulation Board and Selwyn Havelock Porter. Part II of the *Commercial Goods Vehicles Act* 1955 is of the same character as a Victorian statute enacting that every person using a Victorian road who damaged that road should be liable to pay the State compensation for the damage caused. In the United States a distinction has been drawn between a charge for use of and a charge for the privilege of using State highways. [He referred to *Capitol Greyhound Lines* v. *Brice* (3).] It is submitted that in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (4) *Kitto* and *Taylor* JJ., in expressing a view that no charges were permissible, approached the matter from the point of view of a privilege tax: see per *Kitto* J. (5) and per *Taylor* J. (6). The Court should have regard to the declaration of the legislature as to the nature of the charge. [He referred to *Abitibi Power & Paper Co. Ltd.* v. *Montreal Trust Co.* (7); *R.* v. *University of Sydney*: *Ex parte Drummond* (8).] The plaintiffs did not adduce any evidence that the charge operated as an excessive charge. Some latitude is to be allowed to the legislature in fixing the charge. Nothing more than a rough judgment is required. [He referred to *Capitol Greyhound Lines* v. *Brice* (9).] The use of evidence in determining the validity of charges of this character has been discussed in the Supreme Court of the United States. [He referred to *Hendrick* v. *State of Maryland* (10); *Interstate Transit Inc.* v. *Lindsey* (11); *Capitol Greyhound Lines* v. *Brice* (12).] If evidence may be

(1) (1955) 93 C.L.R., at p. 194.
(2) (1933) 48 C.L.R. 316.
(3) (1950) 339 U.S. 542, at p. 557 [94 Law. Ed. 1053, at p. 1062.]
(4) (1955) 93 C.L.R. 127.
(5) (1955) 93 C.L.R., at pp. 220-223.
(6) (1955) 93 C.L.R., at pp. 238-239.
(7) (1943) A.C. 536, at p. 548.
(8) (1943) 67 C.L.R. 95, at p. 113.
(9) (1950) 339 U.S., at pp. 546, 550, 552-553, 554-555 [94 Law Ed., at pp. 1057, 1059, 1060, 1061.]
(10) (1914) 235 U.S. 610, at pp. 622 et seq. [59 Law. Ed. 385, at p. 391 et seq.].
(11) (1931) 283 U.S. 183 [75 Law. Ed. 953.]
(12) (1950) 339 U.S., at p. 547 [94 Law. Ed., at p. 1057.]

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considered, the evidence here indicates that the charge is what it is described to be, that it is reasonable and that if there is added to the charge what the average vehicle pays by way of registration and half of the contribution to the petrol tax, the total is always less than the estimate of damage attributable to that vehicle.

R. R. St. C. Chamberlain Q.C. and *W. A. N. Wells* for the State of South Australia, addressed the Court as *amici curiae.*

J. D. Holmes Q.C., in reply.

Aug. 30.

The following written judgments were delivered:—

DIXON C.J. This suit is brought in the original jurisdiction of the Court for the purpose of attacking the validity of certain provisions of Victorian law affecting the liability to pecuniary exactions of persons carrying goods in motor vehicles in the course of inter-State trade. In the first place the validity is attacked of the provisions of Pt. II of the *Commercial Goods Vehicles Act* 1955 (No. 5931) of Victoria in so far as those provisions purport to require the owners of vehicles engaged in inter-State trade to pay a charge. In the second place the validity is attacked of the provisions of the *Motor Car Act* 1951 (Act No. 5616) as amended in so far as they purport to apply to owners operators or drivers of commercial goods vehicles used on highways in Victoria in the course of inter-State trade and to require the payment of the fees set out in pars. B (*b*) and (*c*) of the second schedule. Since the issue of the writ the second schedule has been replaced by another: see Act No. 6038. But the attack has been continued on the footing that the substituted schedule now applies.

The plaintiffs sue as representative parties. They purport severally to represent groups of persons all possessing a common interest because they engage in the inter-State carriage of goods, but grouped according to membership of certain associations. Such a form of representation may be open to objection but no objection was in fact taken to the constitution of the suit. As it was constituted not only were the State of Victoria and its Transport Regulation Board named as defendants but the Chief Commissioner of Police as representing the police force. This seems a novel and objectionable course, but we are not called on to consider it.

Except for the allegation that the provisions attacked burdened inter-State commerce the defendants admitted the facts pleaded in the statement of claim. In justification of the charge under Pt. II

of the *Commercial Goods Vehicles Act* 1955 of which the plaintiffs complained the defendants pleaded that the charge is no more than a reasonable recompense or compensation for the use of the roads in Victoria by the vehicles in respect of which it is imposed or a reasonable contribution to road maintenance for the wear and tear caused to the roads by such vehicles. An analogous plea was set up with respect to the fees which the *Motor Car Act* 1951 as amended was expressed to make payable on registration.

Both the sufficiency in law and the correctness in fact of these justifications were put in issue by the plaintiffs. The parties agreed that a convenient course would be to lead evidence before a single judge and upon that evidence to have the case argued before the Full Court. The action came on for trial before *Taylor* J. accordingly and at the conclusion of the evidence his Honour pursuant to s. 18 of the *Judiciary Act* 1903-1955 directed the case to be argued before the Full Court upon the evidence before him.

At the argument the weight of the attack was directed against the validity of Pt. II of the *Commercial Goods Vehicles Act* 1955 although of course ss. 6 and 17 and the material parts of the second schedule of the *Motor Car Acts* as affecting inter-State transport of goods did not escape challenge.

The provisions of Pt. II of the *Commercial Goods Vehicles Act* were treated as an attempt by the Victorian legislature to take advantage of the view expressed in the joint judgment of *McTiernan* and *Webb* JJ. and myself (1) and in the respective judgments of *Williams* J. (2) and *Fullagar* J. (3) in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (4) that the freedom of trade commerce and intercourse among the States which s. 92 assures is not necessarily incompatible with the States obtaining from inter-State carriers by road some contribution towards the upkeep of the highways they use. In each of the three judgments mentioned there is a discussion of the reasons why without impairing the freedom of inter-State trade commerce and intercourse a State may require inter-State carriers to pay some contribution to the maintenance of the roads used, and there is a consideration of the nature of, and the limits upon, the charge that might be made. *Kitto* J. and *Taylor* J. adopted the contrary view. *Kitto* J. expressed his conclusion thus—" Neither in reason nor upon authority have I found it possible to reconcile the freedom which s. 92 decrees for trade, commerce, and intercourse among the States with the existence in a State legislature of a power to make a compulsory levy

(1) (1955) 93 C.L.R., at pp. 171-179.
(2) (1955) 93 C.L.R., at pp. 190-195.
(3) (1955) 93 C.L.R., at pp. 208-211.
(4) (1955) 93 C.L.R. 127.

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upon an individual as a condition, or by reason, of his traversing the roads of the State in the course of an inter-State journey" (1). His Honour proceeded to give reasons for this conclusion, reasons it must at once be admitted which must strike the mind as possessing prima facie great logical force, deriving as they do from a simple position. It is the position that whatever restrictions, consistently with s. 92, you may "apply to some individuals for the sake of others so that their possibly conflicting interests may be mutually adjusted" (2), you cannot say that if a trader engages in an inter-State activity he must make a payment of money without moving into a different field; you must deny that he may enter as of right and make a law having a direct adverse operation upon the activity, in short burden it with tax.

It may be said that *Kitto* J. regarded it as neither logically proper nor practically possible to draw a distinction between a compulsory charge for the use of the roads as a facility or service and such a tax. "The whole matter seems to me to come down to this", said his Honour. "A State law imposing a compulsory levy upon an individual by reference to his use of something belonging to or provided by the State must necessarily depend upon the existence in the State legislature of one of two powers: either a power to exclude that individual from that use, or a power to tax him upon that use. That s. 92 prevents the taxation of inter-State trade, commerce, and intercourse, is obvious. That it prevents the exclusion of individuals from the use of the public roads in the course of inter-State trade, commerce, or intercourse, except by a law that is regulatory in the relevant sense of that word, the Privy Council has conclusively laid down" (3). (See *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (4)).

Taylor J. carried the same reasoning a step further. His Honour dealt with the argument that to require an inter-State operator to pay for his use of the road was no more than to levy charges for facilities provided and that "since those operators receive money's worth in return for the payment of the charges, they are not subjected to any unconstitutional burden" (5). This line of reasoning *Taylor* J. regarded as containing a fallacy which would appear from a consideration of the manner in which public revenues may be raised. His Honour first discussed the raising of revenue for general or special purposes either throughout the State or upon or in relation to particular persons or classes of persons, and the possibility always of saying broadly that those paying taxes pay "for

(1) (1955) 93 C.L.R., at p. 216.
(2) (1955) 93 C.L.R., at pp. 218, 219.
(3) (1955) 93 C.L.R., at p. 225.
(4) (1955) 93 C.L.R., at pp. 216-225.
(5) (1955) 93 C.L.R., at p. 238.

services or facilities received, or to be received, or for the carrying out of public works which they, as members of the community, or of some special class, enjoy or will enjoy" (1). His Honour then expressed his general conclusion as follows—" Perhaps this conception is more readily recognizable when a tax is levied for a special purpose upon those persons whose special benefit it is thought the purpose will serve. But whatever course is adopted the power to levy imposts or taxes is subject to the constitutional limitation which arises from the terms of s. 92 and it seems clear to me that any impost or tax, or so-called charge, whether levied upon a limited class for special purposes or by way of contribution to a tax for general purposes, which is made payable as a condition of engaging in or carrying on inter-State trade, must offend against s. 92 " (1). (See *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (2)).

The primary case for the plaintiffs is that the views of *Kitto* J. and *Taylor* J., which formed part of the *ratio decidendi* by which those learned judges reached their judgment in the case, are correct and that such views should receive effect in the present case. The contrary views expressed by the other members of the Court, the plaintiffs say, went beyond what was strictly necessary for the decision of the case and the plaintiffs attack them as erroneous. But the plaintiffs go further and contend that the provisions contained in Pt. II of the *Commercial Goods Vehicles Act* 1955 go outside the conditions which the judgments of the majority of the Court contemplated as essential to the validity of any charge made upon inter-State carriers for using the roads so that on any view Pt. II cannot be supported.

The heading of Pt. II is " Contributions to Road Maintenance ". The central provision of the Part is sub-s. (1) of s. 26 which enacts that the owner of every commercial goods vehicle shall, as provided by the Part, pay to the board towards compensation for wear and tear caused thereby to public highways in Victoria a charge at the rate prescribed in the fourth schedule. That schedule provides that the charge to be paid in respect of every vehicle shall be one-third of a penny per ton of the sum of—(*a*) the tare weight of the vehicle ; and (*b*) forty per cent of the load capacity of the vehicle—per mile of public highway along which the vehicle travels in Victoria.

A second sub-paragraph of the fourth schedule provides that in assessing the charge fractions of miles and fractions of hundredweights shall be disregarded, but hundred-weights (in relation both

(1) (1955) 93 C.L.R., at p. 239.

(2) (1955) 93 C.L.R., at pp. 236-240.

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to tare weight and load capacity) are to be taken into account as decimals of tons. The expression " commercial goods vehicle " means (as does the word " vehicle " itself) a motor car (together with any trailer) carrying goods for hire or reward or for any consideration or in the course of any trade or business: s. 2. There is an immaterial exclusion from the definition. The exclusion is of a primary producer's vehicle of not more than two tons load capacity when used solely for his business of primary producer.

The " board " to which the charge is to be paid is the Transport Regulation Board under the *Transport Regulation Act* 1955 (No. 5930).

Section 25 excludes from the operation of Pt. II vehicles of not more than four tons load capacity. If a trailer is attached its capacity is included in the measurement. Section 25 also excludes vehicles used for the carriage of certain commodities. It will be necessary to say more of this later but for the moment it can be passed by. A definition gives means of readily determining load capacity: s. 2.

There are provisions dealing with the enforcement and collection of the charge. The liability to pay it accrues from the actual use of the road and the amount is quantified by the length in Victoria of the journey. Payment is not exacted as a condition precedent to carrying the goods or entering upon or continuing the journey. Sub-section (2) of s. 26 provides that the charge shall become due at the time of the use of any public highway by the vehicle and if not then paid shall be paid and recoverable as provided in the Part. Sub-section (3) makes the charge a civil debt due to the board by the owner of the vehicle and recoverable summarily or in any court of competent jurisdiction. Failure to pay is also included among the offences which s. 31 creates. Conviction for an offence is an occasion upon which the court may order payment to the board of any amount which the evidence shows to be unpaid: s. 32. Records must be kept by the owner of a commercial goods vehicle of his journeys in Victoria and must be sent to the board together with the amount owing for charges, subject to any arrangement with the board: ss. 27, 28 and 29.

Section 30 which consists of two sub-sections is of sufficient importance to set out. It is as follows:—" (1) All moneys received by the Board by way of charges under this Part shall be paid into the Country Roads Board Fund to the credit of a special account to be called the 'Roads Maintenance Account'. (2) Money to the credit of that account shall be applied only on the maintenance of

public highways (including grants to municipalities for that purpose)."

From the foregoing certain cardinal features of the charge are evident. In the incidence of the charge there is no distinction between commercial goods vehicles which pass over the border and those which do not. The rate of the charge is a third of a penny a ton mile calculated on the tare weight and two-fifths of the load capacity of the vehicle. It applies only to vehicles of more than four tons load capacity, that is to heavy lorries and the like whose use of the road might be supposed to make a considerable contribution to the increase of the costs of maintenance. In the next place the amount of the charge depends on the distance covered in Victoria. Then the proceeds of the charge must go to the credit of a Roads Maintenance Account formed in the Country Roads Board Fund and money to the credit of that account must be applied to the maintenance of public highways either directly or through municipalities. Lastly the charge is according to s. 26 (1) a payment "towards compensation for wear and tear caused by commercial goods vehicles to public highways in Victoria". It might be wrong to accept this description of the charge as providing in itself a demonstrative reason for concluding that the charge is simply compensatory, but it is given additional force by the requirement of s. 30 (2) that the money shall be applied only to the maintenance of public highways. The expression "maintenance" is not defined in the statute itself but the Country Roads Board Fund is an account established in the Treasury by s. 38 of the *Country Roads Act* 1928 and s. 14 of that Act contains a definition of the term which would confine the expenditure to keeping roads in the condition they possessed when constructed, or if a road has since been improved, in its improved condition. It is a definition which, while not in terms made directly applicable, shows what the legislature means.

A matter that is to be noted is that the rate of the charge is uniform and does not vary with the class of road traversed or with its susceptibility to damage from the axle load of the vehicle or with its sufficiency, in point of design, construction or maintenance, to bear the axle load.

The inquiry whether the charge may be lawfully imposed consistently with s. 92 may conveniently be divided into two parts. There is first the question whether there is any description of charge for using its roads that a State may impose upon transport including inter-State transport without infringing upon the freedom assured by s. 92. If so, there is then the question whether the charge now in question is of the permissible description.

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No one can be more alive than I am to the difficulties of the first of these questions but the full re-examination which the subject has received in the present case has not led me to repent of the views expressed upon it in the reasons of *McTiernan* J., *Webb* J. and myself in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1). Accordingly I wish to begin by incorporating those pages in this judgment by reference. In what follows I shall endeavour to avoid repeating what they contain. The reasoning there appearing does not however go back to the more abstract propositions from which *Kitto* J. begins in stating the grounds of his opinion on this question in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (2). As will be seen from the citations which his Honour gives, I have long understood the words of s. 92 in the sense which *Kitto* J. describes. Any abstract restatement of the meaning of the law is however exposed to misconstruction and moreover time must disclose that this or that aspect deserves greater emphasis than was foreseen. In *McCarter* v. *Brodie* (3) I spoke of what I had written in the case of *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (4) and to that I wish only to add that, if that dissenting judgment and the dissenting judgment in *Willard* v. *Rawson* (5) have now acquired any authority, what is important for present purposes to notice is the statement in the latter judgment (6) of the doctrine prevailing in the United States with reference to motor transport between States and the terms in which it is rejected as inapplicable to s. 92. There occurs in the citation the following passage—" If a statute fixes a charge for a convenience or service provided by the State or an agency of the State, and imposes it upon those who choose to avail themselves of the service or convenience, the freedom of commerce may well be considered unimpaired, although liability to the charge is incurred in inter-State as well as intra-State transactions. But in such a case, the imposition assumes the character of remuneration or consideration charged in respect of an advantage sought and received " (7). In the judgment in *O. Gilpin's Case* (4) the fact that the interference must amount to a restriction or burden is made the first consideration (8) and by way of example of what is not a burden the illustration is given of tolls on a bridge (9).

