

91403

1967/10

IN THE PRIVY COUNCILNo. 34 of 1966.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

UNIVERSITY OF LONDON INSTITUTE OF ADVANCED LEGAL STUDIES 15 MAR 1968 25 RUSSELL SQUARE LONDON, W.C.1.
--

B E T W E E N

5	FREIGHTLINES & CONSTRUCTION HOLDING LIMITED	(Plaintiff) <u>Appellant</u>
	- and -	
	THE STATE OF NEW SOUTH WALES AND THE COMMISSIONER OF MOTOR TRANSPORT	(Defendants) <u>Respondents</u>
10	- and -	
	T.N.T. (SYDNEY) PPTY. LIMITED	<u>Intervener</u>
	- and -	
	THE COMMONWEALTH OF AUSTRALIA	<u>Intervener</u>
	- and -	
15	THE STATE OF SOUTH AUSTRALIA AND THE ATTORNEY-GENERAL OF SOUTH AUSTRALIA	<u>Interveners</u>
	- and -	
20	THE STATE OF VICTORIA AND THE ATTORNEY-GENERAL OF VICTORIA AND THE STATE OF TASMANIA AND THE ATTORNEY-GENERAL OF TASMANIA	<u>Interveners</u>
	- and -	
	THE STATE OF QUEENSLAND AND THE ATTORNEY-GENERAL OF QUEENSLAND	<u>Interveners</u>
25	- and -	
	THE STATE OF WESTERN AUSTRALIA AND THE MINISTER FOR JUSTICE OF THE STATE OF WESTERN AUSTRALIA	<u>Interveners</u>

CASE FOR THE APPELLANT

30 A. INTRODUCTORY. (PARAGRAPHS 1-4):

1. This appeal is brought by special leave granted

Record

Page 8. by Her Majesty by Order in Council dated 28th
Page 7. July, 1966, against an Order of the Full Court
of the High Court of Australia (Taylor, Windeyer
and Owen JJ.) of 2nd May, 1966, whereby the said
High Court of Australia upheld with costs a
Page 6. demurrer by the Respondents to the whole of the
Page 1. Statement of Claim of the Appellant. 5

Page 1. 2. By its said Statement of Claim the Appellant
sought a declaration that the Road Maintenance
(Contribution) Act 1958-1965 of the State of New
Page 2. South Wales generally or, in the alternative, 10
certain specified sections and schedules thereof
was or were invalid by reason of the provisions
of Section 92 of the Constitution of the Common-
wealth of Australia. Alternatively, the 15

Page 2. Appellant sought a declaration that the said Act
cannot validly apply in respect of motor vehicles
owned by the Appellant and used exclusively in or
for the purposes of inter-State trade commerce
or intercourse by reason of the said section of 20
the Constitution.

3. In upholding the Respondents' said demurrer
to the Statement of Claim the High Court held
that the said Act in its application to motor
vehicles used exclusively in the course and for 25
the purposes of inter-State trade and commerce
does not infringe Section 92 of the Constitution.

4. The ultimate question for decision in this
appeal is whether the High Court was correct in
so holding. 30

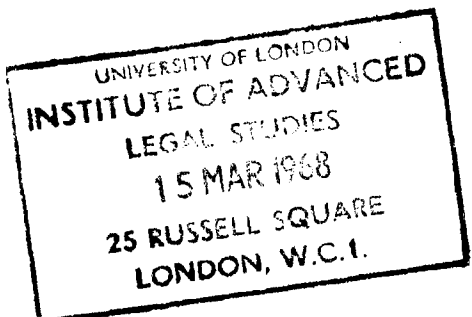
B. MATERIAL PROVISIONS OF ROAD MAINTENANCE
CONTRIBUTION ACT 1958-1965. (PARAGRAPHS 5-7):

5. The most material provisions of the Road
Maintenance (Contribution) Act 1958-1965 are as
follows:- 35

"Sec. 3. (1) In this Act, unless the context
or subject matter otherwise indicates
or requires --

.....

"Commercial goods vehicle" or
"vehicle" means any motor vehicle 40
(together with any trailer) which
is used or intended to be used for
carrying goods for hire or reward
or for any consideration or in the



course of any trade or business
whatsoever.

.....
"Load capacity", in the case of a
motor vehicle or trailer, means --

- 5 (a) the load or carrying capacity
thereof as shown in the
certificate of registration
issued in respect thereof,
10 or on the records kept,
under the Motor Traffic Act,
1909, as amended by subsequent
Acts, or under any correspond-
ing legislation or ordinance of
15 any State or Territory of the
Commonwealth; or
- (b) where in such certificate there
is shown the tare weight of the
motor vehicle or trailer and
20 either the maximum permissible
gross weight of the motor
vehicle or trailer together
with the load which may be
carried thereon or the aggregate
weight of the motor vehicle or
25 trailer, the difference between
such gross or aggregate weight
and the tare weight; or
- (c) where no such load or carrying
capacity is shown in such
30 certificate or on such records
or where no such weights are
shown in such certificate or no
such certificate is in force,
the load or carrying capacity
35 aforesaid of a similar motor
vehicle or trailer registered
under the Motor Traffic Act,
1909, as amended by subsequent
Acts.

