

UNIVERSITY OF LONDON
W.C.1.
13 FEG 1962
INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN: DENNIS HOTELS PROPRIETARY LIMITED Appellant

- and -

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THE STATE OF VICTORIA and
HENRY EDWARD BOLTE Respondents

- and -

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THE COMMONWEALTH OF AUSTRALIA, THE
STATE OF NEW SOUTH WALES AND THE
ATTORNEY GENERAL OF THE STATE OF
NEW SOUTH WALES

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THE STATE OF WESTERN AUSTRALIA
and THE ATTORNEY GENERAL of the
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STATE OF SOUTH AUSTRALIA and
THE ATTORNEY GENERAL OF THE STATE
OF SOUTH AUSTRALIA and THE STATE
OF TASMANIA and THE ATTORNEY
GENERAL OF THE STATE OF TASMANIA Interveners

CASE FOR THE STATE OF NEW SOUTH WALES AND
THE ATTORNEY GENERAL OF THE STATE OF NEW
SOUTH WALES AS INTERVENERS

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1. This Appeal is brought by Special Leave granted
by Her Majesty by Order in Council dated 3rd p. 95.
August 1960 from a judgment of the Full
Court of the High Court of Australia dated p. 94.

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pp. 10-11.

pp. 1-7.

26th February 1960 which allowed a demurrer by the Respondents (defendants) to a Statement of Claim of the Appellant (plaintiff) so far as it sought a Declaration that section 19(1)(a) of the Licensing Act 1948 (Victoria), as amended, was invalid in that it purported to impose a duty of excise contrary to the provisions of section 90 of the Commonwealth of Australia Constitution Act 1900.

2. Before the High Court the Appellant had sought to recover fees which it had paid for a victualler's licence under section 19(1)(a) of the Licensing Act 1928 (hereafter referred to as "The Victorian Act") and also fees which it had paid for temporary victualler's licences under section 19(1)(b) of that Act. The basis of the Appellant's claim was that the fees payable under these sections were duties of excise within the meaning of s. 90 of the Constitution; that the power to impose such duties was granted exclusively to the Parliament of the Commonwealth of Australia by that section; and that, therefore, sections 19(1)(a) and (b) were invalid. The Appellant sought Declarations accordingly and also an

p. 7.

injunction restraining the Respondents from imposing and collecting these fees.

3. The Respondents demurred to the whole of the State- p. 10.
ment of Claim on the ground that it disclosed no cause of action in that neither of the sections imposed or purported to impose a duty of excise contrary to section 90 of the Constitution and each of them was a valid law of the Parliament of the State of Victoria.

10 4. The Full High Court by a majority (Fullagar, Kitto,
Taylor and Menzies JJ.; Dixon C.J., McTiernan
and Windeyer JJ. dissenting) allowed the
Respondents' demurrer so far as it related to p. 94.
section 19(1)(a) of the Act, but by a majority
(Dixon C.J., McTiernan, Menzies and Windeyer JJ.;
Fullagar, Kitto and Taylor JJ. dissenting) over-
ruled the demurrer so far as it related to
section 19(1)(b). The Respondents have not
sought to appeal from the judgment of the High
Court so far as it relates to s. 19(1)(b)..

20 5. The Liquor Act 1912, as amended, of New South
Wales (hereafter referred to as "The New South
Wales Act") is in pari materia with the Vic-
torian Act. The decision of the High Court and
the reasons of the majority of the Judges

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upholding the validity of s. 19(1)(a) of the Victorian Act would, it is submitted, support the validity of corresponding provisions of the New South Wales Act and uphold the constitutional power of the State of New South Wales to enact such provisions.

- p.96.
6. The Order in Council by which the Appellant was granted leave to enter and prosecute this Appeal provides that the Respondents may raise as a preliminary point the plea that the Appeal is incompetent without a certificate of the High Court of Australia that the question raised in the Appeal is one which ought to be determined by Her Majesty in Council. These Interveners desire to support the objection of the Respondents to the competency of the Appeal and they submit that the question which the High Court decided, namely, whether section 19(1)(a) of the Victorian Act was within the legislative power of the State of Victoria is a question as to the limits inter se of the constitutional powers of the Commonwealth and those of the States within the meaning of section 74 of the Constitution and the Interveners adopt and rely upon the arguments set forth in the Case for
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the Respondents in support of this submission.

7. The Interveners also support the Respondents' case for the validity of section 19(1)(a) of the Victorian Act. The similarity of the New South Wales Act to the Victorian Act both in its general scheme and in its provisions imposing fees upon the grant and renewal of liquor licences appears from the following comparison:

The Victorian Act.