It was not until the decision of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 1] (10) that any

(1) (1955) 93 C.L.R., at pp. 171-179.
(2) (1955) 93 C.L.R., at p. 217.
(3) (1950) 80 C.L.R. 432, at p. 467.
(4) (1935) 52 C.L.R. 189.
(5) (1933) 48 C.L.R. 316.
(6) (1933) 48 C.L.R., at pp. 333, 334.
(7) (1933) 48 C.L.R., at p. 334.
(8) (1935) 52 C.L.R., at p. 204.
(9) (1935) 52 C.L.R., at p. 206.
(10) (1955) A.C. 241; (1954) 93 C.L.R. 1.

question could arise as to the nature or extent of the conception underlying these statements. Now, as it appears to me, the developments which have occurred in the intervening years show that the conception was neither sufficiently emphasised nor defined. Indeed the question may perhaps be said to be whether the conception should be expanded and applied to roads.

When it is said that a toll upon a bridge, to take the example mentioned, does not burden inter-State commerce, it does not mean that the payment is not borne by the traffic or that the payment is so small that its incidence cannot be felt. It means that the payment is of such a kind that it is no impairment of the freedom of commerce or of movement if you are required to make it. The *Air Navigation Regulations* do not impose a burden on inter-State air navigation when they forbid the use of an aerodrome if it is neither under the control of the Director-General of Civil Aviation nor licensed by him and when at the same time they require the payment of charges for the use of aerodromes, air routes and airway facilities maintained and operated by the Commonwealth: (cf. regs. 89 and 104). Nor do State laws empowering harbour authorities to impose a tonnage rate on inter-State ships berthing at wharves or a charge upon the goods unshipped necessarily burden inter-State commerce.

Although the payments are exacted under the authority of the law from parties engaged in inter-State commerce who must incur the charges if they are to pursue the inter-State transactions, yet there is no detraction from the freedom of inter-State commerce. The reason, as I venture to suggest, simply is that, without the bridge, the aerodromes and airways, the wharves and the sheds, the respective inter-State operations could not be carried out and that the charges serve no purpose save to maintain these necessary things at a standard by which they may continue. However it may be stated, the ultimate ground why the exaction of the payments for using the instruments of commerce that have been mentioned is no violation of the freedom of inter-State trade lies in the relation to inter-State trade which their nature and purpose give them. The reason why public authority must maintain them is in order that the commerce may use them, and so for the commerce to bear or contribute to the cost of their upkeep can involve no detraction from the freedom of commercial intercourse between States. It is not because the charges are consensual for plainly they are imposed by law; if the conditions are fulfilled that the law prescribes, a liability arises. It is not because they are based on property. Indeed the instruments of commerce in question

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are public works often subject to and complicated by a combination of authorities.

Once however it appears that, under colour of the law, the charge is imposed not for the purpose of obtaining a proper contribution to the maintenance and upkeep of the work but for the purpose of adversely affecting the inter-State commerce, then whatever its guise it is called in question by s. 92 as an infringement of the freedom of trade commerce and intercourse among the States.

I was never able to share the view that because the State was responsible for providing and maintaining both railways and roads it was open to the State without impairing the freedom of inter-State commerce to impose a restraint or control on the carriage of goods or persons by road and so, as it was called, to " co-ordinate " the passenger or goods traffic between the two. I could not see how it was consistent with s. 92 whether done by a licensing system or by some other means of restriction. Now, of course, that proposition has been definitely overruled. But it is one thing to say that the fact that the State provides the roads does not mean that a restraint or restriction by the State of the carriage of goods or persons over them is no detraction from the freedom of trade commerce and intercourse among the States. It is another thing to say that the constitutional assurance of that freedom means that no part of the expense of providing the roads may be thrown directly upon the traffic using them in the course of trade including inter-State trade.

The idea that because the State provided roads and railways the State could so to speak control the distribution of inter-State traffic in goods and passengers between the two means of transport seems to have its source in the traditional belief that a man may do what he likes with his own and in the tacit assumption that the State does not, in such a matter, differ from a man. But it is an idea that has been put aside once for all. Nevertheless the question still remains whether the State, considered as an institution of government, must look to its general resources of revenue not only in order to provide the highways but also to maintain them and can demand no contribution from the commerce that uses them if the commerce be inter-State. The question depends, in one view, upon our notion of what is freedom of inter-State commerce and in another view upon our conception of the place taken among the instruments of commerce of roads constructed to carry motor traffic of all kinds. One may suppose that, if the governments concerned combined to construct a new roadway between Melbourne and Sydney of the most modern kind capable of bearing heavy traffic,

s. 92 would have nothing to say to a decision on the part of the governments that it should not be constructed or opened as a free public way but only as a toll road so that the annual charges for interest and costs of maintenance should be borne by the traffic that chose to use it. Such a road would of course clearly fall within what was said in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1) viz. " A modern highway is in fact a constructional work of a very substantial character indeed. It cannot be distinguished from the facilities that have been mentioned either in cost, the technical and engineering skill it demands or the general purpose it serves. It is an engineering work of a major description designed to carry heavy motor vehicles between distant places " (2).

It would be true that the old roads would remain as alternatives to the traffic. It would be true too that the new road would not have been dedicated to the public as a highway and would not otherwise have come directly under the law of public highways. But how far are these two matters elements determining the character of the toll as nothing but compensation for " the use of a physical thing provided for the service of commerce "? For I venture to say that the toll supposed must bear that aspect and not be regarded as an unconstitutional burden upon the freedom of inter-State trade. The alternative choice of the old road would speedily become unreal. And the law of public highways is State law which, unless s. 92 is to be construed as rendering it unchangeable, the State Parliament may change or abolish as it sees fit.

The truth is that we cannot, in this problem, ignore the ultimate financial relationship between the road and the traffic. If the road were made by concessionaires under a franchise we would say that but for the right to levy tolls the road would not exist and that because the road performed a special service to the traffic, the traffic must pay the tolls. The illustration is of course far from the present case ; for we are concerned not with a modern highway of such a description or with toll roads, but with a ton mileage charge for all Victorian highways. The value of the illustration is that by its very obviousness it directs the mind to what must, as it seems to me, be the true point of the present question. The true point must lie in the recognition of the completely interdependent relation between modern transport and modern roads, not only as a matter of engineering but also as a matter of finance. The success of transport by road depends upon the state of the roads and the state of the roads depends upon the expenditure upon them,

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

(2) (1955) 93 C.L.R., at p. 178.

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expenditure in reparation, for the most part, of the wear and tear upon them caused by the transport.

I believe that the logic of the relationship has led very many countries to place a great part of the cost of highways upon the traffic that uses them. Here it is done by, (1) the contributions made under the *Commonwealth Aid Roads Act* 1954-1955 out of the customs and excise duties mentioned in the schedule to that Act, which in effect are levied on motor fuel, (2) registration fees and (3) levies more or less analogous to that now in question. In America the pattern that obtains and has obtained can be sufficiently seen from the case cited in the argument of *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1) and particularly from the opinion of *Frankfurter* J. and the schedule thereto in *Capitol Greyhound Lines* v. *Brice* (2).

In the light of the considerations to which I have referred in the foregoing and, more particularly, of those stated in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (3), it appears to me that the imposition of a charge for using the roads of a State is not necessarily inconsistent with the freedom of inter-State commerce.

But it is evident that such a charge must not go outside or beyond the limitations which are necessarily implied in that conception of its nature which forms its justification. That conception is that if the charge is no more than a fair recompense for the actual use made of the highway having regard, not only to the wear and tear to which every use of it contributes, but to the costs of maintenance and upkeep, its imposition may not be incompatible with the freedom guaranteed by s. 92. As the cases in the United States suggest, it is not possible consistently with s. 92 to impose a tax on a man in respect of his right to engage in the inter-State carriage of goods or people. It is another thing, however, to require him to pay for the actual use he makes of the road. Again, to impose the capital costs of road construction upon the traffic would not seem consistent with s. 92. Traffic is a constant flow and the regularly recurring charges of maintaining a surface for it to run upon may be recoverable from the flowing traffic without any derogation of the freedom of movement; but any contribution to capital expenditure goes altogether outside such a principle. The charge moreover must be a genuine attempt to cover or recover the costs of upkeep. It may of course be arrived at by a pre-estimate; and an *ex post facto* discovery of error in the pre-estimate will not necessarily

(1) (1955) 93 C.L.R., at pp. 140-143.
(2) (1950) 339 U.S. 542 [94 Law. Ed. 1053.]
(3) (1955) 93 C.L.R., at pp. 171-179.

mean that the pre-estimate was not genuine. When in respect of the amount of the charge it is said that it must be reasonable that means reasonable in relation to its nature and purpose. If a ton mileage rate is in question it must be reasonable as a proportionate contribution made by the description of vehicle by reference to which the contribution is fixed, that is to say a proportionate contribution to the recovery of those costs of upkeep the bearing of which by the traffic cannot be said to impair the freedom of inter-State transport. Obviously a State cannot single out inter-State transport from transport generally for a particular charge. The places where a journey begins or ends have no bearing on the justness of a compensatory charge made for using the road.

The passage which as I have already said must be read into this judgment from that in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1) concludes (2) with a reference to the difficulties necessarily arising in working out the distinction between, on the one hand, recompense or remuneration for the provision of a specific physical service of which particular use is made and, on the other hand, a burden placed on inter-State transportation in aid of the general expenditure of the State. The careful argument in this case on the part of the plaintiffs was of course not directed to diminishing or solving the difficulties; but it had a particular value as an exposure of latent questions to which any practical measure must give rise. Nevertheless I am confirmed in the view that it is " necessary to draw the distinction and ultimately to attempt to work out the conception so as to allow of a charge compatible with real freedom because it is no more than a fair recompense for a specific facility provided by the State and used for the purpose of his business by the inter-State trader " (3).

It will have been observed that the tonnage rate of one-third of a penny a mile is charged upon the whole journey by s. 26 and the fourth schedule of the *Commercial Goods Vehicles Act*. In the case of an inter-State journey it may well begin at the warehouse door of the suburb of a capital city and end in a country town of a neighbouring State. The beginning and the end of the journey may involve ill-made and insufficient streets and the middle of the journey a main road or State highway. Is a flat rate charge " justifiable " for the whole journey ? At each end the State may have provided bad roads and, owing to their insufficiency, the axle weight of the vehicle may have done them great injury. The

(1) (1955) 93 C.L.R., at pp. 171-179.
(2) (1955) 93 C.L.R., at pp. 178, 179.
(3) (1955) 93 C.L.R., at p. 179.

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middle of the journey may have been over an expensive but satisfactory road and the wear and tear slight. Infinite variations of the theme are possible but this illustration is enough to make it clear. Is it consistent with the theory that a proper charge by way of compensation for using the roads is not incompatible with freedom of transit to impose a flat tonnage rate per mile in disregard of all the varying roads and circumstances? It is easy, in answer to the question, to say that the exigencies of a busy and practical world do not admit of any nicer treatment of individual cases. But such an answer may draw the retort that it only shows how impossible the distinction is. The point however is met by other considerations. There is only one charge it is true, a third of a penny a ton per mile. But it is not a flat rate per vehicle. The load capacity of the vehicle must, to begin with, be at least four tons. That implies a vehicle that is not light. As the load capacity goes up, the weight of the vehicle increases and so does the amount payable. The limit of loaded weight in Victoria is an axle weight of 17,000 lbs. and for particular roads this may be reduced by proclamation; (see s. 32 (1) (*g*), (3) and (4) of the *Motor Car Act* 1951 (No. 5616)). If you add to this the general probabilities to which conditions in Victoria give rise, it is a reasonable conclusion that, unless in relation to the more frequented inter-State routes the rate is excessive, then the complaint ought not to be made that it is excessive in relation to other highways.

In the next place it is to be noted that an arbitrary percentage (forty per cent) of the load capacity is adopted as that to be added to the tare weight. Is it " reasonable " to adopt such a standard? Does it satisfy the requirement that there should be a reasonable relation between the charge and the purpose, viz. a contribution to upkeep commensurate with the use made of the roads and the consequential wear and tear? Here again general considerations must be taken into account. The loads carried by any given vehicle must vary. It is not " unfair " to calculate the charge on a basis which experience suggests as the likely average of the loads carried by vehicles, in a matter where exact statistical investigation and the assessment of each individual load are alike out of the question. By " unfair " is meant a course likely to result in an unwarranted burden upon the commercial journeys of individuals incommensurate with the purpose of obtaining no more than recompense for the use of the highway.

Then it was said that the Act was not expressed to be temporary, that it imposed a fixed rate without provision for change and, even if its amount appears now not to be incompatible with s. 92,

a change of conditions may give it an entirely different effect. To that it must be answered that if now there is no interference with the freedom of inter-State trade commerce and intercourse there cannot be any present violation of s. 92. If tomorrow the facts change so that the operation of the enactment changes too and s. 92 is violated (an hypothesis making some demands on credulity) then s. 92 will doubtless prevail over it.

Next it was said that close consideration of the operation of s. 4 and the list in the second schedule and comparison with s. 25 (*b*) and the exemptions in the third schedule together with s. 25 (*a*) raise a sufficiently persuasive inference that the *Commercial Goods Vehicles Act* 1955 had for its real object the protection of the railway system. It appeared with enough certainty, so it was said, that the right to a licence was given to intra-State traffic only where the railways do not provide its needs and that the incidence of the charge corresponded in pattern. It may be remarked that s. 4 and the second schedule go back in effect to the *Transport Regulation Act* 1933 (No. 4198) s. 22 (*h*) and third schedule. But as that Act had for one of its purposes the protection of the railways, perhaps the early beginning of these provisions is of little importance. What is of importance is that the argument is based on the policy attributed to exemptive and entitling provisions; from their nature it is sought to give to the charge a complexion obnoxious to s. 92. It does not give any new or different feature or application to the charge. The argument seems to lack a sufficient basis for an adverse conclusion as to the motive of the legislature; and even if the inference were drawn it would amount really to another example of reliance upon what *Isaacs* C.J. called "legislative *mens rea*" as a ground for bringing a statute within s. 92.

The most serious objection to the validity of the charge lies in the fact that it is named in the statute as an unexplained figure. If calculations are made with reference to imaginary journeys to the New South Wales or South Australian border from Melbourne of vehicles of various axle weights and loading capacities, it will be found that there is no prima facie reason for suspecting that the incidence of the charge is harsh or prohibitory. But there is no positive ground on the face of the legislation for associating the quantum of the rate with the actual cost of the maintenance and upkeep of Victorian roads. If it matters we were informed from the bar that no report or statement of figures was placed before the legislature showing the process by which the rate was reached. In these circumstances the defendants (the State of Victoria and the board) went into evidence for the purpose of proving that the rate

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is not excessive but falls within the limits imposed by the considerations to which I have adverted and that it is in the sense explained " reasonable ". A first scrutiny of the basis of calculation seemed to justify the contention. But the closer criticism to which the evidence was subjected by Mr. *Menhennitt* greatly weakened its cogency. It would be tedious to go over the question in detail. But there were some points made against the process of estimation with which I cannot agree. In the first place I think it was quite proper to disregard the fact that a proportion of road costs are met from rates. That cannot operate in relief of those using the roads for the purposes of their business. In the second place there is no reason for excluding from the figures for maintenance the estimate of what ought to have been expended but had not been expended. Nor is the argument sound as to the need of taking into account a correlative reduction in the ensuing year.