40 "Motor vehicle" means any motor car,
motor carriage or other vehicle
propelled upon any public street
wholly or partly by any volatile
45 spirit, steam, gas, oil, or elec-
tricity, or by any means other than
human or animal power, and includes
a trailer, but does not include any

vehicle used on a railway or tramway.

.....

"Public street" means any street, road, lane, bridge, thoroughfare, footpath, or place open to or used by the public, and includes any place at the time open to or used by the public on the payment of money or otherwise. 5

.....

"Tare weight", in the case of a motor vehicle or trailer, means -- 10

(a) the tare weight or unladen weight thereof as shown in the certificate of registration issued in respect thereof under the Motor Traffic Act, 1909, as amended by subsequent Acts, or under any corresponding legislation or ordinance of any State or Territory of the Commonwealth; or 15 20

(b) where no such tare weight or unladen weight is shown in such certificate or no such certificate is in force -- 25

(i) where the vehicle is not a trailer, the gross weight of the vehicle laden with the tools and accessories usually carried, with such fuel, water and oil as may be in or upon the vehicle but otherwise unladen; and 30 35

(ii) where the vehicle is a trailer, the gross weight of the trailer (including any article affixed thereto) unladen ready for attachment to a motor vehicle. 40

(2) This Act shall be read and

5 construed subject to the Commonwealth of Australia Constitution Act and so as not to exceed the legislative power of the State to the intent that where any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected.

15 Sec. 4. This Act 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.

.....

20 Sec. 5. (1) The owner of every commercial goods vehicle shall as provided by this Act pay to the Commissioner towards compensation for wear and tear caused thereby to public streets in New South Wales a charge at the rate prescribed in the First Schedule.

25 (2) Such charge shall become due at the time of the use of any public street by the vehicle and if not then paid shall be paid and recoverable as in this Act provided.

.....

35 Sec. 6. (1) The owner of the vehicle shall keep in duplicate in or to the effect of the form in the Second Schedule an accurate daily record of all journeys of the vehicle along public street in New South Wales.

40 (2) The owner of the vehicle shall retain for a period of six months after the completion of any journey, and on demand make available to the Commissioner or an authorised officer, a copy of each such record

for inspection when so required.

- Sec. 7. (1) Subject to this Act, not later than the fourteenth day following a date to be fixed by the Governor and notified by proclamation published in the Gazette each owner of a commercial goods vehicle which has, during the period commencing on the commencement of this Act and ending on the last day of the month immediately preceding the month that forms part of the date proclaimed under this subsection, travelled on any public street in New South Wales shall deliver to the Commissioner at his office in Sydney in respect of each such vehicle --
- (a) the record for such period which the owner is required to keep pursuant to section six of this Act certified as correct; and 20
 - (b) the amount of all moneys owing by way of charges payable in respect of such period pursuant to the provisions of this Act in so far as not already paid to the Commissioner. 30
- (2) Subject to this Act, not later than the fourteenth day of the month next succeeding the month that forms part of the date proclaimed under subsection one of this section, and not later than the fourteenth day of each month thereafter, each owner of a commercial goods vehicle which has, during the preceding month, travelled on any public street in New South Wales shall deliver to the Commissioner at his office in Sydney in respect of each such vehicle --
- (a) the record for the previous month which the owner is required to keep pursuant 45

to section six of this Act certified as correct; and

5 (b) the amount of all moneys owing by way of charges payable in respect of such previous month pursuant to the provisions of this Act in so far as not already paid to the Commissioner.

10 (3) It shall be sufficient delivery, for the purposes of this Act, of any record or payment of moneys owing by way of charge if such record or pay-
15 ment is sent by prepaid registered letter through the post addressed to the Commissioner at his office in Sydney and such letter is posted not later than the day on which such
20 record or payment is by subsection one or two of this section required to be delivered to the Commissioner.

Sec. 9. (1) The Commissioner shall pay --

25 (a) one-fifth of all moneys received by him by way of charges under this Act into the County of Cumberland Main Roads Fund to the credit of a special account to be called the "Roads Maintenance Account";

30 (b) four-fifths of all moneys received by him by way of charges under this Act into the Country Main Roads Fund to the credit of a special account to be called
35 the "Roads Maintenance Account".

40 (2) (a) Money to the credit of the Roads Maintenance Account in the County of Cumberland Main Roads Fund shall be applied only on the main-tenance of public streets in the County of Cumberland (including grants to municipalities and shires for that purpose).

45 (b) Money to the credit of the Roads Maintenance Account in the Country Main Roads Fund shall be applied only on the maintenance of

public streets outside the County of Cumberland (including grants to municipalities and shires for that purpose).