10 The Victorian Act provides for the regulation and control of the sale of liquor in Victoria and it does this principally by means of a discretionary licensing system. As appears from the provisions of the Licensing Act 1958 which re-enacts with no material alterations the provisions of the Licensing Act 1928, the sale of liquor without a licence, or contrary to the provisions of a licence, is prohibited (s. 154).
20 The Act permits the granting of licences of various descriptions, including victualler's licences and temporary victualler's licenses; a victualler's licence is in force to the end of the year for which it is granted and authorises the licensee to sell and dispose of liquor in any quantity on the premises specified in the licence; a

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temporary victualler's licence is in force for a limited period specified in the licence (ss. 7, 8, 9). Applications for the grant or renewal of licences must be made to the Licensing Court constituted under the Act (s. 80) and the Court may, on various grounds grant or refuse such applications. If the Court accedes to an application for the grant or renewal of a licence, it is required to issue a Certificate and cause a duplicate thereof to be transmitted 10 to the appropriate Public Officer (s. 96). Upon the grant or renewal of a licence a fee prescribed by s.19 of the Act is payable by the applicant or holder of the licence and s. 97 requires that this fee be paid to the Public Officer before the licence may issue. An applicant for the grant or renewal of a licence is required to furnish particulars to enable the Court to estimate the amount of the fee payable (s. 21) and the Court is directed finally and conclusively to fix the amount of any 20 fee payable on a percentage basis under the Act and to fix such sum as it thinks reasonable in any case where information is not or cannot be produced to the Court or is incomplete or

insufficient to enable the Court to determine the gross amount paid or payable for liquor purchased (s. 20). The Act generally regulates the premises hours and conditions under which a licensee may lawfully sell liquor. The provisions of s. 19 challenged by the Appellant are in the following terms:

Section 19(1): The fees to be paid for such licenses respectively shall be as follows:-

10 (a) For any of such licenses, other than those for which special provision is made in this section, the fee shall be equal to the sum of six per centum of the gross amount (including any duties thereon) paid or payable for all liquor which during the twelve months ended on the last day of June preceding the date of application for the grant or renewal of the licence was purchased for the premises or (in the case of a packet licence) the vessel in respect of which such grant or
20 renewal is sought;

(b) For a temporary victualler's licence or a temporary packet licence - One pound for each day during which the licence will be in force in respect of each booth stall bar or place

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from which liquor will be sold in the case of a temporary victualler's licence and One pound for each day during which the licence will be in force in the case of a temporary packet licence, and in either case a further fee equal to the sum of six per centum of the gross amount (including any duties thereon) paid or payable for all liquor purchased for sale or disposal under such licence.

The New South Wales Act.

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As in the case of Victoria, the New South Wales Act regulates and controls the sale of liquor principally by means of a licensing system. The Act prohibits the sale of liquor by any person unless he is authorised under the Act to sell the same and prohibits him from selling liquor otherwise than in accordance with the terms of the authority conferred on him under the Act (s. 43). The Act provides that a Licensing Court may grant and renew various descriptions of licences for the sale of liquor including publican's licences and booth or stand licenses (ss. 4, 5, 10, 14(1)). Licences, other than booth or stand licences, are in force from the date of grant until the 30th June next following (s. 14(2)); and are renewable

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annually upon application to the Licensing Court (s. 35). Booth or stand licences are in force only for particular days specified in the licence (s. 20). Under Part X of the Act Certificates of Registration authorising the Secretary of a club to sell liquor on club premises may be granted (s. 132A) and these Certificates are in force from the date of issue until the 30th June next following and may be renewed annually (s. 144).

10 A fee is payable upon the grant or renewal of a licence or Certificate of Registration (ss. 21, 150A) and the amount of any fee payable on a percentage basis on the renewal of a licence or Certificate of Registration is fixed finally and conclusively by the Licences Reduction Board constituted under the Liquor (Amendment) Act 1919 (s. 23(1) s. 150A(2)). Upon the first renewal of a licence or Certificate of Registration after the grant of a new licence or Certificate of Registration or where no information
20 or insufficient information is furnished to enable the Board to fix the fee upon a percentage basis the Board is empowered to fix the fee at such amount as it thinks fair and reasonable (s. 23(2) s. 150A(3)). The Board is required

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to inform the Clerk of the Licensing Court of the District where the premises are situated of the amount of the fee (s. 23(3) s. 150A(4)). and payment of the fee is a condition precedent to the issue of the licence or Certificate of Registration (s. 32 s. 139(3)). The holder of a publican's licence or of a club Certificate of Registration is required to submit, before renewal of a licence or Certificate of Registration, returns of liquor purchases for the purpose of assessing the fees (s. 22(1), s. 151A). As in the case of the Victorian Act the New South Wales Act regulates the premises hours and conditions under which a licensee may be permitted to sell liquor (ss. 25, 26, 40A, 40B 44-46, 49, 53, 57, 65). The provisions of s. 21 of the New South Wales Act (the section corresponding to s. 19 of the Victorian Act) and of s. 150A of the New South Wales Act are, so far as material, as follows:-

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S. 21(1) The following fees shall be paid in respect of licences under this part namely :- 20

- (a) For a new publican's licence such sum (not exceeding five hundred pounds) as may be fixed by the Licensing Court granting the licence.
- (b) For the renewal of a publican's licence, a sum

equal to five pounds per centum of the gross amount (including any duties thereon) paid or payable for all liquor (other than liquor sold by the licensee to other licensed persons) which, during the twelve months ended on the thirty first day of December next preceding the date of the application for the renewal of the licence was delivered upon or purchased for the premises in respect of which each such renewal is sought or any neighbouring premises in which the licensee temporarily carried on business pursuant to an authority given under section forty of this Act, and including all liquor delivered by him or on his behalf upon, or purchased by him for any booth or stand in respect of which a licence was, during the said period of twelve months granted to him or to any other person.