On the whole I think the defendants made out their case that the rate adopted in the fourth schedule of the Act was in fact of an order imposing upon the class of vehicles and owners falling within its application no more than a reasonable charge by way of compensation or recompense for the use actually made of the roads; one falling fairly enough within the description of s. 26 (1), viz. " towards compensation for wear and tear caused thereby to public highways in Victoria ".

The attack on Pt. II of the Act has certainly revealed weaknesses in the manner in which it is constructed but on the whole I think the proper conclusion is that the charge it imposes does not involve an inconsistency with s. 92.

The second question in the suit relates to the *Motor Car Acts* 1951-1956 (Vict.), ss. 6, 17 and 20 and pars. B (*b*) and (*c*) of the second schedule together with reg. 59 of the *Motor Car Regulations* (Victorian *Government Gazette* 1952, No. 838, p. 5963, 1954, No. 686, p. 5291). The question is whether consistently with s. 92 vehicles exclusively employed in carrying goods in the course of inter-State trade can fall within the application of so much of s. 6 of the *Motor Car Acts* 1951-1956 (Vict.) as requires the payment of the appropriate fees prescribed by the second schedule.

The provision imposing the requirement is expressed in general terms but if it cannot constitutionally apply to vehicles exclusively engaged in inter-State trade there can be no question of the general invalidity of the provision. Victorian law contains a general " severability provision " (Act No. 3930) and inasmuch as the schedule and so much of s. 6 as imposes the liability to payment clearly have a distributable operation or application, it would mean

no more than that such vehicles were not covered. There is of course no question that vehicles engaged in intra-State trade must comply with the registration provisions other than that imposing a liability to pay fees. Further, vehicles entering Victoria but registered in other States or parts of Australia are not involved. For reg. 59, made under s. 20, exempts a motor car temporarily in Victoria from the obligation to register and pay registration fees provided it is registered and insured in accordance with the laws of another State or a Territory and bears the registration plate and label if any, of that State or Territory.

Again there can be no doubt, and in fact it is not denied, that s. 6 and the second schedule, which impose the liability to pay registration fees, apply in full to motor vehicles which, though engaging in inter-State trade, do not do so exclusively. The question is confined to motor vehicles which depend upon a Victorian registration and are exclusively employed in inter-State trade. This does not mean that the owner of the motor vehicle or its driver must reside in Victoria ; s. 18 says they need not. It means that according to Victorian State law the vehicle has no other title to be on the highway than a Victorian registration. Section 17 (*a*) provides that if a motor car or trailer is used on a highway without being registered as required by Pt. II, which relates to registration, the driver is guilty of an offence, unless he can make out one of certain defences none of which is material here.

Sub-section (4) of s. 6 says that, subject to the Act, a fee, as provided for in the second schedule, shall be paid on the registration of or the renewal of the registration of a motor car, motor cycle or trailer. The registration is effective for twelve months only : sub-s. (3). The second schedule must now be found in Act No. 6038 but except that the fees specified are fifty per cent higher it is the same as that standing in the *Motor Car Act* 1951 when the writ was issued. The schedule fixes fees which are to be calculated on the power-weight units of the car. To obtain the power-weight units of a car you add the horsepower to the weight in hundredweights of the car unladen and ready for use. The schedule contains a list of rates varying for different descriptions of vehicle. A not immaterial matter is that the kinds of vehicles which concern the plaintiffs are described according to the use made of them. The very definition of " motor car " in s. 3 (1) of the Act includes the attribute that the vehicle is " used or intended for use on any highway ". Sub-paragraph (*b*) of par. B of the schedule prescribes the rates " for a motor car used for carrying passengers for hire . . . or used for carrying goods or (subject to an exception in favour

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of primary producers) in the course of trade ". Then there is a list of rates which ascend with the weight of the car and also if the wheels are six or more and not four and again if the tires are not pneumatic. For present purposes it is enough to give the rates in par. B (*b*) for a vehicle with less than six wheels but having pneumatic tires. If the motor car is less than two tons in weight unladen, for each power unit the rate is six shillings; if two tons and less than three tons, seven shillings and sixpence, and if three tons or more, nine shillings.

All registration fees go into the Country Roads Board Fund (s. 38 (*d*) as substituted by s. 6 (1) of Act No. 5512); the application of that fund is wider than maintenance of highways (see s. 39).

Although the provisions of the Act and of the regulations are framed on the footing that it is the owner who will register a car and pay the registration fee there is no penalty upon ownership or possession of an unregistered motor vehicle. Driving the car on the highway without registration is the act to which the penalty is attached.

The incidence of the fees may be seen from figures given in evidence. It appears that before the rates were raised by fifty per cent the annual fee for an average truck of three to four tons, petrol driven, would be £21, for one of four to five tons £26, for one of five to six tons £38 and for one of six tons and more £52. One of the plaintiffs said that since the increase in the rates the annual registration fee he paid for a truck of eight tons tare and of ten tons capacity was £108.

It will be seen from the foregoing that the registration fee is, (i) payable on registration, (ii) quantified by reference to (a) the power and weight of the vehicle, (b) its commercial use and (c) the possession of tires likely to be more harmful to roads than pneumatic tires, (iii) enforced by penalising the use on the highway of an unregistered motor vehicle and (iv) sufficient in amount to constitute a significant burden. Before the Full Court counsel devoted little argument to the question whether the fees can be imposed on vehicles exclusively employed in carrying goods in inter-State trade. But to me it seems to be by no means free of difficulty. For the defendants it was simply said that the question was governed by *Willard* v. *Rawson* (1), the authority of which still stood. The grounds upon which the decision in that case proceeded would no doubt apply to the present case; indeed I think that if now accepted they would apply with greater logical force than they did to the legal and factual situation in *Willard* v. *Rawson* (1). But I cannot

(1) (1933) 48 C.L.R. 316.

agree that it is the same legislation or the same case. The question in *Willard* v. *Rawson* (1) concerned an inward journey into Victoria by a truck registered in New South Wales carrying nothing but goods from New South Wales. Until about eighteen months before that time the relevant Victorian law had been in much the same condition as it is now. Section 4 (1) of the *Motor Car Act* 1928 required registration in the same way as s. 6 (1) of the *Motor Car Act* 1951 now does. Sub-section (3) of s. 4 of the former Act corresponded with sub-s. (4) of s. 6 of the latter and required payment on registration of the fees provided for in a second schedule which was indistinguishable from that of the present Act, that is before the rates were raised by fifty per cent. Sub-section (4) of s. 4 of the Act of 1928 contained the provisions which in substance are now to be found in s. 17 of the Act of 1951 and included the prohibition of driving an unregistered motor car upon a highway. Sub-section (7) of s. 4 of the Act of 1928 contained in effect the provision which now stands as reg. 59 exempting visiting cars from registration and consequently from the payment of the fees. It differed in confining the exemption to cars owned by residents of another State. But Willard owned the car he drove and he resided in New South Wales; so the difference may be ignored. What caused the difficulty was the introduction into the law of Victoria of a limitation upon the exemption of visiting motor cars. By the *Motor Car Act* 1930 (No. 3901) s. 5 (*e*) the exemption contained in sub-s. (7) of s. 4 of the Act of 1928 was replaced by a new exemption which, although otherwise of the same general effect, expressly excluded from its benefit "a motor car which is used in Victoria for carrying passengers for hire or goods for hire or in the course of trade". This form of exclusion of the commercial use of vehicles from the exemption remained in force but a short time. Indeed before *Willard's Case* (1) reached this Court the *Motor Car Act* 1932 (No. 4045) s. 2 (1) had substituted a proviso to the exemption requiring motor cars carrying passengers or goods from another State to obtain a permit for a short incursion into the State and special permits for longer journeys. The proviso would not now be regarded as valid. It was removed in 1939 by s. 42 of Act No. 4688 in favour of a regulation-making power covering the subject. My dissent from the decision of the Court upholding Willard's conviction for driving his car, although carrying goods and so excluded from the exemption, was not based on narrow grounds. But in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 1] (2) I stated the position I was prepared to adopt as

(1) (1933) 48 C.L.R. 316.

(2) (1953) 87 C.L.R. 49.

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to *Willard's Case* (1). I did so in the course of an attempt to make it clear that there is nothing necessarily inconsistent with s. 92 in making uniform laws covering the organisation and conduct of motor traffic and transportation. I shall repeat the passage. " For myself I do not know why a uniform law for the organisation and the regular conduct of motor traffic or a uniform law prescribing conditions for the business of carrying by road should be regarded as necessarily impairing the freedom of inter-State trade commerce and intercourse. The provision which in *Willard* v. *Rawson* (1), all the judges but myself upheld as valid did not appear to me to be of this character. It was a special provision affecting only motor cars registered in other States if used in Victoria for the carriage of goods. Motor cars if registered in another State were exempt from registration in Victoria and from the payment of the registration fee annually payable in that State. But the provision impugned specially withdrew this exemption if the vehicle was used to carry goods. Thus entry into Victoria of a New South Wales lorry carrying goods at once exposed it to the levy of what to a Victorian car would be an annual fee. This appeared to me to be a direct burden upon inter-State trade. I am quite prepared to accept the view that my conclusion as to the character or characterisation of the provision was erroneous, but it has nothing to do either with the present case on the one hand or with a general regulation of transport on the other hand " (2). In *R.* v. *Vizzard*; *Ex Parte Hill* (3) I had distinguished *Willard's Case* (1) by reference to the grounds on which it was decided and I quoted passages from the reasons of *Rich* J., of *Starke* J., of *McTiernan* J. and of *Evatt* J. I do not think I did more than show by quotation the view which each of their Honours took but *Fullagar* J. in *McCarter* v. *Brodie* (4) regarded the passage as a correct statement by me of the reasons underlying the decision in *Willard* v. *Rawson* (1) and summarised them thus—" To put it very shortly, the fee was not a tax but rather in the nature of a reasonable charge for facilities provided by the State and used by persons who drove motor cars in Victoria, it did not deal with trade and commerce as such, and, if it could be said to have any burdensome effect on inter-State trade and commerce, that effect was merely indirect and consequential. So understood, I think that there is no great difficulty in regarding *Willard* v. *Rawson* (1) as an example of ' regulatory ' legislation. It would not, of course, affect my opinion in the present case if I thought otherwise of *Willard* v. *Rawson* (1), but I have thought it

(1) (1933) 48 C.L.R. 316.
(2) (1953) 87 C.L.R., at p. 69.
(3) (1933) 50 C.L.R. 30, at pp. 67,68.
(4) (1950) 80 C.L.R. 432.

proper to express my view of that case" (1). In *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 1] (2) *Kitto* J. expressed parenthetically his agreement with this statement of *Fullagar* J. In the judgment of *McTiernan* and *Webb* JJ. and myself in *Nilson* v. *State of South Australia* (3), *Willard's Case* (4) was again referred to and I stated for myself that all I found it necessary to say about the case was that the decision of the majority of the Court, in so far as it is not to be accounted for by an adherence to a conception of the operation of s. 92 which is no longer open, appears to depend simply upon a characterisation in which I found myself at the time unable to agree.

In his reasons in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (5) *Kitto* J. expressed fully his views upon *Willard* v. *Rawson* (4) and I shall set out what his Honour said. It is as follows—"I should add a word as to the view to which I have come in regard to the much debated case of *Willard* v. *Rawson* (4). The judgments of *Evatt* and *McTiernan* JJ. must, I think, be put on one side as having proceeded upon a view of s. 92 which the more recent decisions of the Privy Council have made untenable. *Rich* J. directed his attention to the question whether the tax there in question (which he described as a fee upon registration) was a direct, immediate or intended burden upon inter-State trade, commerce, and intercourse as distinguished from one which was consequential, mediate or remote; and his answer that the burden was merely consequential was based upon the view that the tax was imposed, not upon trade, commerce, or intercourse as such, but upon motor vehicles. If his Honour had been willing to concede that, being a tax upon the *use* of motor vehicles on public streets, it was a burden imposed in reference to one of the essential characteristics of a form of inter-State intercourse, he must necessarily have given the opposite answer to the question. *Starke* J., after adverting to some considerations which he apparently regarded as tending in favour of the validity of the tax, adopted as 'the real answer' the view that the requirement that fees be paid was attached as a reasonable adjunct to the main provisions of the Act, just as were (in his Honour's opinion) the registration and licensing requirements, the main provisions being considered as directed to the protection of the State highways and those who used them. The licensing provisions have since been shown not to be of this character. The registration provisions are no doubt (in the main at

(1) (1950) 80 C.L.R., at p. 500.
(2) (1953) 87 C.L.R., at p. 102.
(3) (1955) 93 C.L.R. 292, at p. 304.
(4) (1933) 48 C.L.R. 316.
(5) (1955) 93 C.L.R. 127.

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least) consistent with s. 92 as being in aid of the regulation of the traffic, even in the narrowest sense of regulation. If the tax in question had been really a registration fee, in the sense of a payment for the work of officers of the State in putting the registration through, perhaps it would have been valid. But in fact it was of a totally different character; it was simply a tax upon a form of travel, the payment of it being made a condition precedent to the right to use the public streets" (1). In the same case *Taylor* J. referred to *Willard* v. *Rawson* (2). His Honour expressed the opinion that the reasons of the majority are now at least of doubtful validity. His Honour said that in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 1] (3) the Judicial Committee were not invited to review the case (4). *Taylor* J. then pointed out the difficulties now of supporting the several grounds upon which the respective judgments of the members of the majority of the Court proceeded. Finally his Honour said this—"I do not understand the observations of *Fullagar* J. in *McCarter* v. *Brodie* (5) as giving approval, as was suggested in argument, to the reasoning in *Willard* v. *Rawson* (2). Rather they indicate that, upon the views taken in that case of the character and effect of the Act in question, the decision was by no means an obstacle to the opinions formed and expressed by him concerning the Victorian *Transport Regulation Act*" (6).

In the foregoing observations of *Kitto* J. it will be noticed that the Act is submitted to objective consideration. It seems however that *Fullagar* J. put his views about *Willard* v. *Rawson* (2) rather upon the conception of the legislation found in the judgments of the majority of the Court. As will have been seen, it is in that way that I found a reconciliation of the decision with other cases.

It is now necessary to turn to two decisions given by the Court with reference to the same kind of fee or duty, namely the decision with reference to the New South Wales *Motor Vehicles (Taxation) Act* 1951 in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (7), and the decision with reference to *Nilson* v. *State of South Australia* (8).

In the first of these cases the Court held invalid an attempt to include vehicles used exclusively in or for the purposes of inter-State trade in a liability to a tax levied on motor vehicles upon registration.

(1) (1955) 93 C.L.R., at pp. 224, 225.
(2) (1933) 48 C.L.R. 316.
(3) (1955) A.C. at p. 283; (1954) 93 C.L.R., at p. 10.
(4) (1955) 93 C.L.R., at p. 244.
(5) (1950) 80 C.L.R., at p. 500.
(6) (1955) 93 C.L.R., at p. 245.
(7) (1955) 93 C.L.R., at pp. 179-183, 196-198, 211-215, 218, 219, 244, 245.
(8) (1955) 93 C.L.R. 292.

In most features the tax closely resembled the registration fees now in question but there were the following distinctions: (1) It was imposed by a separate statute and called a tax. (2) While it was payable as a condition of registration it was a Crown debt, and a failure to pay it exposed the vehicle to seizure if used on a public street. (3) There was no exemption of vehicles registered in another State. (4) The rates of tax were calculated upon the weight of the motor vehicle in hundredweights, were steeply graduated but on much the same basis as in Victoria and were appreciably higher than in that State. The examples given in this judgment of the incidence of the rates in the Victorian schedule may be compared with the examples of the New South Wales tax given in that case (1).