(3) The costs of administration of this Act shall be met -- 5

(a) as to one-fifth part thereof -- from such part of the proceeds of the taxes collected under the Motor Vehicles (Taxation) Act, 1951, or any Act imposing taxes upon motor vehicles in lieu of the taxes imposed upon motor vehicles by that Act, as would but for this paragraph be wholly payable to the County of Cumberland Main Roads Fund; 10 15

(b) as to four-fifth parts thereof -- from such part of the proceeds of the taxes so collected as would but for this paragraph be wholly payable to the Country Main Roads Fund. 20

(4) The provisions of this section shall have effect notwithstanding anything contained in the Main Roads Act, 1924, as amended by subsequent Acts. 25

Sec. 10. (1) Any person who -- 30

(a) fails to keep any record as required by this Act or to retain a copy of any such record or to make a copy thereof available for inspection as required by this Act; or 35

(b) omits any item from any such record or copy thereof; or

(c) makes any false or misleading statement in any such record or copy thereof; or 40

(d) fails to deliver any such record to the Commissioner as required by this Act; or

5 (e) fails to pay to the Commissioner
as required by this Act any
charges payable in respect of
any vehicle,
shall be guilty of an offence
against this Act.

10 (2) Every person who is guilty of
an offence against this Act shall
for every such offence be liable
to a penalty not exceeding two
hundred pounds.

15 Sec. 10A. (1) Where the owner of a
commercial goods vehicle is a body
corporate and such owner fails to
deliver to the Commissioner in
accordance with the provisions of
20 section seven of this Act the
record referred to in paragraph (a)
of subsection two of that section
or, as the case may be, with those
provisions as modified by any
arrangement made under section
25 eight of this Act, the Commissioner
may serve a notice on any director,
member of the governing body or
manager, of such body corporate
informing him that unless such
30 record is delivered to the
Commissioner within such period,
not being less than fourteen days
after the service of such notice,
as may be specified therein, such
director, member or manager shall
35 be guilty of an offence against
this Act.

40 If any record referred to in any
such notice is not delivered to
the Commissioner within the period
specified in the notice, the
director, member or manager on
whom the notice was served shall
be guilty of an offence against
this Act.

45 (2) Where any such owner fails to
pay any amount payable by it to the
Commissioner in accordance with the
provisions of paragraph (b) of
subsection two of section seven of

this Act, or, as the case may be, with those provisions as modified by any arrangement made under section eight of this Act, the Commissioner may by notice in writing served on such director, member or manager require such director, member or manager to pay such amount to the Commissioner within such period not being less than fourteen days after the service of the notice as may be specified therein. 5 10

Any such notice may require the payment of all moneys owing by way of charges in respect of any one or more vehicles or months. 15

Upon the expiration of the period specified in the notice, the director, member or manager on whom it was served shall be liable to pay such amount to the Commissioner. 20

Nothing in this subsection affects the liability of a body corporate to pay any amount to the Commissioner in accordance with any of the provisions of this Act, but -- 25

(a) where any such amount is paid to the Commissioner in accordance with the provisions of this subsection the liability under this Act of the body corporate shall be reduced by the same amount; and 30 35

(b) where, after a notice has been served in accordance with the provisions of this subsection on a director, member of the governing body or manager, of a body corporate, any such amount is paid by the body corporate the amount for which any such director, member or manager is liable 40 45

under this subsection shall be reduced by the amount paid by the body corporate.

5 (3) Any amount not paid to the Commissioner in accordance with the requirements of any notice served under subsection two of this section shall be a civil debt due to the Commissioner by the director, member or manager on whom the notice was served and, without affecting any other method of recovery provided by this Act, may be recovered by the Commissioner in any court of competent jurisdiction.

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20 (4) If any amount required to be paid by the director, member of the governing body or manager, of a body corporate in accordance with the requirements of a notice served on him under subsection two of this section is not paid within the period specified in the notice, such director, member or manager shall be guilty of an offence against this Act.

25
30 Nothing in this subsection affects the liability of any such director, member or manager under any other provision of this section.

(5) Any notice under this section may be served --

- 35 (a) personally; or
- 40 (b) by sending it by pre-paid letter post to the director, member or manager to whom it is addressed at the registered office of the body corporate.

Service of the notice may be proved by the oath of the person who served it, or by affidavit or otherwise.

45 (6) (a) Where any amount is paid

to the Commissioner by a
director or member of the
governing body of a body
corporate in accordance with
the requirements of a notice
served on him under subsection
two of this section or pursuant
to an order made under section
twelve of this Act, such director
or member shall have a right of
contribution against any other
person who is a director or
member of the governing body of
such body corporate. 5
10

(b) Where any amount is so
paid by a person who is a
manager of a body corporate,
every person who is a director
or member of the governing body
of such body corporate shall be
jointly and severally liable to
reimburse him for such amount. 15
20

Sec. 11. (1) Any penalty incurred for
breach of any provision of this
Act may be recovered in a summary
manner before a stipendiary
magistrate or any two justices in
petty sessions. 25

(2) A prosecution for an offence
against this Act may be commenced
at any time within twelve months
from the commission of the offence. 30

Sec. 12. (1) Where any person is convicted
of an offence against this Act the
court before which he is so
convicted may, in addition to
imposing a penalty on such person
for the offence, order him to pay
to the clerk of the court within
a time to be specified in the
order any amount which from the
evidence given during the
proceedings the court is satisfied
should have been, but has not been,
paid by the person so convicted
to the Commissioner by way of
charge under this Act. Any
amount paid to the clerk of the
court under this subsection shall 35
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45

be paid by him to the Commissioner.