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(j) For a booth or stand licence two pounds per day.

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S. 150A.(1) The following fees shall be paid in respect of Certificates of Registration granted or renewed under this part, namely:

(a) For a new Certificate of Registration of a club such sum (not exceeding £500) as may be fixed by the Licensing Court granting the

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Certificate; in no case shall the fee payable under this paragraph exceed a sum calculated at the rate of one pound for each bona fide member of the club at the date of the application as shown on the statement required to be furnished under sub-section two of section one hundred and thirty-six of this Act;

- (b) For the renewal of a Certificate of Registration of a club a sum equal to five pounds per centum of the gross amount (including any duties thereon) paid or payable for all liquor which, during the twelve months ended on the thirty-first day of December next preceding the date of application for the renewal was delivered upon the club premises or purchased for or on behalf of the club.

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8. These interveners submit that the fees imposed by s. 19(1)(a) of the Victorian Act are not duties of excise. The liability to pay them is not tied to or dependent upon the manufacture or production of the liquor or the taking of any step or the making of any transaction between the manufacture or production of the liquor and its distribution to the consumer. It is not a tax "on the goods" but on the right to engage in a particular business

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in which the competition is limited by the Statute. The liability to pay the fees is tied entirely to the grant or renewal of the licence and the quantum of the fee is a measure of the size of the licensee's business varying with the value of the privilege which the licence gives him. The features of the Victorian Act which support the foregoing submissions and which are also to be found in the New South Wales Act are briefly as follows:-

- 10 (a) The Licensing system under the Act is manifestly a means adopted for effecting a comprehensive and strict control of the trade in liquor in the public interest. The control and regulation of the trade with this objective preponderates throughout the provisions of the Act. There can be no suggestion that the *raison d'etre* of the licensing system is the exaction of a charge on liquor.
- 20 (b) The "Keystone of the whole licensing system" (so described by Fullagar J. in Bergin v. Stack 88 C.L.R. at p. 260) is the prohibition in s. 154 of the Act against trading in liquor without a license. Since the Act and a licence granted thereunder confines the authority to sell and dispose of liquor to the

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premises specified in the licence and in other ways limits the authority of the holder to trade, the effect of the prohibition in s.154 is that the grant of a licence confers upon the holder not only a privilege to carry on a business otherwise unlawful but confers a measure of security from competition, the only competitors being other holders similarly confined to specified places of business and similarly limited in their authority to trade in liquor.

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(c) The licence fee is payable only by virtue of the grant or renewal of the licence. It is then payable in full and no right to refund arises if no sales or other dealings in liquor are made pursuant to the privilege conferred by it.

(d) No particular purchase, sale or other dealing by the licensee or any other person itself attracts any liability to pay a charge. In particular the purchase of stock from time to time by the licensee creates no liability, for no fee is payable unless and until the licence is renewed. It follows that the liability is not related to transactions in

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liquor.

- (e) The fee is quantified by the value of past purchases of liquor and if the licence is not renewed no liability attaches to anybody in respect of the purchases. If the holder does not renew it, no liability attaches to him for his purchases or other dealings in the liquor.
- (f) In the case of a new licence a fee is still payable for the grant even though no purchases have been made.
- (g) The amount payable by the grantee for a grant or renewal of a licence is the same whether during the currency of the licence he sells more or less liquor than he or the previous holder of the licence purchased in the previous year.
- (h) The value of the past purchases on which the fee is assessed is an approximate measure of the size of the business carried on at the licenced premises and a fair, if not exact, indication of the value to the grantee of the privilege to be conferred on him by the grant of the licence. Accordingly, as between different licencees, the prices they have to

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pay for the privilege of engaging in the business varies with the value of the privilege which the licence gives.

9. In the light of these considerations, it is submitted that the fees imposed by s. 19(1) (a) of the Victorian Act are properly to be characterised as fees imposed by the State upon the grant of a licence or privilege of a quasi-monopolistic kind to carry on a business and as such are within the power of a State to impose. 10

The Interveners adopt and rely upon the arguments set forth in the Case for the Respondents in support of this submission.

10. If, contrary to the Intervener's submissions, it should be held that this Appeal is competent, the Interveners submit that the Appeal should be dismissed for the Reasons set forth in the Case for the Respondents.

R. R. DOWNING

K. J. HOLLAND

MERVYN HEALD

No. 7 of 1961

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

DENNIS HOTELS PROPRIETARY LIMITED
Appellant

- and -

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- and -

THE COMMONWEALTH OF AUSTRALIA,
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STATE OF NEW SOUTH WALES

The State of Western Australia
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of the State of Tasmania
Interveners

CASE FOR THE STATE OF NEW SOUTH
WALES AND THE ATTORNEY GENERAL
OF THE STATE OF NEW SOUTH WALES
AS INTERVENERS

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