In holding this tax or duty inapplicable to vehicles employed exclusively in inter-State trade, *McTiernan* and *Webb* JJ. and I gave reasons which laid some emphasis on the position of the carrier seeking to enter New South Wales with a vehicle registered in another State. But the judgment proceeded :—" If on the other hand the operator belongs to New South Wales, his registration will necessarily be annual although he may have his vehicle across the border for long periods and off the roads altogether for substantial intervals. The fact is that in neither case has the tax any definite relationship to the use of the roads. This is perhaps the principal but it is not the only difficulty in the way of sustaining the tax as a compensatory charge made for the use of the roads as a facility provided by the State. The relation between the various rates of tax is evidently not based on the amount of use which the vehicles make or are likely to make of the roads " (2). After discussing other suggested justifications the judgment turns to the possibility of treating the exaction as a tax levied on the motor vehicles on the basis of property and proceeds :—" In the case of a piece of property which can have only one use and that transport, for example a use in the carriage of goods by road, that is not perhaps a basis for validity which is easy to make out. But, be that as it may, the truth is that the incidence of the tax, though in terms it is levied on ' motor vehicles ', is upon their use. It is a condition of registration without which they cannot be used on roads of the State. The definition itself of motor vehicle depends on propulsion in the streets. The tax operates immediately upon the use of a motor vehicle for the carriage of goods in inter-State commerce and imposes a substantial burden. Section 92 therefore protects a person whose use of the vehicle is in inter-State commerce from the imposition of the tax " (3).

(1) (1955) 93 C.L.R., at pp. 180, 181, 213.

(2) (1955) 93 C.L.R., at pp. 181, 182.

(3) (1955) 93 C.L.R., at p. 182.

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Williams J. stated thus the essential ground for holding the tax incapable of applying to vehicles exclusively engaged in inter-State trade:—" The amount of the tax is not calculated upon the distance the vehicle is driven along the roads. It is imposed so that the vehicle may be lawfully used or driven on the public streets for a certain period. It is therefore necessary for any motor vehicle moving along a public street in New South Wales in order to cross the border in or out of New South Wales to be registered and pay the tax. Otherwise it is liable to be seized and forfeited (*Management Act*, s. 6). The tax is imposed directly upon the movement of vehicles and therefore upon the movement of vehicles in inter-State trade commerce or intercourse" (1). *Fullagar* J. said:—" . . . the exaction of a fee as a mere incident of registration may be said not to offend against s. 92 : cf. *Willard* v. *Rawson* (2). But the exaction imposed by the *Management Act* and the *Taxation Act* cannot be regarded as a mere incident of registration regarded as an object in itself. What is imposed by those Acts is a real and very substantial tax on motor vehicles" (3). In the concluding part of his reasons his Honour says—" It is true that the tax in question is not imposed on or in respect of any activity which possessed the characteristics of trade, commerce or intercourse. Generally speaking, it will fall on the owner of a chattel, and it may be said without material inaccuracy, that it will be payable by him by virtue of his ownership. But this is not, I think, enough to take it outside the scope of s. 92. It is, in form and in substance, a tax on a chattel, in the same sense as a land tax is a tax on land. But the particular chattel in question is a chattel the very *raison d'être* of which is that it may serve as an instrument of trade commerce and intercourse. It is one of the normal everyday instruments of trade commerce and intercourse. And the Acts forbid it to be used in New South Wales, unless the tax is paid, in the performance of its only useful function. Of such a restriction or burden, so far as it affects inter-State trade commerce and intercourse it cannot, I think, be said that it 'is imposed in virtue of or in reference to none of the essential qualities which are connoted by the description "trade, commerce, and inter-course among the States"' (per *Dixon* J. in *Gilpin's Case* (4))" (5). *Kitto* J. concurred in the view that the tax could not validly apply to vehicles used solely in inter-State trade even if "an appearance of some reasonable relation between the amount of the tax payable by an

(1) (1955) 93 C.L.R., at pp. 196, 197.
(2) (1933) 48 C.L.R. 316.
(3) (1955) 93 C.L.R., at p. 214.
(4) (1935) 52 C.L.R., at p. 206.
(5) (1955) 93 C.L.R., at pp. 214, 215.

individual and his use of the roads might prevent a conflict with s. 92" (1). *Taylor* J. in effect treated the decision in *Willard* v. *Rawson* (2) as the only possible ground for regarding the tax as capable of including vehicles exclusively engaged in inter-State trade and his Honour disposed of the decision in the manner already stated (3).

Nilson v. *State of South Australia* (4) related to motor vehicles registered in other States and coming into South Australia in the course exclusively of inter-State trade. The vehicles could not do so under South Australian law without registration and payment of registration fees if the unladen weight of the vehicles exceeded two and a half tons. In mode of calculation and incidence the fees resembled the registration fees with which we are now concerned. The requirement that they should be paid on registration is the same and so is the prohibition against driving a vehicle on a road unless registered. In unanimously holding that s. 92 protected the plaintiffs from the imposition the members of the Court referred to the reasons given in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (5). In the judgment of *McTiernan* J., *Webb* J. and myself the following passage states the grounds of the decision—"The plaintiff's case is that this amounts to a tax upon inter-State transportation which is inconsistent with the freedom of trade commerce and intercourse among the States guaranteed by s. 92. It is difficult to see what other character it can bear. The roads cannot be used unless the vehicle is registered and the vehicle cannot be registered unless the imposition is paid. Before a commercial motor vehicle carrying goods from another State can enter South Australia the owner must register it and pay the large fee or tax. The registration will enable him to use South Australian roads for six months if he pays fifty-two and one-half per cent of the yearly fee. But he may not need to use them again or he may intend to use them only intermittently. The decision of the question is covered by the reasons given in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (5) which should be read as part of this judgment" (6).

I have thought it desirable to set out fully the course which judicial opinion has followed upon the consistency with s. 92 of exactions like that now in question because only so is it possible to see—first, the complete lack of relation of the doctrines upon which *Willard* v. *Rawson* (2) was decided to the principles which,

(1) (1955) 93 C.L.R., at p. 216.
(2) (1933) 48 C.L.R. 316.
(3) (1955) 93 C.L.R., at pp. 244, 245.
(4) (1955) 93 C.L.R. 292.
(5) (1955) 93 C.L.R. 127.
(6) (1955) 93 C.L.R., at p. 303.

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under the decisions of the Privy Council, now guide the Court in applying s. 92; second, the artificial view of the *Motor Car Act* and schedule adopted by or ascribed to *Willard* v. *Rawson* (1), and third, the close analogy to the present case of the decision in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (2) and in *Nilson's Case* (3).

It appears to me that on a proper scrutiny of Pt. II of the *Motor Car Acts* 1951-1956 (Vict.) and the second schedule it must be seen that no room exists for the grounds upon which it has been sought to reconcile with s. 92 the imposition upon vehicles exclusively engaged in inter-State commerce of the rates contained in sub-par. (*b*) of par. B of the schedule. (1) The exaction cannot be regarded simply as a fee contributing to the cost of registration a service in the interest of motor car owners and drivers and others so that it is nothing but an incident or adjunct of the traffic. (2) It cannot be treated as another contribution to the maintenance of the highways compensatory for the use made of them. (3) It cannot be justified as a tax upon the ownership or possession of a chattel considered independently of the use of the chattel in the carriage of persons or goods, including the inter-State carriage of persons or goods. (4) It cannot be treated as involving no appreciable burden upon the possession of a motor vehicle as a means of inter-State carriage and movement.

The truth is that the owner of a motor vehicle unregistered elsewhere is prohibited from driving it upon a Victorian highway in the course of inter-State commerce unless, in order to obtain registration, he pays an annual tax involving an appreciable burden, a tax which is heavier if he desires to carry passengers or goods or journey in the course of trade and increases with the size of his vehicle, that is to say with its carrying capacity. It is thus a tax the incidence and quantification of which is bound up with inter-State trade and commerce when it is applied to vehicles exclusively engaged therein.

It follows that consistently with s. 92 motor vehicles solely engaged in inter-State commerce cannot be liable to pay the registration fees imposed by sub-par. (*b*) of par. B of the second schedule.

I think that the relief which will suffice for the purposes of the plaintiffs is a declaration that sub-s. (4) of s. 6 of the *Motor Car Act* 1951 (No. 5616) and sub-pars. (*b*) and (*c*) of par. B of the second schedule as substituted by Act No. 6038 cannot apply to commercial goods vehicles used on highways in Victoria not otherwise than in

(1) (1933) 48 C.L.R. 316.
(2) (1955) 93 C.L.R. 127.
(3) (1955) 93 C.L.R. 292.

the course of trade and commerce among States and in what is necessarily incidental thereto and that s. 17 cannot apply so as to make it an offence for a person to drive a commercial vehicle exclusively so used without complying with the requirement of s. 6 that the vehicle shall be registered and a fee shall be paid pursuant to sub-s. (4) of that section. Otherwise the relief claimed should be refused.

McTIERNAN J. I agree in and respectfully adopt the reasoning of the Chief Justice both in regard to Pt. II of the *Commercial Goods Vehicles Act* 1955 and s. 6 (4) of the *Motor Car Act* 1951 and par. B (*b*) of the second schedule of the *Motor Car Fees Act* 1956.

Accordingly, I concur in the order that the Chief Justice proposes.

I would only add a reference to *Adam Smith's "The Wealth of Nations"* Book V, Part Third, Chap. I, where such public works as roads, bridges, etc. are discussed as facilities of commerce.

WILLIAMS J. In this action many plaintiffs are named but few could be chosen as proper plaintiffs. Those who are proper plaintiffs are individuals engaged in the business of the inter-State carriage of goods by road. For that purpose they use the public highways of Victoria. The vehicles they use are sometimes fully loaded, sometimes partly loaded and sometimes unloaded. None of the plaintiffs uses the whole of the Victorian network of public highways. But for the purposes of inter-State carriage they are free to use any of these highways. In the action declarations are sought (1) That Pt. II of the *Commercial Goods Vehicles Act* 1955 (Vict.) or ss. 26-33 thereof and the fourth and fifth schedules thereto or parts of such sections and schedules are contrary to s. 92 of the Constitution and beyond the powers of the Parliament of Victoria and invalid, or alternatively have no application to the owners of commercial goods vehicles whilst such vehicles are travelling along public highways in Victoria in the course of or for the purpose of inter-State trade commerce or intercourse or to persons driving such vehicles or to such vehicles whilst so travelling. (2) That ss. 6, sub-ss. (1), (2), (3), (4) and (5), and 17 (*a*) (*b*) and (*d*) of the *Motor Car Acts* of the State of Victoria or parts thereof are contrary to s. 92 of the Constitution and beyond the powers of the Parliament of Victoria and invalid, or alternatively have no application to owners, operators or drivers of commercial goods vehicles used on highways in Victoria exclusively in the course of or for the purpose of inter-State trade commerce or intercourse. Very wide declarations are therefore sought but, having regard to s. 2 of the

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Acts Interpretation Act 1930 (Vict.), the plaintiffs could not expect to obtain declarations in respect of any of the impugned legislation other than declarations that such legislation cannot validly apply to vehicles used exclusively in and for the purpose of inter-State trade commerce and intercourse.

The action came on for hearing before *Taylor* J. who, after hearing the evidence, referred the action to the Full Court under the provisions of s. 18 of the *Judiciary Act* 1903-1955. Of the two Acts the constitutional validity of which is challenged little need be said about the *Motor Car Acts* 1951-1956. Sections 6 and 17 (*a*) (*b*) and (*d*) of these Acts are indistinguishable in substance from the sections of the *Motor Vehicles Taxation Management Act* 1949-1951 and the *Motor Vehicles* (*Taxation*) *Act* 1951 (N.S.W.) which were held to infringe s. 92 of the Constitution in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1). The *Motor Car Acts* operate to make it unlawful for any person to drive a motor car on a Victorian highway without the vehicles being registered as required by the Act. The formula for calculating the registration fee as provided in the second schedule is to ascertain the power weight unit of the vehicle by adding together the sum of its horse-power and the weight in hundredweights unladen and ready for use and to multiply a sum of money by this power weight unit. In this way a considerable fee is arrived at. It is a fee which has no relation to a reasonable fee for inspecting a vehicle to see that it is in a fit mechanical condition and otherwise suitable for use on the Victorian highways or for giving it a registration number so that it might readily be indentified. The fee must be paid as a condition precedent to the vehicle's being lawfully driven on the Victorian highways for a period of twelve months. The amount of the fee bears no relation to the distance the vehicle is driven along the highways. It is paid for the privilege of using the highways at all. It cannot be described as a contribution towards the maintenance of the highways to make good the damage done to them by the use actually made of them by the vehicle. Sections 6 and 17 (*a*) (*b*) and (*d*) of these Acts must for the reasons given in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1) be held to be invalid in respect of vehicles used exclusively in and for the purpose of inter-State trade commerce or intercourse. See the joint judgment of *Dixon* C.J., *McTiernan* and *Webb* JJ. (2); *Williams* J. (3); *Fullagar* J. (4); *Kitto* J. (5) and *Taylor* J. (6).

(1) (1955) 93 C.L.R. 127.
(2) (1955) 93 C.L.R., at pp. 179-182.
(3) (1955) 93 C.L.R., at pp. 196-198.
(4) (1955) 93 C.L.R., at pp. 211-215.
(5) (1955) 93 C.L.R., at pp. 215, 216.
(6) (1955) 93 C.L.R., at pp. 244, 245.

The present Victorian Act is the same in all material respects as the Act that was held to be valid in *Willard* v. *Rawson* (1) but in my opinion that decision is inconsistent with the reasons of the Privy Council in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 1] (2), an opinion which I first expressed, somewhat in sorrow, in *Nilson* v. *State of South Australia* (3). The dissenting judgment of *Dixon* J., as he then was, in *Willard* v. *Rawson* (1) should now be accepted as correct.

The constitutional validity of Pt. II of the *Commercial Goods Vehicles Act* must now be considered. This legislation does not in my opinion infringe s. 92 and is valid. I propose to state my reasons for reaching this conclusion as briefly as I can. In *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (4) five out of the seven judges of this Court expressed the opinion that a State can charge a person engaged in the inter-State carriage of goods a reasonable sum as compensation for the wear and tear done to the highways by his vehicles. The highways are a facility provided and maintained by the State without which the goods could not be carried by road at all and a reasonable charge for their use, having regard to the benefit the inter-State carrier derives from their existence, does not constitute an undue burden on the freedom of inter-State trade guaranteed by s. 92. The relevant passages appear in the joint judgment of *Dixon* C.J., *McTiernan* and *Webb* JJ. (5); in the judgment of *Williams* J. (6) and in the judgment of *Fullagar* J. (7). It was contended that these passages, not being essential to the decision, are mere *obiter dicta* and we were invited to reconsider them and to decide not to follow them. It is true that the views there expressed are *obiter* but it is obvious that they were only expressed after careful consideration in order to give the legislatures concerned some indication of the kind of legislation imposing a charge which could stand consistently with s. 92. That the State legislatures were urgently in need of such guidance is apparent from a perusal of the cases which occupy vol. 93 of the *Commonwealth Law Reports* from p. 127 to p. 316. In discussing the constitutional validity of Pt. II of the *Commercial Goods Vehicles Act,* I intend to accept these passages as a correct statement of the law and to dispose of the present proceedings on this basis.

Part II which is headed " Contributions to Road Maintenance " contains ss. 25 to 33 inclusive of the Act. Section 25 exempts from

(1) (1933) 48 C.L.R. 316.
(2) (1955) A.C. 241; (1954) 93 C.L.R. 1.
(3) (1955) 93 C.L.R. 292, at p. 305.
(4) (1955) 93 C.L.R. 127.
(5) (1955) 93 C.L.R., at pp. 172-179.
(6) (1955) 93 C.L.R., at pp. 190-195.
(7) (1955) 93 C.L.R., at pp. 204-211.