5 (2) Any such order shall be deemed to be a conviction or order whereby a sum of money is adjudged to be paid within the meaning of the Justices Act, 1902, as amended by subsequent Acts.

.....

FIRST SCHEDULE

10 1. The rate of the charge to be paid in respect of every vehicle shall be five-eighteenths of one cent per ton of the sum of --

(a) the tare weight of the vehicle; and

15 (b) forty per centum of the load capacity of the vehicle, per mile of public street along which the vehicle travels in New South Wales.

20 2. In assessing such charge fractions of miles and fractions of hundredweights shall be disregarded but hundredweights (in relation to both tare weight and
25 load capacity) shall be taken into account as decimals of tons.

30 6. The appointed date for the purposes of Section 7 of the Road Maintenance (Contribution) Act 1958-1965 was and is the first day of June, 1958.

7. Section 82(2) of the Justices Act 1902, as amended, of the State of New South Wales is applicable to any prosecution under the last mentioned Act, and provides as follows:-

35 (2) Whenever by any conviction or order it is adjudged that any fine or penalty, or any sum of money, or costs, shall be paid, the Justice or Justices making the conviction or
40 order shall, except where the conviction or order is made against a corporate body,

Record

therein and thereby adjudge that, in default of payment, in accordance with the terms of the conviction or order, of the amount thereby adjudged to be paid as ascertained thereby, the person against whom the conviction or order is made shall be imprisoned and so kept for a period calculated in accordance with the provisions of this subsection, unless the said amount and, if to such Justice or Justices it seems fit, the costs and charges of conveying him to prison be sooner paid;

.....

Where the said amount does not exceed ten shillings such period shall not exceed twenty-four hours.

Where the said amount exceeds ten shillings but does not exceed twenty shillings such period shall be forty-eight hours.

Where the said amount exceeds twenty shillings such period shall be one day for each ten shillings of such amount or part thereof, but in no case shall such period exceed twelve months.

Such imprisonment shall be with either hard labour or light labour, as the Justice or Justices in and by the conviction or order adjudge.

Pages 1 & 6.

C. STATEMENT OF CLAIM AND DEMURRER. (PARAGRAPHS 8-9):

8. The following facts (inter alia) were alleged in the Statement of Claim, and, for the purposes of this Appeal, are not in dispute (the references therein to "the said Act (as amended as aforesaid)" being references to the Road Maintenance (Contribution) Act 1958-1965):

Page 3.

"2. The Plaintiff, Freightlines & Construction Holding Limited, is and has been at all material times a Company duly incorporated in and in accordance with the laws of the State of New South

Wales and is entitled to sue in and by its said corporate name and style.

Record

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3. The Defendant, The Commissioner for Motor Transport, is and has been at all material times a body corporate under the laws of the State of New South Wales and is liable to be sued in and by his said corporate name and style.

Page 3

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6. The Plaintiff carries on and has at all material times carried on business as an inter-State carrier of goods by road for reward. The Plaintiff is and has been at all material times the owner of certain motor vehicles (being "commercial goods vehicles" within the meaning of the said Act (as amended as aforesaid) having a "load capacity" within the meaning of the said Act (as amended as aforesaid) of more than four (4) tons) which are used for the purposes and in the course of the Plaintiff's said business on journeys from one to another of the following cities, that is to say: Sydney in the State of New South Wales, Melbourne in the State of Victoria, Brisbane in the State of Queensland and Adelaide in the State of South Australia, and for no other purposes. During the course of many of the said journeys the said motor vehicles travel along various public roads in the State of New South Wales.

Page 4

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7. The Defendant, The Commissioner for Motor Transport, has claimed and continues to claim that the Plaintiff is bound pursuant to the said Act (as amended as aforesaid);

Page 4

(a) To pay to the said Defendant certain charges in accordance with Section 5 of the said Act (as amended as aforesaid)

(b) To keep accurate daily records of all journeys of each of the said motor vehicles along public streets in New South Wales and to retain for a period of six (6) months after the completion

Record

of any such journey and on demand to make available to the said Defendant or an authorised officer a copy of each such record for inspection when so required, in accordance with the provisions of Section 6 of the said Act, (as amended as aforesaid), and 5

(c) To deliver to the said Defendant at his office in Sydney in respect of each of the said motor vehicles certain records and certain moneys in accordance with the provisions of Section 7 of the said Act (as amended as aforesaid).” 10

Page 6.

9. The point of law stated in the Demurrer was that the Road Maintenance (Contribution) Act 1958-1965 and all the Sections and Schedules thereof referred to in the Statement of Claim are valid and validly apply in respect of the Appellant's vehicles and that the Statement of Claim therefore discloses no cause of action. 15 20

D. SECTION 92 OF THE CONSTITUTION.
(PARAGRAPHS 10-13):

10. Section 92 of the Constitution in its first paragraph provides that on an event which has happened: 25

“... trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.” 30

11. Section 92 of the Constitution is a provision of great importance in the structure of the Federal system in Australia. It is an over-riding constitutional provision guaranteeing absolute freedom of trade commerce and intercourse among the States which, by effectively withdrawing from both the Commonwealth and the States power to make any law inconsistent with the freedom guaranteed, provides a substantial limitation of the legislative power of both the Commonwealth and the States. The nature and extent of this limitation have been the subject of direct consideration by the Privy Council on five previous occasions, namely in the following cases: 35 40 45

James v. Cowan (1932 A.C. 542)

James v. The Commonwealth (1936 A.C. 578)

The Commonwealth & Ors. v. Bank of New South
Wales & Ors. (1950 A.C. 235)

5 Hughes & Vale Pty. Limited v. The State of New
South Wales (1955 A.C. 241)

Commissioner for Motor Transport v. Antill
Ranger & Company Pty. Limited (1956 A.C. 527).

10 12. By one or more of the decisions of the
Privy Council referred to in Paragraph 11
hereof the following propositions relating to
Section 92 of the Constitution have been
established:

15 (a) That Section 92 of the Constitution
guarantees the absolute freedom of the
individual from any legislative
provisions which may fairly be said to
impose a burden upon his inter-State
trade, commerce or intercourse (see
20 Hughes & Vale Pty. Limited v. The State
of New South Wales (No. 1), 1955 A.C.
241 at 295, 296, 297-8, 306).

25 (b) That the fact that the same volume of
trade flows from State to State both
after and before the interference with
or the burden upon the individual
trader does not mean that freedom of
trade and commerce among the States
remains unimpaired (see Hughes & Vale
Pty. Limited v. The State of New South
30 Wales (No. 1), 1955 A.C. 241 at 295,
296).

35 (c) That a law prohibiting, restricting or
burdening inter-State trade or commerce
does not escape objection merely because
it applies alike to inter-State trade or
commerce and to the domestic trade or
commerce of a State (see Hughes & Vale
Pty. Limited v. The State of New South
40 Wales (No. 1), 1955 A.C. 241 at 295, 296).

(d) That it is the necessary and legal effect
of the law itself rather than its ulterior
effect socially or economically that
determines whether or not it is consistent
with Section 92 (see Hughes & Vale Pty.

Limited v. The State of New South Wales
(No. 1), 1955 A.C. 241 at 295, 296).

- (e) That a law which cannot fairly be said to impose a burden on a trader or deter him from trading but which merely regulates trade, commerce or intercourse among the States can be compatible with the freedom guaranteed by Section 92 of the Constitution (see Hughes & Vale Pty. Limited v. The State of New South Wales (No. 1), 1955 A.C. 241 at 297-8, 306). 5 10
- (f) That the question what is the pith and substance of the impugned law, though possibly a help in considering whether it is nothing but a regulation of a class of transactions forming part of trade and commerce, is beside the point when the law amounts to a prohibition or the question or regulation cannot fairly arise (see Hughes & Vale Pty. Limited v. The State of New South Wales (No. 1), 1955 A.C. 241 at 295, 296). 15 20
- (g) That for the purposes of the application of Section 92 no distinction can be maintained between on the one hand motor vehicles as integers of traffic and on the other hand the trade of carrying by motor vehicles as part of commerce (see Hughes & Vale Pty. Limited v. The State of New South Wales (No. 1), 1955 A.C. 241 at 296). 25 30
- (h) That the exclusion of certain vehicles from public roads either absolutely or upon any condition going beyond true regulation is invalid in its application to vehicles while used in the course of inter-State trade and commerce (see Hughes & Vale Pty. Limited v. The State of New South Wales (No. 1), 1955 A.C. 241). 35 40

E. DECISION OF HIGH COURT IN THIS CASE.
(PARAGRAPH 13):

Page 7.

13. In upholding the Respondents' demurrer in the present case the High Court gave no reasons for judgment since in Commonwealth Freighters Pty. Limited v. Sneddon (102 C.L.R. 280) the 45

5 High Court had upheld the validity of the Road Maintenance (Contribution) Act 1958 (which has since been amended in certain respects not material for present purposes and as so amended is the Act in question in the present case) in its application to motor vehicles used exclusively in the course and for the purpose of inter-State trade and commerce.

10 F. ISSUES IN THIS APPEAL. (PARAGRAPHS 14-15):

15 14. This appeal raises primarily for decision the question whether a State may consistently with Section 92 of the Constitution impose charges as a condition of or by reason of the use of public roads by vehicles engaged in inter-State trade and commerce. (This question is hereinafter referred to as "the general question"). The Appellant submits that the general question
20 should be answered in the negative and that, in this event, the appeal should be upheld.

25 15. If however the general question is to be answered in the affirmative, two further questions (hereinafter respectively referred to as "the first subsidiary question" and "the second subsidiary question") arise namely:

30 (i) Whether a State may consistently with Section 92 of the Constitution impose charges as a condition of or by reason of the use of public roads by vehicles (of a specified load capacity) engaged in inter-State trade and commerce where the
35 criterion of operation of the law imposing such charges is, as in the Road Maintenance (Contribution) Act 1958-1965, that the vehicle in question is a vehicle which is used
40 or intended to be used for carrying goods for hire or reward or for any consideration or in the course of any trade or business whatsoever.