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the operation of Pt. II " (*a*) any vehicle the load capacity of which (together with any trailer for the time being attached thereto) is not more than four tons ; or (*b*) any vehicle while being used solely for any or some of the purposes specified in the Third Schedule or while travelling unladen directly to or from the business premises of the owner of the vehicle so as to be so used or after having been so used." Section 26 which is the charging section is in the following terms : " (1) The owner of every commercial goods vehicle shall as provided by this Part pay to the Board towards compensation for wear and tear caused thereby to public highways in Victoria a charge at the rate prescribed in the Fourth Schedule. (2) Such charge shall become due at the time of the use of any public highway by the vehicle and if not then paid shall be paid and recoverable as in this Part provided. (3) Any charge payable under this Part shall be a civil debt due to the Board by the owner of the vehicle concerned and, without affecting any other method of recovery provided by this Part, may be recovered in any court of petty sessions as a civil debt recoverable summarily or in any court of competent jurisdiction." Sections 27 to 29 require the owner of the vehicle to keep an accurate daily record of all journeys of the vehicle along public highways in Victoria and within fourteen days of the end of each month to forward to the head office of the board in Melbourne in respect of each vehicle the record for the previous month and the amount of all moneys owing by way of charges payable in respect of that month. Section 30 is in the following terms : " (1) All moneys received by the Board by way of charges under this Part shall be paid into the Country Roads Board Fund to the credit of a special account to be called the ' Roads Maintenance Account '. (2) Money to the credit of that account shall be applied only on the maintenance of public highways (including grants to municipalities for that purpose)." Section 31 creates certain offences, one offence being failure to pay to the board as required by Pt. II any charges payable in respect of any vehicle. Section 32 relates to prosecutions for an offence and to the recovery of any charges which have not been paid to the Board. Section 33 contains certain evidentiary provisions. The third and fourth schedules are in the following terms : " Section 25, Third Schedule, (1) The carriage of berries and other soft fruits, unprocessed market garden and orchard produce (other than potatoes and onions), milk, cream, butter, eggs, meat, fish or flowers, and, on the return trip, any empty containers used on the outward trip for the carriage of any such commodity. (2) The carriage of livestock to or from agricultural shows or exhibitions, or direct from farm to market

or from market to farm or from farm to farm or to or from agistment. Section 26, Fourth Schedule, (1) The rate of the charge to be paid in respect of every vehicle shall be one-third of a penny per ton of the sum of—(*a*) the tare weight of the vehicle; and (*b*) forty per-centum of the load capacity of the vehicle—per mile of public highway along which the vehicle travels in Victoria. (2) In assessing such charge fractions of miles and fractions of hundred-weights shall be disregarded but hundred-weights (in relation to both tare weight and load capacity) shall be taken into account as decimals of tons."

Part II therefore consists of s. 25 exempting certain commercial goods vehicles from its operation; s. 26 which requires the owner of every commercial vehicle to pay to the board towards compensation for wear and tear caused thereby to public highways in Victoria a charge at the rate prescribed in the fourth schedule; s. 30 which provides that all moneys received by the board by way of charges under this part shall be paid into a special Roads Maintenance Account and that the moneys to the credit of that account shall be applied only to the maintenance of public highways; and certain incidental sections required to make the charges imposed by s. 26 effective. The fourth schedule is important because it prescribes the rate of charge. The charge is on a ton-mile basis and the schedule provides a simple formula which enables the owner of the vehicle to calculate the amount of the charge with precision. Part II of the *Commercial Goods Vehicles Act* like the previous Victorian Act which was held invalid in *Armstrong* v. *State of Victoria* (1) has the merit of simplicity but it has also the merit of clarity which that Act lacked. The operator, intra-State or inter-State, knows exactly what he has to do in order to comply with its provisions. It also has the merit that its provisions cannot cause any delay in the making of the inter-State journey. No permit is required to cross the Victorian border and no moneys have to be paid as a condition precedent to the vehicle's entering or leaving Victoria. The legislation is of a general character. It does not discriminate against inter-State trade. It applies to all commercial vehicles using the Victorian highways not exempted by s. 25, whether on an intra-State or an inter-State journey. The same vehicles are exempted from the charge, whether they are travelling intra-State or inter-State. If their load capacity is not more than four tons, or if they are engaged in the carriage of the goods or chattels referred to in the third schedule, they are exempt. Accordingly the legislation on its face embodies all the characteristics which the majority

(1) (1955) 93 C.L.R. 264.

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of this Court considered legislation imposing a charge should embody in order to comply with s. 92. Part II is headed " Contributions to Road Maintenance ". Section 26 states that the contribution is towards compensation for wear and tear caused by the vehicle to public highways in Victoria. These statements by the Parliament of Victoria are not of course conclusive upon a question of constitutional validity but they are entitled to respect and should not lightly be disregarded: *Australian Communist Party* v. *The Commonwealth* (1); *Abitibi Power & Paper Co. Ltd.* v. *Montreal Trust Co.* (2). Where the plaintiff alleges that legislation is invalid because it infringes s. 92 the burden must be on him prima facie to prove the invalidity. The invalidity may and generally does appear from the provisions of the legislation itself. But in the present case the legislation on its face is valid. It purports to charge the owner of the commercial goods vehicle only for the use he actually makes of the Victorian highways. It is a charge on a ton-mile basis calculated upon a formula which is reasonable on its face. In the joint judgment of *Dixon* C.J., *McTiernan* and *Webb* JJ. in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (3) the following passage appears: " Prima facie it " (that is the legislation imposing the charge) " will present that appearance " (that is the appearance of a real attempt to fix a reasonable recompense for the use of the highway) " if it is based on the nature and extent of the use made of the roads (as for example if it is a mileage or ton-mileage charge or the like); if the proceeds are devoted to the repair, upkeep, maintenance and depreciation of relevant highways, if inter-State transportation bears no greater burden than the internal transport of the State and if the collection of the exaction involves no substantial interference with the journey. The absence of one or all of these *indicia* need not necessarily prove fatal, but in the presence of them the conclusion would naturally be reached that the charge was truly compensatory " (4). *Williams* J. said: " It does not appear to me that a charge could be imposed which would not enter the deterrent field which was more than a reasonable charge for the use of the road over which the vehicle, having regard to its size and weight and other characteristics, intends to travel and it appears that the charge to be reasonable would have to be based mainly upon the extent of the wear and tear the road would be likely to suffer from the projected journey. All traffic, light or heavy, presumably causes some wear

(1) (1951) 83 C.L.R. 1, at pp. 200, 201, 224, 225.
(2) (1943) A.C. 536, at p. 548.
(3) (1955) 93 C.L.R. 127.
(4) (1955) 93 C.L.R., at pp. 175, 176.

and tear to the roads, but presumably also the heavier the vehicle the more wear and tear that is caused to the roads. It is for the cost of this extra wear and tear, if any, that it would be reasonable to charge. It is probably not susceptible of any precise calculation. But an approximation should be possible. The onus would be on the plaintiff to prove that the charge was unreasonable and the court would be disinclined, I should think, to upset any charge that was reasonable on its face and supported, if challenged, by a calculation based on some appropriate formula" (1). *Fullagar* J. said: "Any such charge, to be valid, must not discriminate against inter-State traffic, and some real connection—some relation of *quid pro quo*—must appear between the charge and the maintenance of the roads. Subject to those two points, I think that a fair degree of latitude must be allowed in prescribing the incidence of a charge, and that practical considerations attending the collection of a charge must be borne in mind in considering its validity" (2). The statements in these passages were not of course intended to lay down rigid rules for the calculation of the charge. They were intended to indicate the general character of a charge that could be upheld. They should not be read as though they were the provisions of a statute. Applying the *indicia* there stated in this manner it is apparent, I think, that the plaintiffs are unable to shift the initial onus of proof by resorting to the provisions of Pt. II of the *Commercial Goods Vehicles Act*. The legislation on its face exhibits all the characteristics required to indicate that the charge imposed is prima facie no more than it is claimed to be by s. 26, that is, a contribution towards compensation for the wear and tear caused by the vehicle to public highways in Victoria.

But that is not the end of the case. However reasonable the charge may appear to be on its face the ultimate question must be whether it is in fact reasonable at the time it is imposed. The owner may be required to pay a sum which could not in fact bear any real relation to the wear and tear caused to the highways by the particular journeys. In that case the charge could not be reasonable compensation for the damage suffered and would impose an undue burden on inter-State trade. The relation between the amount of the charge and the damage done to the highways must therefore be examinable. In the present action evidence was given on this issue. It proves to my mind that the amount of the charge produced by the operation of the formula in the fourth schedule is in fact reasonable. I shall not refer to the evidence in any detail. It consists mainly of the estimates contained in

(1) (1955) 93 C.L.R., at pp. 194, 195. (2) (1955) 93 C.L.R., at p. 211.

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exhibit 1 and exhibit B and the oral evidence of Mr. Hosking the planning and research engineer of the Country Roads Board of Victoria. These estimates show that the annual sum required to maintain the whole of the Victorian roads in proper order and repair in the year 1954-1955 was £15,148,000. The whole of this sum was not in fact expended. Only £12,648,000 was spent and a further expenditure of £2,500,000 was required to complete the work. The total length of the Victorian roads is 80,000 miles of which 3,850 miles are classed as State highways and 9,789 miles as main roads. The expenditure required for the maintenance of State highways was at the rate of £560 per mile and the expenditure required for the maintenance of main roads at the rate of £325 per mile. The expenditure required for the maintenance of the whole of the Victorian roads was £190 per mile. Exhibit 1 divides the total number of motor vehicles registered for Victoria in March 1955, that is 559,000, into ten classes which can broadly be divided into two sub-classes, the first sub-class comprising private cars, business cars, trucks with a nominal carrying capacity of under two tons and trucks with a nominal carrying capacity of two to three tons and the second sub-class comprising (e) trucks with a nominal carrying capacity of three to four tons, (f) trucks with a nominal carrying capacity of four to five tons, (g) trucks with a nominal carrying capacity of five to six tons, (h) trucks with a nominal carrying capacity of more than six tons, (i) semi-trailers and (j) 'buses. There are 34,000 vehicles in classes (e) to (j). These classes comprise the vehicles the weight of which causes considerably more damage to the roads than vehicles in the first sub-class and this damage increases rapidly as the weight increases. After an examination of the estimated average annual mileage of vehicles in each class, the average gross weight of vehicles in each class, the average load carried by vehicles in each class expressed as proportion of load capacity and the cost of construction of roads designed to carry (a) axle loads in excess of 8,000 lbs. and up to 17,000 lbs. (the highest permissible load in Victoria) and (b) axle loads up to 8,000 lbs., it was estimated that the maintenance costs attributable to vehicles with permissible axle loads in excess of 8,000 lbs., that is the vehicles in classes (e) to (j), was 62% of £15,148,000, that is 9.4 millions. But the only vehicles subject to the charge imposed by s. 26 of the *Commercial Goods Vehicles Act* are those in classes (f) to (i) inclusive and of this 9.4 millions 7.4 millions is attributable to the vehicles in these classes. After allowing for the amounts paid by the Commonwealth to the State of Victoria under the Federal *Aid Roads Act* towards the construction and maintenance of Victorian

roads (half this amount being allocated in the estimates to maintenance and the other half to construction) and for the registration fees payable under the *Motor Car Acts* the amount of maintenance cost expressed as pounds per vehicle in each class was for class (e) £121, (f) £156, (g) £248, (h) £296, (e) £486 and (j) £346. These amounts expressed in pence per ton-mile were (e) 0.37, (f) 0.37, (g) 0.38, (h) 0.39, (i) 0.41 and (j) 0.39. As a third of a penny per ton-mile is 0.33 and this figure is below any of these amounts it cannot be said that one-third of a penny per mile is an unreasonable amount to include in the fourth schedule. Exhibit 1 shows that the amount actually collected under Pt. II of the *Commercial Goods Vehicles Act* for the period 1st April 1956 to 28th February 1957 was £1,083,182 and that it was estimated that the amount which would be collected in the first twelve months of the operation of the legislation if all due payments were made in accordance with the Act was £2,015,000. As the total expenditure required for the maintenance of the Victorian roads was £15,148,000 the truth of the statement in s. 26 of the *Commercial Goods Vehicles Act* that the charge is towards compensation for wear and tear caused by vehicles to public highways in Victoria becomes very apparent. And it becomes even more apparent when a dissection of the 7.4 millions of the expenditure for maintenance attributable to the vehicles in classes (f) to (i) inclusive indicates that after deducting from this sum the proper allowances for registration fees, Commonwealth grants, estimated collections under s. 26 and estimated amounts for third schedule exemptions, there remains a discrepancy of 3.9 millions, this sum representing the extent to which damage done to the roads by the vehicles in these classes is not recouped from the charges imposed by s. 26 amd must be borne by the general revenues of the State.

It was contended that the calculation of £15,148,000 as the cost of maintenance of the Victorian roads was excessive because several items were included in this sum which should not be there. In the first place it was objected that £2,500,000 should not have been included because it was not spent but to my mind it was rightly included because the inquiry is what amount is required to make good the damage done to the roads and in this inquiry the whole amount required to make good this damage should be included whether it has been actually spent or not. Exhibit B contains a dissection of the amount actually expended, £12,648,000, between the road-making authorities, that is to say, the Country Roads Board, the Greater Melbourne Municipalities, other municipalities, and other government authorities. This dissection shows that £6,176,000 was expended by the Country Roads Board, £2,650,000

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by Greater Melbourne Municipalities, £3,430,000 by other municipalities and £392,000 by other government authorities. It was objected that the moneys spent by the municipalities on keeping the roads in repair within their geographical areas was primarily their responsibility and payable out of the rates and should not have been included in the calculation. But it is obvious that this item was rightly included. There is no less reason why a contribution should not be made towards the expenses incurred by municipalities in making good the damage done to their roads than there is why a contribution should not be made to the Country Roads Board to make good the damage done to the State highways and main roads for the maintenance of which it is responsible. Exhibit B also shows that included in the sum of £12,648,000 is the sum of £1,906,000 said to be the estimated cost of that portion of reconstruction costs necessary for maintaining a reasonable running surface with present grading alignment and width. It was objected that this item should not have been included in the calculation. It was submitted that the only maintenance towards which the inter-State carrier could be called upon to contribute was in effect keeping the existing surface in repair and if the damage was such that the existing surface could not be repaired and the road had to be reconstructed the expenditure required for this purpose was a capital cost and could not be charged against maintenance. But the whole of the cost of reconstruction is not included in the estimate of £15,148,000 but only part of that cost based on an estimate of the expenditure necessary to maintain a reasonable running surface on the highway as originally constructed. The expenditure towards which the inter-State carrier may reasonably be expected to contribute is at least the expenditure necessary to maintain the road in such a condition that he may use it and if a portion of the road becomes unusable until it is reconstructed the expenditure necessary to carry out this reconstruction is, I should think, part of the expenditure required to maintain the road in this condition. But in the estimate he has only been charged with part of this expenditure, that is with the " maintenance element ", so that in this respect he has nothing to complain about. Another objection to the calculation was that it takes into account the whole network of State highways whereas it should only have taken into account what the passage already cited from the joint judgment designates as " relevant highways ". No doubt the inter-State carrier mainly uses the principal inter-State highways in the course of his business. But he has to collect the goods he carries somewhere and deliver them somewhere and for these purposes he may require to use any part of the State network. Section 92

protects the freedom of the inter-State trader to use every road in the State. In such a calculation therefore it is reasonable to take into account this network as a whole. The formula in the fourth schedule provides that forty per cent of the load capacity of the vehicle shall be added to the tare weight of the vehicle and the one-third of a penny per ton shall be multiplied by this addition. Vehicles may often carry a load which is lighter than their total load capacity either because they may not be fully loaded or if fully loaded the goods may be light in weight. They may sometimes have to make the return journey empty. The inclusion in the multiplier of only forty per cent of the load capacity would appear to provide a reasonable margin for such contingencies. It must be emphasised that a charge for the use of the roads in order to be compensatory need not be a precise calculation of the amount of the exact damage done to a particular road on a particular journey by a vehicle of a particular weight carrying a particular load. Calculations as precise as this would be impossible. They would require a separate calculation of the expenditure required to maintain each road or at least each class of road in good repair and might require the vehicle to go from one weighbridge to another to weigh its load from time to time. Charges based on such calculations could become intolerably complicated and the journey of a vehicle which had to be continuously weighed could be indefinitely delayed. The passages from the judgments already cited stress the fact that the charge need not be precisely calculated. It is lawful if it is broadly calculated to provide reasonable compensation for the average damage done to the roads by vehicles carrying average loads. It was also objected that in the calculations all sorts of other items should have been taken into account, for instance the direct taxes such as income and pay roll taxes and the indirect taxes resulting from customs and excise duties imposed on petrol, tyres and tubes that inter-State operators have to pay. It was even objected that road transport contributes to the prosperity of the community though the precise amount of the contribution is immeasurable but that some credit should be given for this item in the computation of a reasonable charge. Contentions such as these illustrate the extent to which the plaintiffs are prepared to go. Taxes whether direct or indirect of the kind mentioned have nothing to do with the amount required to maintain the highways of a State in a proper condition of repair. It is the expenditure directly required for this purpose and no other expenditure that is relevant. The contribution the inter-State carrier may be required to make to the upkeep of the roads if otherwise reasonable cannot

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become unreasonable because he incurs other expenses in the course of his business. The only question is whether he is being charged a reasonable sum for the use he makes of a facility provided by the State which he is entitled to use as of right but without which he could not carry on his business at all. It was contended that one reason why the *obiter dicta* of the majority judges should be abandoned was that it is really impracticable to calculate a reasonable charge. The weather it was said contributes to the wear and tear of the roads and it was contended that this was wear and tear which could not be measured. In my opinion it need not be measured. The operation of s. 92 does not depend on the weather. It protects the right of the inter-State carrier to use the roads in all weathers. The evidence is that it is not the weather but the use of the roads in wet weather that really causes the damage and there is no suggestion that inter-State operators take care not to cause this damage by suspending their journeys whenever it rains.