45 (ii) Whether, even if a State may impose such charges as aforesaid upon

fulfilment of certain conditions (e.g. that the "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 vehicles may be expected to make" - per Dixon C.J., McTiernan and Webb JJ., in Hughes & Vale Pty. Limited v. The State of New South Wales (No. 2), 93 C.L.R. 127 at 175), such conditions are fulfilled or have been shown to be fulfilled in the present case. 5 10

The Appellant submits that the first subsidiary question and the second subsidiary question should each be answered in the negative and that, if either is answered in the negative, the appeal should be upheld. 15

G. APPELLANT'S SUBMISSIONS ON THE GENERAL QUESTION. (PARAGRAPHS 16-19): 20

16. (a) It has been established by the decision of the Privy Council in Hughes & Vale Pty. Limited v. The State of New South Wales (1955 A.C. 241) that a law excluding vehicles engaged in inter-State trade from the use of public roads is inconsistent with the absolute freedom of such trade, unless the law is merely "regulatory" in the relevant sense. 25

(b) On the assumption that neither law is merely "regulatory" in the relevant sense, a law imposing charges as a condition of or by reason of the use of public roads by vehicles engaged in inter-State trade (such as the Road Maintenance (Contribution) Act 1958-1965) is not less inconsistent with the absolute freedom of such trade than a law excluding such vehicles from the use of public roads. 30 35

(c) It follows that a law imposing charges as a condition of or by reason of the use of public roads by vehicles engaged in inter-State trade is inconsistent with the absolute freedom of such trade unless the law is merely "regulatory" in the relevant sense. 40

(d) The said Act in its imposition of such charges is not merely "regulatory" in the relevant sense. Some of the reasons for this 45

conclusion are:

- 5 (i) It does not comply with the criteria of permitted regulation approved by the Privy Council in Hughes & Vale Pty. Limited v. The State of New South Wales (1955 A.C. 240) in that it is not a law which "cannot fairly be said to impose a burden on a trader or deter him from trading" (ibid at 298) and it does
10 "impose a real burden or restriction upon inter-State trading" (ibid at 303);
- 15 (ii) "To tell an individual that, though in a particular activity he observes all the restraints and takes all the steps which the fullest protection of the interests of his fellows is considered to require, the very fact of his
20 performing that activity at all is to bring upon him a liability to contribute to the common purse is ... to meet him outside the field of regulated conduct in an ordered society and in effect to deny flatly that he may enter it as of right" (see per Kitto J., Hughes & Vale Pty. Limited v. The State of New South Wales (No. 2), 93 C.L.R. 127 at 219) and per Barwick C.J., Harper v. The State of Victoria, 40 A.L.J.R. 49 at 53);
- 25 (iii) It is quite alien to the type of law approved by the Privy Council in Hughes & Vale Pty. Limited v. The State of New South Wales (No. 1) (supra) as
30 exemplifying the concept of permitted regulation in respect of the actual use of public roads (e.g. laws prescribing
35 warning devices to be carried by vehicles, prohibiting excessive speed and dangerous driving, and prescribing rules of the road). In this regard, the Appellant
40 submits that the basic nature of any permissible regulation must be "the material accommodation of the rights and actions of those engaged" in inter-State trade or commerce "so that each
45 is free in respect of such trade and commerce, though none have licence" (see per Barwick C.J., Harper v. The State of Victoria, 40 A.L.J.R. 47 at 53).

17. (a) Section 92 of the Constitution clearly prohibits the imposition of a tax upon inter-State trade.

(b) "The carriage of merchandise from one State to another is not a thing incidental to inter-State commerce but in the language used by Johnson J., of navigation in Gibbons v. Ogden (1824 9 Wheat. 1 at page 229) is 'the thing itself; inseparable from it as vital motion is to vital existence'" (per Dixon C.J., Hughes & Vale Pty. Limited v. State of New South Wales (No. 1) 87 C.L.R. at 67; Hughes & Vale Pty. Limited v. State of New South Wales (No. 1) 1955 A.C. 241 at 302).

(c) It follows that Section 92 of the Constitution prohibits the imposition of a tax upon the carriage of merchandise from one State to another.

(d) By whatever name the charge imposed by the Road Maintenance (Contribution) Act 1958-1965 "is designated it remains in essence a tax payable for the use of the roads" and, to accept the proposition that the direct imposition of such a charge on inter-State trade does not impair the freedom guaranteed by Section 92, it would be necessary to accept the proposition that, consistently with that freedom, inter-State trade may be directly subjected to imposts and taxes so long as they are "reasonable". Such a proposition is untenable (see per Taylor J., Hughes & Vale Pty. Limited v. The State of New South Wales (No. 2) 93 C.L.R. 127 at 237).

18. "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 which is regulatory in the relevant sense of that word, the Privy Council has conclusively laid down. That the notion of regulation extends to the imposition of a

5 pecuniary charge upon a class of individuals for using something from the use of which the legislature concerned has no power to exclude that class is a proposition for which" there is "no support either in anything the Privy Council has said or in the conception itself" (see per Kitto J., Hughes & Vale Pty. Limited v. The State of New South Wales (No. 2), 93 C.L.R. 127 at 225).