It was even contended that s. 26 of the *Commercial Goods Vehicles Act* is in reality not a fixation of a charge for wear and tear done to the roads but an integral part of a railway protection Act. The contention was based on the fact that s. 25 exempts certain vehicles from the operation of Pt. II. It was said that the goods and live stock included in the third schedule were not suitable for carriage by railway and only suitable for carriage by road and that goods carried by vehicles of not more than 4 tons load capacity were in the same category. There is no evidence to warrant such a contention. Many of the goods in the third schedule are goods which would appear to be quite suitable for carriage by railway and the railways are certainly suitable for the carriage of live stock. There is no reason why the railways should not carry many of the goods that could be carried by vehicles with a load capacity of not more than four tons. The reason for the exemptions in s. 25 does not appear. But if a State is permitted by s. 92 to make a reasonable charge as compensation for the use of the roads there is no reason why it should not exempt certain vehicles from the payment of the charge provided the contributions lost by the exemptions are not loaded onto those who are not exempt and provided there is no discrimination against inter-State trade. The amount of the contributions lost by the exemptions is estimated only to be £335,000. It may be that the vehicles that are not exempted by s. 25 and are therefore brought into charge by s. 26 include most of the vehicles which carry goods in competition with the goods the railways prefer to carry. But the fact that the position of the railways in this competition is improved by making these vehicles contribute to

the maintenance of the roads is not a ground for invalidating the legislation if the charge is properly related to the use of the roads.

Finally it was objected that the charge imposed by s. 26 of the *Commercial Goods Vehicles Act* is of indefinite duration so that, even if it is reasonable at the present time, it may become unreasonable in the future if improved methods of road construction and maintenance and more suitable tyres and such like inventions lessen maintenance costs. It was contended that if Pt. II of the Act is now held to be valid it could never subsequently become invalid however much circumstances may change because there is no room for a legal theory that valid acts can become invalid or *vice versa* because of changed facts. Therefore the legislation imposing the charge must be invalid *ab initio* and the fact that the legislation is permanent is fatal to its validity. But an Act must be valid, at least temporarily, if it is valid when it is passed. If a valid Act can never subsequently become invalid so much the worse for the plaintiffs. I can see no reason why an Act which is valid may not subsequently become invalid from change of circumstances. A Commonwealth Act passed at the height of hostilities which could only be justified by the defence power as extended in wartime would in my opinion become invalid when that power had contracted in peacetime to such an extent that it is no longer wide enough to support it; *Australian Woollen Mills Ltd.* v. *The Commonwealth* (1); *Australian Textiles Pty. Ltd.* v. *The Commonwealth* (2) and *R.* v. *Foster* (3). We are here concerned with a State Act and a State Act valid at its inception can subsequently be invalidated under s. 109 of the Constitution by a paramount Commonwealth law. Having regard to s. 2 of the *Acts Interpretation Act* 1930 (Vict.) Pt. II of the *Commercial Goods Vehicles Act* could not be invalid at its inception or subsequently become invalid in its application to intra-State trade. It could only be invalid in its application to inter-State trade. If the charge imposed by s. 26 is reasonable under present circumstances and therefore does not infringe s. 92 the legislation must at present be valid in its application to inter-State trade. But if circumstances changed to such an extent that a charge which was reasonable at its inception became unreasonable in the future—if for instance some invention enabled a State to construct a network of roads that required no maintenance—a charge imposed on inter-State operators as a contribution to wear and tear which was no longer taking place could not continue to

(1) (1944) 69 C.L.R. 476, at pp. 499, 500.

(2) (1945) 71 C.L.R. 161, at pp. 180, 181.

(3) (1949) 79 C.L.R. 43.

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be supported as compensatory. It is a case of an Act intended to be permanent dying because it has been smitten by a superior law.

For these reasons I agree with the order proposed by the Chief Justice.

WEBB J. In this case directed by *Taylor* J. under s. 18 of the *Judiciary Act* 1903-1955 to be argued before the Full Court of the High Court the plaintiffs, who are hauliers by motor transport in the inter-State trade, and associations of such hauliers, seek declarations that provisions of Acts of the Victorian Parliament, namely the *Commercial Goods Vehicles Act* 1955 (No. 5931) and the *Motor Car Acts* (Nos. 5616 and 6038), are unconstitutional and invalid as infringing s. 92 of the Commonwealth Constitution, the former Act because it imposes a road charge purporting to be limited to the wear and tear of the roads caused by the vehicle and the latter Acts because they impose registration fees based on the use of the roads by the vehicle. Both the charge and the fee purport to be applicable to inter-State and intra-State hauliers in respect of all roads in Victoria.

The validity of a specified kind of road charge payable by *inter-State* hauliers is supported by the views of a majority of this Court as at present constituted in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1). But the plaintiffs submit, as is the fact, that the expression of those views was unnecessary for the disposal of the demurrer in that case, and that this Court should not regard itself as bound by those views but should apply the views of the minority justices who thought that no road charge of any kind could validly be imposed as against inter-State hauliers. I must say that I do not find it easy to adhere readily to the views that I shared in the joint judgment with the Chief Justice and *McTiernan* J. in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1) in upholding the validity of a specified type of road charge. That is because of the undoubted fact that s. 92 prevents any haulier from being required to pay any charge for the right to enter upon and use the public roads on any inter-State journey and use necessarily causes wear and tear of roads, and so might appear to preclude this charge. However I do adhere to the views in the joint judgment. Moreover, public safety demands that inter-State hauliers should have responsibility for the costs of repair of roads as well as of vehicles and that the burden of keeping roads safe should not be wholly borne by others.

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

But the plaintiffs submit further that the requirements of a valid road charge as set out in the majority judgments, amd more particularly in the joint judgment, are not met in the *Commercial Goods Vehicles Act* 1955.

The relevant passage in the joint judgment reads:—" For the purposes of that provision " (i.e. s. 92) " it may perhaps be said with some confidence that if a charge is imposed as a real attempt to fix a reasonable recompense or compensation for the use of the highway and for a contribution to the wear and tear which the vehicle may be expected to make it will be sustained as consistent with the freedom s. 92 confers upon transportation as a form of inter-State commerce. But if the charge is imposed on the inter-State operation itself then it must be made to appear that it is such an attempt. That it is so must be evident from its nature and character. Prima facie it will present that appearance if it is based on the nature and extent of the use made of the roads (as for example if it is a mileage or ton-mileage charge or the like); if the proceeds are devoted to the repair, upkeep, maintenance and depreciation of relevant highways, if inter-State transportation bears no greater burden than the internal transport of the State and if the collection of the exaction involves no substantial interference with the journey. The absence of one or all of these *indicia* need not necessarily prove fatal, but in the presence of them the conclusion would naturally be reached that the charge was truly compensatory . . . . In speaking of ' relevant highways ' it is intended to mark the importance of recognizing the size of Australian States . . . . It is for the use of certain roads that it is supposed the recompense is made, and not for the use of roads of an entirely different character many hundreds of miles away. It may of course be immaterial, if the charge is based on average costs of road care, repair and maintenance, which may well give a lower rate than if it were based on the costs in connection with the highway used. It does not seem logical to include the capital cost of new highways or other capital expenditure in the costs taken as the basis of the computation. It is another matter with the recurring expenditure incident to the provision and maintenance of roads. The judgment whether the charge is consistent with the freedom of inter-State trade must be made upon a consideration of the statutory instrument or instruments by and under which it is imposed. The fault with s. 18 (4)-(6) " (i.e. of the New South Wales Act then under consideration) " is that these provisions confer an authority which *ex facie* gives no assurance that the charge imposed under it will conform with what amount to constitutional necessities . . ." (1).

(1) (1955) 93 C.L.R., at pp. 175, 176.

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The material provisions of the *Commercial Goods Vehicles Act* and the *Motor Car Acts* are—

(1) the *Commercial Goods Vehicles Act* by s. 2 defines commercial goods vehicle as any motor car together with any trailer which is used or intended to be used for carrying goods for hire or reward, with specific exceptions. Part II of the Act is headed "Contributions to Road Maintenance" and includes ss. 25 to 33. Section 25 provides that Pt. II shall not apply with respect to any vehicle the load capacity of which (together with any trailer for the time being attached thereto) is not more than four tons; or to any vehicle while being used solely for any or some of the purposes specified in the third schedule. Section 26 provides that the owner of every commercial goods vehicle shall pay to the Transport Regulation Board under the *Transport Regulation Act* 1955 towards compensation for wear and tear caused thereby to public highways in Victoria a charge at the rate prescribed by the fourth schedule; such charge shall become due at the time of the use of any public highway by the vehicle and if not then paid shall be paid and recoverable as provided; and any charge shall be a civil debt due to the board by the owner of the vehicle. Section 27 provides that the owner shall keep an accurate daily record of all journeys along public highways in Victoria and shall retain it for six months after completion of any journey and on demand make available to the board a copy of each record for inspection. Section 28 provides that the owner shall not later than the fourteenth of each month deliver to the board the record for the previous month and of the charges owing if not already paid. Section 29 provides that the owner may arrange with the board as to the time and place for paying charges. Section 30 provides that all moneys received by the board by way of charges shall be paid into the Country Roads Board Fund to the credit of a special account to be called "Road Maintenance Account"; and that moneys to the credit of that account shall be applied only on the maintenance of public highways (including grants to municipalities for that purpose). Section 31 makes failure to keep and deliver records or pay charges an offence punishable by fine and by s. 32 the court may order payment of the road charges in addition to the fine. Section 33 enacts evidentiary provisions. The fourth schedule provides that the rate of the charge to be paid in respect of every vehicle shall be one-third of a penny per ton of the sum of the tare weight of the vehicle and forty per cent of the load capacity of the vehicle per mile of public highway along which the vehicle travels in Victoria.

(2) the *Motor Car Acts* by s. 3 defines motor car as meaning any vehicle propelled by internal combustion, steam, gas, oil, electricity or other power and used or intended to be used on any highway, and by s. 6 provides that every motor car and every trailer attached shall be registered by the Chief Commissioner of Police and that a fee as provided in the second schedule to the Acts shall be paid on registration or renewal of registration. The second schedule provides that for a motor car used for carrying goods for hire or in the course of trade (with specified exceptions) the fees shall be amounts ranging from six shillings to ten shillings and three pence for each power-weight unit, varying according to the number of wheels and the types of tyres. It also prescribes the method of determining the power-weight units. These fees are very substantial, in some cases exceeding £100 per annum.

I proceed to state my views on these two statutes.

As to the *Commercial Goods Vehicles Act*: The question whether the road charge is valid must be decided upon a consideration of the Act itself which on its face must give an assurance that the charge conforms with constitutional necessities. That is required by the joint judgment as I understand it. The good faith of any Australian Parliament cannot be questioned. But it is one thing to refrain from questioning good faith and quite another to attribute infallibility. We are not at liberty to take for granted everything that Parliament says even if we desired to do so. When as here we are considering whether an Act of Parliament is constitutional on its face we are required to find in its terms and not elsewhere an assurance that it is constitutional. So I thought when I adhered to the joint judgment and nothing has since occurred to induce me to change that opinion. I find it difficult to see how anything short of an assurance on the face of the Act could meet constitutional requirements, as otherwise the test of constitutionality would be transferred from the Act to something purporting to be done under the Act. But the validity of what purports to be done under the Act could in turn be determined only from a consideration of the terms of the Act which for this purpose must be precise and imperative. A road charge must have statutory authority and be within it, and in turn the statute imposing the charge or giving the authority must comply with the Commonwealth Constitution. So we are again thrown back on the Act itself in considering the constitutionality of the road charge. As to this a statutory provision directing even a reasonable charge has been held by this Court to be too indefinite: *Hughes & Vale Pty. Ltd.* v. *State of Queensland* (1).

(1) (1955) 93 C.L.R., at p. 258.

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The *Commercial Goods Vehicles Act* would appear to be at least consistent with the joint judgment in so far as it purports to impose a charge only for a contribution towards wear and tear of roads, is based on the extent of the use of the roads, being a ton-mileage charge, the collection of the charge involves no interference with the journey, and the proceeds are to be applied only to maintenance of public highways. But the Act fails to comply with the joint judgment in that it does not on its face give an assurance that it conforms to constitutional requirements, seeing that there is nothing in the Act which shows how the multiplier one-third of a penny per ton is arrived at. If the figure were one-third of a shilling the reasoning in support of an assurance *ex facie* would necessarily be the same, which negatives any such assurance. Again there is no assurance on the face of the Act that only the cost of maintenance of relevant highways is taken into account in assessing the charge or that the cost of maintenance of public roads generally is not greater than the cost of maintenance of relevant highways. A further objection is that the charge like the Act is of indefinite duration. As to this see *Hughes & Vale Pty. Ltd.* v. *State of Queensland* (1). To conform to constitutional requirements the charge should be limited always to the actual cost of maintenance so far as that is practicable. Really to comply with the joint judgment the Act should contain a formula for ascertaining wear and tear on relevant highways and supply the figures or indicate the source of the figures for the calculation, and provide also for reviews say quarterly, half-yearly or annually to insure that the road charge will never substantially exceed maintenance cost of the relevant highways.

It may be that the Act complies with the requirements of the judgments of *Williams* J. and *Fullagar* J. in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (2). *Williams* J. said:— "All traffic, light and heavy, presumably causes some wear and tear to the road, but presumably also the heavier the vehicle the more wear and tear that is caused to the roads. It is for the cost of this extra wear and tear, if any, that it would be reasonable to charge. It is probably not susceptible of any precise calculation. But an approximation should be possible. The onus would be on the plaintiff to prove that the charge was unreasonable and the court would be disinclined, I should think, to upset any charge that was reasonable on its face and supported, if challenged, by a calculation based on some appropriate formula . . ." (3). In *Armstrong*

(1) (1955) 93 C.L.R., at p. 258.
(2) (1955) 93 C.L.R. 127.
(3) (1955) 93 C.L.R., at pp. 194, 195.

v. *State of Victoria* (1) his Honour said that the formula must be prescribed by the legislation.