10 19. The Appellant submits that, for the reasons set forth above and for the reasons appearing in the Judgments of Kitto J., and Taylor J., in Hughes & Vale Pty. Limited v. The State of New South Wales (No. 2) (93 C.L.R. 127) and in the Judgments of Kitto J., and Taylor J., in Armstrong v. The State of Victoria (No. 2) (99 C.L.R. 28) and for 15 the reasons appearing in the Judgment of Barwick C.J., in Harper v. The State of Victoria (40 A.L.J.R. 49 at 53), a State may not consistently with Section 92 of the Constitution impose charges as a condition of or by reason of the use of public highways by vehicles engaged in inter-State trade and 20 commerce.

H. APPELLANT'S SUBMISSIONS ON THE FIRST SUBSIDIARY QUESTION. (PARAGRAPHS 20-21):

30 20. (a) A law directed to the use of vehicles on public roads the effect of which is to affect differentially the class of vehicles engaged in inter-State trade and some other class of vehicles to the detriment of the former class is necessarily inconsistent with the absolute freedom of inter-State trade. (See per Dixon J., (as he then was) in O. Gilpin Limited v. Commissioner for Road Transport and Tramways (New South Wales) 52 C.L.R. 189 at 205-6).

40 (b) It is immaterial to the validity of this proposition that the class of vehicles engaged in inter-State trade is affected only by reason of its inclusion in a larger class e.g. the class of vehicles used or intended to be used for carrying 45 goods for hire or reward or for any consideration or in the course of any trade

or business whatsoever;

(c) It follows that a law directed to the use of vehicles on public roads the effect of which is to affect differentially (i) the class of vehicles used or intended to be used for carrying goods for hire or reward or for any consideration or in the course of any trade or business whatsoever and (ii) the class of vehicles not so used or intended to be used, to the detriment of the former class is, insofar as it would apply to vehicles engaged exclusively in inter-State trade, inconsistent with the absolute freedom of inter-State trade and contrary to Section 92 of the Constitution.

(d) The Road Maintenance (Contribution) Act 1958-1965 (subject to matters of detail and qualifications immaterial for present purposes) is such a law and in its application to vehicles engaged in inter-State trade is consequently inconsistent with Section 92 of the Constitution.

21. (a) The relevant provisions of the Road Maintenance (Contribution) Act, 1958-1965 require that the charges imposed by that Act should be paid, not in respect of all vehicles (of a specified load capacity), but only in respect of "any motor vehicle (together with any trailer)" (of a specified load capacity) "which is used or intended to be used for carrying goods for hire or reward or for any consideration or in the course of any trade or business whatsoever" (emphasis added).

(b) It follows that the charge or burden imposed by the Act is so imposed as a consequence of the owner of the vehicle using or intending to use the vehicle in or for the purposes of trade. It is not the mere fact that a vehicle (of specified load capacity) is driven along a public road which attracts the charge. The criterion of operation of the charging provisions of the Act is that the vehicle is used or intended to be used for carrying goods for hire or reward or for any consideration or in the course of trade or business. To adapt the words of Dixon J., (as he then was) in

O. Gilpin Limited v. Commissioner for Road
Transport and Tramways (New South Wales), 52
C.L.R. 189 at 205), the application of the
charge to the act of driving the particular
motor vehicle along a public street is made
the consequence of that act being or liable
to be of a commercial or trading character.

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(c) Since the charge is imposed upon the
act of driving the particular motor vehicle
upon the public road by reference to or in
consequence of the fact that the vehicle is
used or intended to be used for the carriage
of goods for reward or in the course of some
other trade or business, the charge is, in
the case of a carrier of goods for reward,
a burden imposed upon the owner of the
vehicle by reference to or in consequence of
his being engaged in the business of carrying
goods for reward. If he were not engaged in
the business of carrying goods for reward he
could (provided he did not use or intend to
use the vehicle in question in the course
of any other trade or business) drive or
cause to be driven the identical vehicle
along the identical public streets without
being liable to pay the charges imposed by
the Act. The Act discriminates against trade
in imposing the charges and the charges
themselves are therefore a burden upon the
particular trade or business of the owner
of the vehicle and where, as in the present
matter, the owner of the vehicle is engaged
in the business of an inter-State carrier of
goods for reward, the charge is a burden
upon that business.

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(d) It follows that, in the light of the
principles set forth in sub-clauses (a),
(c), (d) and (g) of Paragraph 12 (above),
the Road Maintenance (Contribution) Act
1958-1965 cannot by reason of the
provisions of Section 92 of the Constitution
validly apply in respect of the Appellant's
motor vehicles engaged in inter-State trade.