Fullagar J. said:—" Any such charge, to be valid must not discriminate against inter-State traffic, and some real connection—some relation of *quid pro quo*—must appear between the charge and the maintenance of the roads. Subject to those two points, I think a fair degree of latitude must be allowed in prescribing the incidence of a charge, and that practical considerations attending the collection of a charge must be borne in mind in considering its validity " (2).

However, with great respect, I leave it to their Honours to decide whether the *Commercial Goods Vehicles Act* provides for a valid charge, according to their views as expressed above.

As to the Motor Car Acts: I agree with the submission of the plaintiffs that the registration fees are so large in some cases that they must be taken to be imposed for the use of the roads. This view is supported by the definition of motor car in s. 3. But there is no statement in the Act, let alone any assurance, that the fees are only a contribution towards wear and tear of the relevant highways, and so the provisions for these fees are, like the road charges under the *Commercial Goods Vehicles Act* contrary to s. 92 and invalid or at all events not applicable to inter-State hauliers and their motor vehicles.

I would make the declarations and grant the injunctions sought to the extent warranted by these views.

As to the extent and form of relief that should be granted, the provisions of both Acts have been shown, in my opinion, to be inconsistent with s. 92 of the Commonwealth Constitution. In saying that these provisions are invalid and I mean nothing more than that. But they are still applicable to those hauliers who are not exclusively engaged in inter-State trade or commerce, and so no question of severance arises, as I understand the meaning of " severance " as applied to legislation in part invalid, that is to say, the cutting away of the invalid from the valid part of the enactment, which process consists simply in striking out words, phrases, sentences, paragraphs, Divisions or Parts; provided that what remains of the enactment is intelligible and is not a quite different enactment, unless the legislature directs, as in s. 2 of the Victorian *Acts Interpretation Act* 1930 (No. 3930), that the enactment as so modified shall nevertheless be a valid enactment, in which case the legislature is still legislating and not attempting to delegate to the courts its power to legislate. See *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick & Coy* (3). Then what is called for here is

(1) (1955) 93 C.L.R. 264, at p. 284.
(2) (1955) 93 C.L.R., at p. 211.
(3) (1952) 85 C.L.R. 467, at p. 485.

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a reading down and not a cutting down of the legislation, that is to say, the reading of the provisions inconsistent with s. 92 so as to exclude their application to hauliers engaged exclusively in inter-State trade or commerce. So in my opinion the declaration should simply declare the road charges and registration fees respectively to be inapplicable to the plaintiffs while exclusively engaged in inter-State trade or commerce, and, to avoid any possible oversight, without specifying the particular inapplicable provisions by numbers or letters; and the injunction should be framed likewise.

It may well be that this will leave in doubt the position of inter-State hauliers under the *Motor Car Acts*, which seems to me to be a system of registration based on the payment of fees. However without hearing argument on the point I am not prepared to hold that the Court has the power, and therefore the responsibility, and further can reasonably be sure of being able to elucidate, the position of such hauliers following the declaration. Can we say that no registration fee of any kind, even a nominal fee, may be imposed on inter-State hauliers? In *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 1] (1) the Privy Council quoted, without expressing any dissent, that part of the judgment of *Fullagar* J., in *McCarter* v. *Brodie* (2) in which his Honour referred to the majority judgment in *Willard* v. *Rawson* (3) and added that the requirements of the *Motor Car Acts* afforded a good example of what was permissible, including provision for a registration fee "which on its face was not unreasonable". Actually the fee was as heavy then as it is now, allowing for the depreciation of the currency in the meantime. However, their Lordships had already observed that they had not been invited to review *Willard* v. *Rawson* (3), which by a majority, *Dixon* J., as he then was, dissenting, sustained the validity of the registration fee.

On the whole, but not without some hesitation, I think that further argument should not be invited and that the Victorian Parliament should be left to deal with the situation that will arise out of the proposed declaration, because, as far as I can see at this stage, it can do so as adequately by amending legislation as this Court could hope to do by further interpretation.

Since writing these reasons for judgment I have had the advantage of reading the proposed order by the Chief Justice. As regards the relief that I would grant to the plaintiffs against the operation of the *Motor Car Acts* I respectfully concur in the proposed order.

(1) (1955) A.C. 241, at pp. 297 et seq.; (1954) 93 C.L.R. 1, at pp. 23 et seq.

(2) (1950) 80 C.L.R. 432, at pp. 495-499.

(3) (1933) 48 C.L.R. 316.

FULLAGAR J. This is an action in which the plaintiffs in substance claim (a) a declaration that Pt. II of the *Commercial Goods Vehicles Act* 1955 (Vict.) is invalid or inapplicable to vehicles engaged in inter-State trade, and (b) a declaration that ss. 6 and 17 (*a*), (*b*) and (*d*) of the *Motor Car Acts* of the State of Victoria are invalid or inapplicable to vehicles so engaged. The case comes before the Full Court in pursuance of an order made by *Taylor* J., who, after hearing certain evidence, directed, under s. 18 of the *Judiciary Act* 1903-1955, that the case be argued before the Full Court on that evidence.

Part II of the *Commercial Goods Vehicles Act* 1955 is headed " Contributions to Road Maintenance ". Section 25 provides that this Part of the Act shall not apply to any vehicle the load capacity of which is not more than four tons, or to any vehicle while engaged solely in the carriage of certain classes of goods. Section 26 (1) provides :—" (1) The owner of every commercial goods vehicle shall as provided by this Part pay to the Board towards compensation for wear and tear caused thereby to public highways in Victoria a charge at the rate prescribed in the Fourth Schedule." The fourth schedule provides :—" 1. The rate of the charge to be paid in respect of every vehicle shall be one-third of a penny per ton of the sum of—(*a*) the tare weight of the vehicle ; and (*b*) forty per centum of the load capacity of the vehicle—per mile of public highway along which the vehicle travels in Victoria." Section 30 provides :—" (1) All moneys received by the Board by way of charges under this Part shall be paid into the Country Roads Board Fund to the credit of a special account to be called the ' Roads Maintenance Account '. (2) Money to the credit of that account shall be applied only on the maintenance of public highways (including grants to municipalities for that purpose)." The rest of Pt. II of the Act contains provisions for the keeping of records, the collection of the charge, and other incidental matters. In terms Pt. II (unlike Pt. I, which deals with licences and permits, and excludes from its operation vehicles engaged exclusively in inter-State trade) applies without distinction to vehicles engaged in intra-State trade and vehicles engaged in inter-State trade. The amount of the charge is recoverable as a debt, and non-payment is made an offence by s. 30, but payment is not made a condition of the right to operate.

The question whether a " charge " of this kind can, consistently with s. 92 of the Constitution, be imposed in respect of vehicles engaged exclusively in inter-State carrying has already been fully discussed and considered in this Court : see *Hughes & Vale Pty. Ltd.* v.

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State of New South Wales [No. 2] (1), per *Dixon* C.J. and *McTiernan* and *Webb* JJ. (2); per *Williams* J. (3); per *Fullagar* J. (4); per *Kitto* J. (5) and per *Taylor* J. (6). All the members of the Court were agreed in that case that the particular provisions imposing "charges" then under consideration were invalid so far as they purported to apply to vehicles engaged in inter-State trade. There was, however, a difference of opinion on the broad general question whether a charge related to the use of roads could lawfully be imposed at all in respect of vehicles so engaged. *Kitto* J. and *Taylor* J., differing from the other five members of the Court, answered that question in the negative. The Court is now invited by counsel for the plaintiffs to reconsider the general question and to adopt the view of the minority in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1). It is emphasised that, from the point of view of the minority, what their Honours said on the general question provided a reason for the decision, whereas what was said by the other justices was, from their point of view, in the nature of *obiter dicta*.

It is no doubt technically correct to say that the views of the majority in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1) were expressed *obiter*. But the whole matter was treated as a major question. It was fully considered, and I do not think it should be reopened. For myself, I am of the same opinion now as I was then, although I am as conscious now as I was then of the force of the criticism directed by *Kitto* J. at the view with which his Honour disagreed. I would only repeat and emphasise that, in my opinion, public highways are not rightly regarded for present purposes as "facilities" provided by a State for those who use them. What is, in my opinion, permissible in relation to public highways is not the making of a charge for the use of something which the State can at will allow or forbid to be used. What is permissible (whether you call it a "compensation" or a "recompense" or what you will) is the exaction of a contribution towards the maintenance of something which can be used as of right. The distinction is, to my mind, both real and important. For, if what is permissible were of the former character, the States must obviously be very much at large. If, on the other hand, what is permissible is of the latter character, the powers of the States are defined, and the Courts have a power of investigation and ultimate control, which can be exercised to prevent an infringement of s. 92, the final question in each case being whether what is exacted is in truth

(1) (1955) 93 C.L.R. 127.
(2) (1955) 93 C.L.R., at pp. 171-179.
(3) (1955) 93 C.L.R., at pp. 190-196.
(4) (1955) 93 C.L.R., at pp. 208-211.
(5) (1955) 93 C.L.R., at pp. 218-225.
(6) (1955) 93 C.L.R., at pp. 235-240.

and in substance, and is no more than, a contribution towards the maintenance of public highways. I emphasise these matters partly because I observe that the headnote to the report of *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1) speaks of charges for the use of highways, and partly because I thought that part of the argument before us on the validity of the particular statute proceeded on a wrong view of the real nature of the question at issue. For the rest, I refer to what I said in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (2).

Acceptance of the majority opinion on the general question in that case is, in my opinion, decisive of the present case, and I can express my view very shortly. In the judgment of *Dixon* C.J. and *McTiernan* and *Webb* JJ. it was said that, if a charge is imposed as " a real attempt to fix a reasonable recompense or compensation for the use of the highway and for a contribution to the wear and tear which the vehicle may be expected to make " (3), it will be sustained as consistent with s. 92. That it is such an attempt, it was said, must be evident from its nature and character. Their Honours then set out certain *indicia*, which, they said, might be accepted as showing prima facie that it was such an attempt (4). Part II of the Victorian Act has obviously been framed in the light of this passage, which was read several times during the argument, and which need not be set out here. Every one of the *indicia* mentioned is present here. The charge is based on ton-mileage, and is thus related on its face to the nature and extent of the use made of roads. Section 30 of the Act requires all moneys received by the board to be paid into the Country Roads Board Fund (established under the *Country Roads Act*) to the credit of a special " Roads Maintenance Account ", and money to the credit of that special account is to be applied only to the maintenance of public highways. Inter-State transport bears no greater burden than the internal transport of the State. And the collection of the charge involves no interference with any inter-State journey. It is to be added that the charge is not shown to be quantitatively unreasonable either in the sense of being out of proportion to the actual cost of maintenance or in the sense of imposing a practically prohibitive burden. It is to be added also that the State adduced evidence to show the actual basis on which the amount of the charge had been arrived at. Anything even approximating to mathematical accuracy is obviously out of the question, but the evidence does, I think, establish that there is what *Frankfurter* J.

(1) (1955) 93 C.L.R. 127.
(2) (1955) 93 C.L.R., at p. 208.
(3) (1955) 93 C.L.R., at p. 175.
(4) (1955) 93 C.L.R., at pp. 175, 176.

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(in *Capitol Greyhound Lines* v. *Brice* (1)) has called a "relationship between what is demanded and what is given by the State". It shows, I think, that there has been a "real attempt to fix a reasonable recompense or compensation".

The attack on ss. 6 and 17 of the *Motor Car Act* 1951 (Vict.) cannot, in my opinion, be sustained. Section 6 requires all motor cars to be registered, and requires the payment on registration of the fees set out in the second schedule. The schedule was amended so as to increase the fees by Act No. 6038 (1956). Section 17 forbids the use on a highway of an unregistered motor car. Regulation 59 of the *Motor Car Regulations* exempts from the requirement of registration in Victoria motor cars which are registered in another State and come temporarily into Victoria.

Provisions requiring the registration of motor cars have always been regarded as typical "regulatory" laws, which offend in no way against s. 92, and the mere fact that a fee is charged on registration cannot of itself take them into another category: see *McCarter* v. *Brodie* (2). Laws which are on their face merely regulatory in this sense may turn out on investigation to interfere with freedom of trade and to infringe s. 92. But no reason appears in the present case for attributing any such character to the Victorian laws in question. No support for a contrary view can be found in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (3). The vice of the registration provisions held invalid in *Collier Garland Ltd.* v. *Hotchkiss* (4) lay in the fact that registration could be refused at discretion. This feature is absent from the Victorian legislation.

The action should, in my opinion, be dismissed.

KITTO J. In *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (3) I expressed as clearly as I could the view which then appeared to me to be correct on the question whether a State law imposing charges in relation to the use of public roads can apply, in the face of s. 92 of the Constitution, where the use is in the course of inter-State travel. Five members of the Court disagreed with that view, and because the observations which their Honours made on the topic, though *obiter*, were considered pronouncements, I have studied them with a desire to accept and apply any principle which I could see commanded the approval of a majority of the Court.

Their Honours were necessarily speaking in abstract and somewhat general terms, and it may be that notwithstanding what

(1) (1950) 339 U.S. 542, at p. 550 [94 Law Ed. 1053, at p. 1059].
(2) (1950) 80 C.L.R., at p. 495.
(3) (1955) 93 C.L.R. 127.
(4) (1957) 97 C.L.R. 475.

seem to me significant differences of expression there is a single underlying conception. But if there is, I must confess that it has eluded me. If s. 92 prescribed reasonableness in the statutory treatment of inter-State trade commerce and intercourse, there would be no difficulty. But it prescribes absolute freedom; and that, I take it, includes absolute freedom in the use of public roads. Indeed s. 92 virtually says as much by its reference to internal carriage. When it is said that s. 92 assumes the existence of highways and that they are there for use "according to the ordinary laws of the State" (1), I should interpret this to mean (as applied to public highways which cannot be dealt with by the State on the basis of property (1)) in accordance with such ordinary laws of the State as are consistent with the existence of the guaranteed freedom in respect of the use of such roads for inter-State travel. The nature of the freedom is of course another matter; and I understand that it is in a consideration of the nature of the freedom that justification is seen for a doctrine which distinguishes, in respect of the use of a road, between the movement—the travelling along the road—and the wear and tear on the road which inevitably results from the travelling, and, while admitting that a charge cannot be imposed in respect of the movement as such—the mere travelling—maintains that a charge related to the wear and tear may be imposed. This is apart altogether from any question as to a law requiring a road user to pay for the repair of specific damage which is identifiable as having been caused by him in the course of inter-State travel, so that others may not be impeded by that damage in their use of the same road. I am not sure whether the charge which it is said may be made is considered to be justified as (1) a recompense to the State for services rendered to the road-user by the provision of whatever surfaces he may find as he makes his particular journey; or (2) a reimbursement of the cost which the State would incur if it were to make good (a) the wear and tear caused by the particular traveller or a class of travellers to which he belongs, or (b) the extra wear and tear caused by his vehicle, or the vehicles of the class to which he belongs, over that which is caused by some other vehicles—irrespective, in either case, of whether the State actually proceeds to make good that wear and tear or elects to spend the money on other roads; or (3) a *quid pro quo* for the benefit which the particular traveller derives from the existence of whatever surfaces they may be that he traverses. There are expressions in the judgments which may be thought to support each of these

(1) (1955) 93 C.L.R., at p. 171.

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ideas. But while each of them seems to me to present great difficulties, difficulties standing in the way both of its acceptance and of its practical application, my fundamental perplexity arises from this, that if it is conceded that a person enjoys a constitutional immunity from all charges upon his going inter-State by road, I do not see how it can be asserted, without contradicting the concession, that that person is not immune from a charge imposed and measured by reference to an aspect, or a necessary incident or consequence, of his going inter-State by road. Yet I cannot suppose that I would be right in understanding the judgments as involving mutually repugnant propositions. It can hardly be that the judgment of Portia is being paralleled. But why it would be erroneous to suggest that analogy is a question to which at present I do not see the answer. I can hardly think it would be said that the freedom exists for the abstract "going" which travel imports, but does not exist for the physical acts which constitute the inter-State progression. Nor, I imagine, is it considered that what the State may charge for is the provision of something over and above the roads which s. 92 assumes, for the distinction seems too clear between improving the roads themselves and providing something additional to them.

In this situation, since I am still of the opinion I expressed in the *Hughes & Vale Case* [No. 2] (1), I feel obliged to deal with the case before us in accordance with that opinion. It follows that I must hold invalid, insofar as they would apply to vehicles engaged in inter-State trade, both the sets of provisions which are attacked in these proceedings.

In relation to the evidence which has been adduced in support of the provisions of Pt. II of the *Commercial Goods Vehicles Act* 1955 (Vict.) I desire only to say that I agree with the comments which my brother *Taylor* J. will make upon that evidence, and agree with his conclusion as to the true character of the charge imposed. The charge seems to me to be in truth, as his Honour says, "a tax for general road maintenance", and I cannot reconcile its application to the plaintiffs, in respect of their inter-State journeys, with their constitutional right to freedom of inter-State trade commerce and intercourse.

TAYLOR J. On the assumption that the question whether road charges may validly be imposed upon and collected from persons operating commercial goods vehicles exclusively in the course of inter-State trade now arises directly for decision for the first time

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

and that the observations made concerning this problem in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1) were, strictly, *obiter* I desire to reiterate what I then said and to express my view that, for the reasons then given, the provisions of Pt. II of the *Commercial Goods Vehicles Act* 1955 cannot validly apply to such persons. I do not, however, wish to suggest that the views expressed in the reasons of those members of the Court with whom I differed on that occasion were tentative or not formed after full argument yet, nevertheless, I find myself unable to perceive in the observations of the majority of the Court any commonly accepted test for determining the validity of any such charges or, indeed, any test other than broad and general statements of what is or may be permissible.

There was, of course, general agreement among the members of the Court who formed the majority that s. 92 of the Constitution does not preclude the imposition of charges for the use of public roads and highways by vehicles engaged exclusively in inter-State trade. But the initial difficulty is to ascertain and identify the basis upon which it is said that this may legitimately be done. In the joint judgment of *Dixon* C.J., *McTiernan* and *Webb* JJ., it was said that " if a charge is imposed as a real attempt to fix a reasonable recompense or compensation for the use of the highway and for a contribution to the wear and tear which the vehicle may be expected to make it will be sustained as consistent with the freedom s. 92 confers upon transportation as a form of inter-State commerce. But if the charge is imposed on the inter-State operation itself then it must be made to appear that it is such an attempt. That it is so must be evident from its nature and character. Prima facie it will present that appearance if it is based on the nature and extent of the use made of the roads (as for example if it is a mileage or ton-mileage charge or the like) ; if the proceeds are devoted to the repair, upkeep, maintenance and depreciation of relevant highways, if inter-State transportation bears no greater burden than the internal transport of the State and if the collection of the exaction involves no substantial interference with the journey " (2). *Williams* J., on the other hand, expressed the view that " a State is free to make such a charge as will, having regard to the benefit the carrier derives from the facility, not be an undue burden on him ; and a charge will not be burdensome providing, looking at the matter broadly, the benefit flowing from the provision of the facility more than outweighs the burden flowing from the imposition

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

(2) (1955) 93 C.L.R., at pp. 175, 176.

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of the outgoing" (1). At a later stage he said:—". . . that the charge to be reasonable would have to be based mainly upon the extent of the wear and tear the road would be likely to suffer from the projected journey" (1). "All traffic", he added, "light or heavy, presumably causes some wear and tear to the roads, but presumably also the heavier the vehicle the more wear and tear that is caused to the roads. It is for the cost of this extra wear and tear, if any, that it would be reasonable to charge. It is probably not susceptible of any precise calculation. But an approximation should be possible" (1). *Fullagar* J. was of the opinion that persons using roads exclusively for the inter-State carriage of goods or passengers "may be called upon to make a contribution towards the cost of maintaining something from which they may fairly be regarded as deriving a benefit over and above that which is derived by the community as a whole. In making such a contribution they are not really paying a price for their coming and going. They are paying a price for something which makes their coming and going safer, easier, or more convenient than it would be if the highways which they use were allowed to fall into disrepair or decay" (2). But he foresaw serious difficulties in respect of both quantification and incidence in attempting to fix a contribution which would be valid and he did not endeavour to anticipate these difficulties except to say that any such charge in order to be valid must bear some real relation to the maintenance of the roads and must not discriminate against inter-State traffic (3). The general tenor of these observations leads me to think, however, that what his Honour had in mind was a charge commensurate with the benefit which such persons may be regarded as receiving *over and above* that which is received by the community as a whole.

Without attempting an examination of the ground, or grounds, upon which it was thought that the right to make such charges may be reconciled with s. 92 of the Constitution it may be said that there was some general agreement that the upper limit to road charges which may properly be exacted from persons operating vehicles in the course of inter-State trade is fixed by the concept of reasonableness. *Fullagar* J. did not use this expression but it would appear to be involved in his statement that "some real connection—some relation of *quid pro quo*—must appear between the charge and the maintenance of the roads" (3). But reasonableness, alone, is an abstract concept and does not by itself provide a test for determining what charges may or may not be made; it is a

(1) (1955) 93 C.L.R., at p. 194.
(2) (1955) 93 C.L.R., at p. 210.
(3) (1955) 93 C.L.R., at p. 211.

useful guide if, and only if, we are aware of the various matters which must be considered when the necessity arises of determining whether particular charges are or are not reasonable. Accordingly the joint judgment purports to specify those matters ; the charge must represent the result of " a real attempt to fix a reasonable recompense or compensation for the use of the highway and for a contribution to the wear and tear which the vehicle may be expected to make " (1) and the various characteristics which will invest a charge with the appearance of such an attempt are specified in the passage from the joint judgment already quoted. I take the relevant passages in this judgment to mean that, in considering whether any particular charge is reasonable, it is permissible to inquire whether it can be said to have been based upon some pre-estimate of the damage which heavier vehicles are calculated to cause to the roads which they use. *Williams* J., on the other hand appears to have adopted a less liberal view. After pointing out that heavier vehicles presumably cause more damage to the roads than lighter traffic he added that it was for the cost of the *extra* wear and tear that it would be reasonable to charge and, as already mentioned, the same idea seems to underlie the observations of *Fullagar* J.

In the present case the State of Victoria, it seems, has sought to base its legislation imposing the statutory charges in question upon the views expressed in the joint judgment. It has purported to impose on every vehicle of which the load capacity is more than four tons, a charge at the rate of one-third of a penny per ton of the sum of the tare weight of any such vehicle and forty per cent of its load capacity per mile of public highway along which any such vehicle may travel in Victoria and it has sought to support the charge by evidence that the specified charge will provide no more than a reasonable recompense or compensation for the use of the roads of the State by the vehicles in respect of which the charges are imposed or, in the alternative, not more than a reasonable contribution to road maintenance for the wear and tear caused to such roads by those vehicles.

It is, perhaps, not out of place at this stage to say that the defendants did not take up the position that such evidence was needed to establish the validity of the statutory charge. But if the test is whether, upon ascertainable criteria, the charge may be said to be reasonable it would, it seems to me, be impossible to form a judgment on the critical question without evidence of the material matters. I do not see how any court could, without evidence of those matters, characterise a charge of one-third of a penny per

(1) (1955) 93 C.L.R., at p. 175.

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ton-mile, or, for that matter, a charge of one-third of a shilling per ton-mile, as reasonable or unreasonable.

The gist of the evidence which was adduced in the case is contained in an exhibit which furnishes a great deal of information concerning the number and classes of vehicles registered in Victoria (559,000) their estimated average annual mileages and ton mileages, a comparison of the cost of constructing and maintaining roads and highways for various classes of traffic and estimates of the degree of damage done to roads by heavy vehicles, that is to say, vehicles having an axle load of 8,000 pounds or more, or, approximately, a carrying capacity in excess of four tons. It is unnecessary to traverse the whole of this evidence but for the purposes of the observations which will shortly be made it is desirable to refer to some of the details. Of the 559,000 vehicles said to be registered in Victoria nearly 30,000 are vehicles having a carrying capacity of more than four tons and some unspecified number of the latter class of vehicles is engaged exclusively in inter-State trade. The roads of the State upon which vehicles registered in Victoria may lawfully operate extend over 80,000 miles and of such roads 3,850 miles are State highways and 9,789 miles are classified as main roads. The cost of the construction of roads designed to carry axle loads of up to 8,000 pounds is said to be twenty-three per cent less than the cost of roads designed for carrying heavier traffic. Maintenance costs, it is further said, should be apportioned on the same basis and the cost of necessary maintenance to the roads of the State in the year 1954-1955 was expressed to be £15,148,000 though the whole of this sum was not in fact spent. The annual ton-mileages of the heavier vehicles is said to represent fifty-one per cent of the annual ton-mileages of vehicles registered in Victoria and, up to a point, the exhibit referred to treats the degree of road damage occasioned by different classes of vehicles as proportionate to ton-mileage. After, in effect, charging against the heavier vehicles fifty-one per cent of seventy-seven per cent of the amount of £15,148,000 the exhibit treats the remaining twenty-three per cent of that sum as attributable solely to maintenance necessary as the result of damage done by the heavier vehicles. The result, namely £9,400,000 is said to be the cost of maintenance, during the year referred to, properly attributable to the heavier vehicles and it appears, after adjustments to which it is unnecessary to refer, that a rate of one-third of a penny per ton-mile imposed in respect of the heavier vehicles would not quite recoup this sum. Therefore, it is said, the charges are no more than a reasonable recompense or compensation for the use of the highways and for a contribution

to the wear and tear which such heavier vehicles may be expected to make.

The computations to which I have referred contain a great deal of surmise and conjecture and, perhaps, in some respects, represent even less than " a loose judgment in fixing a *quid pro quo* ". But I have no doubt that they represent, as far as it was possible to do so, an attempt to assess a reasonable charge on the basis of the views expressed in the joint judgment. Nevertheless, I am satisfied that they are insufficient to support the charges made by Pt. II. This opinion, I hasten to add, is based upon a broad consideration of the character of the computations themselves rather than upon criticism of the elements of surmise and conjecture upon which they may, in considerable measure, be said to be based.

The first observation which I wish to make is that I doubt whether the charges are based upon considerations consistent with the views which commended themselves to *Williams* and *Fullagar* JJ. They are not charges made for the *extra* damage done to the roads by heavier traffic nor are they charges commensurate with any benefit which the owners of heavier vehicles may be said to receive over and above that which is derived by the community as a whole; substantially, it may be said that analysis of the exhibit discloses that the specified rate has been imposed in an attempt to recoup to the State the cost of making good all wear and tear which, it is felt upon the assumptions made in the exhibit, may fairly be said to be attributable to the heavier forms of traffic.

But if, as was contended, a charge so based is not open to objection there are, in my view, other reasons for holding that the evidence fails to establish that the charges which Pt. II of the Act seeks to impose are not " reasonable " in any sense in which that expression has, so far, been used. In the first place, it will be observed that one vital factor taken into consideration in making the computations referred to is the cost to the State of maintaining some 80,000 miles of roads of all classes. State highways and main roads, however, constitute little more than 13,000 miles of these roads and there is nothing to give the slightest indication of the extent to which either these or other roads of the State are used by inter-State traffic. Nevertheless the computations proceed on the basis that it is fair and reasonable to make a charge against the owners of vehicles engaged in inter-State traffic based upon maintenance costs for every mile of roadway in Victoria. At this stage the computations, in my opinion, entirely break down for even if it may be said that charges may be imposed upon vehicles operated in the course of inter-State trade to compensate for the damage they occasion to

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the roads which they use, I find it impossible to accept the proposition that a general charge for the maintenance of all roads throughout the State is compatible with s. 92. Indeed, a rate arrived at on this basis seems to wear, distinctly, the appearance of a tax for general road maintenance rather than recompense or compensation, reasonable or otherwise, for the use of the roads upon which such vehicles are operated. It is, I think, nothing to the point to suggest that this objection is overcome by the fact that maintenance costs generally throughout the State have been charged against all heavier vehicles wherever and for whatever purpose they may be used for we have not the slightest idea of the respective quantities of heavy traffic on inter-State routes and other roads.

The matter is further complicated by the fact that the computations ignore a factor which was most material in estimating both the percentage of road maintenance properly attributable to the use both in intra-State and inter-State of heavy vehicles and to the striking of a proper rate of charge for the purpose of recouping maintenance costs. As already appears the computed rate is based upon the number of heavy vehicles registered in Victoria and they ignore altogether vehicles which, though registered in other States, operate on Victorian roads in the course of inter-State trade. But the statutory rate if valid will be imposed not only upon vehicles so registered but upon all other heavy vehicles entering the State in the course of inter-State trade. If the omitted factor had been included the percentage of maintenance costs considered appropriate to be recouped from the owners of heavy vehicles may possibly have been higher but the rate of charge, itself, may well have been much lower. In these circumstances it appears to me that the computations failed to take into account matters which are vital to the question whether the charges are " reasonable " on any view and they leave this question completely unsolved. Accordingly I feel obliged to say that the evidence fails to satisfy me, upon any view that has so far been taken, that the exaction prescribed by Pt. II is or can be said to be no more than " reasonable ". Particularly is this so when it is seen not only that the computations appear to spread road maintenance costs over a much too limited group but that the result of the legislation will be to require the owners of heavier vehicles entering Victoria from other States to make what is, in substance, a general contribution to road maintenance throughout that State.

The result, even it if be assumed that there is some constitutional basis for the imposition upon inter-State traffic of road charges

which, upon some denotation of the term, may be said to be " reasonable ", is, in my opinion, that the statutory provisions which impose the charges in question must be held to have no application to persons operating vehicles exclusively in the course of inter-State trade.

The question whether the provisions of ss. 6 and 17 of the *Motor Car Acts* 1951-1956 can wholly apply to vehicles used exclusively in the course of inter-State trade is, I think, conclusively answered against the defendants by the decisions of this Court in *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [No. 2] (1); *Nilson* v. *State of South Australia* (2) and *Pioneer Tourist Coaches Pty. Ltd.* v. *State of South Australia* (3), and I agree that the appropriate form of declaration which should be made concerning these provisions is that proposed by the Chief Justice.

Declare that sub-s. (4) *of s.* 6 *of the Motor Car Act* 1951 (*No.* 5616) *and sub-pars.* (*b*) *and* (*c*) *of par. B of the second schedule as substituted by Act No.* 6038 *cannot apply to commercial goods vehicles used on highways in Victoria not otherwise than in the course of trade and commerce among States and in what is necessarily incidental thereto and that s.* 17 *cannot apply so as to make it an offence for a person to drive a commercial goods vehicle exclusively so used without complying with the requirement of* s. 6 *that the vehicle shall be registered and a fee shall be paid pursuant to sub-s.* (4) *of that section.*

Order that the plaintiffs pay the defendant's costs of the action except such costs as are exclusively referable to the claim of the plaintiffs in relation to the invalidity of the application to the plaintiffs of so much of the Motor Car Act 1951 *as amended as requires the payment of the fees set out in the second schedule of that Act on registration which costs are to be paid by the defendants. Costs to be set off.*

Solicitors for the plaintiffs, *Alexander Grant, Dickson & King.*
Solicitor for the defendants, *Thomas F. Mornane,* Crown Solicitor for the State of Victoria.

R. D. B.

(1) (1955) 93 C.L.R. 127.
(2) (1955) 93 C.L.R. 292.
(3) (1955) 93 C.L.R. 307.