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I. APPELLANT'S SUBMISSIONS ON THE SECOND
SUBSIDIARY QUESTION. (PARAGRAPHS 22-28):

22.(a) The proposition that, providing certain
conditions are fulfilled, a State may validly
impose charges as a condition of or by reason

of the use of public roads by vehicles engaged in inter-State trade first found judicial expression by way of obiter dicta in several judgments in the High Court in Hughes & Vale Pty. Limited v. The State of New South Wales (No. 2) (93 C.L.R. 127). Subsequently, the proposition was adopted and applied, by a majority of the High Court in Armstrong v. The State of Victoria (No. 2) (99 C.L.R. 28), to uphold the validity of the Commercial Goods Vehicles Act 1955 of the State of Victoria in its application to vehicles engaged in inter-State trade. Thereafter in Commonwealth Freighters Pty. Limited v. Sneddon (102 C.L.R. 280) the High Court applied the decision of the majority in Armstrong v. The State of Victoria (No. 2) (supra) to uphold the valid application to vehicles engaged in inter-State trade of the Road Maintenance (Contribution) Act 1958 of the State of New South Wales (which has since been amended in certain respects not material for present purposes and as so amended is the act in question in the present appeal). In upholding the Respondents' demurrer in the present case the High Court, although it did not give reasons, followed its own decision in Commonwealth Freighters Pty. Limited v. Sneddon (supra).

(b) In order to test the validity of the Road Maintenance (Contribution) Act 1958-1965 by reference to the above-mentioned proposition which is the hypothesis for this branch of the argument, it is necessary to examine the relevant judgments in Hughes & Vale Pty. Limited v. The State of New South Wales (No. 2) and in Armstrong v. The State of Victoria (No. 2) to ascertain what are the conditions which, in the opinion of those Justices who accepted the proposition, require to be fulfilled to avoid conflict with Section 92 of the Constitution. The views of the various Judges who accepted the proposition, as to the conditions (as distinct from evidence or indicia of the fulfilment thereof) which must be fulfilled to avoid conflict with Section 92, appear, in so far as they have been made explicit, in the extracts from the judgments in these two cases which are set forth in sub-paragraphs (c) and (d) hereunder.

(c) Hughes & Vale Pty. Limited v. The State of New South Wales (No. 2) (93 C.L.R. 127):

5 (i) The following passages occur in the joint judgment of Dixon C.J., McTiernan and Webb JJ:-

10 "... 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." (at 175).

20 "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." (at 176).

30 "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 recurring expenditure incident to the provision and maintenance of roads." (at 176).

35 "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." (at 176).

(ii) The following passages occur in the judgment of Williams J.:

40 "In my opinion 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

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the provision of the facility more than outweighs the burden flowing from the imposition of the outgoing." (at 194).

"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 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." (at 194).

"The charge could also include a reasonable contribution towards the cost of administering the Act and of policing the roads in the interests of law and order." (at 195).

"The formula" (for calculating the charge) "could not include an item relating to the cost of constructing new roads, although it could contain an item relating to the cost of widening and re-constructing old roads where some additional width or a strengthened pavement was required to carry the ever-growing amount of traffic and the ever-increasing size and weight of vehicles using the roads. But the formula should be primarily based on the cost of keeping existing roads in repair because the charge is in effect in the nature of a revenue charge made as a contribution towards meeting revenue outgoings and not a capital charge made as a contribution towards capital expenditure incurred in making new roads." (at 195).

"If the charge is in fact a reasonable charge it matters not whether the moneys so raised are paid into funds used for the maintenance or policing of the roads or the administration of the Act or for other purposes." (at 195).

(iii) The following passages occur in the

judgment of Fullager J.:

5 " ... such persons" (viz. persons who use
the 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
10 which is derived by the community as a
whole." (at 210).

"Any such charge, to be valid, must not
discriminate against inter-State traffic."
(at 211).

15 " ... some real connection - some relation
of quid pro quo - must appear between the
charge and the maintenance of the roads."
(at 211).

(d) Armstrong v. The State of Victoria
(No. 2) (99 C.L.R. 28):

20 (i) The following passages occur in the
judgment of Dixon C.J.:

His Honour referred to "the reasons of
McTiernan J. Webb J. and myself in Hughes
& Vale Pty. Limited v. The State of New
25 South Wales (No. 2) 93 C.L.R. at pp. 171-
179." and continued: "... I wish to begin
by incorporating those pages in this
judgment by reference." (at 42).

30 "... 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
35 incompatible with the freedom guaranteed
by s. 92." (at 46).

"... to impose the capital costs of road
construction upon the traffic would not
seem consistent with s. 92." (at 46).

40 "The charge ... must be a genuine attempt
to cover or recover the costs of upkeep."
(at 46)

(ii) McTiernan J. adopted the reasoning

of Dixon C.J.

(iii) The following passage occurs in judgment of Williams J:

"In Hughes & Vale Pty. Ltd. v. State of New South Wales (No. 2) 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 relevant passages appear in the joint judgment of Dixon C.J., McTiernan and Webb JJ." (93 C.L.R. at pp. 172-179); "in the judgment of Williams J." (93 C.L.R. at pp. 190-195 "and in the judgment of Fullagar J." (93 C.L.R. at pp. 204-211). 5 10 15

"... I intend to accept these passages as a correct statement of the law ..." (at 63).

(iv) The following passages appear in the judgment of Webb J: 20

"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) in upholding the validity of a specified type of road charge. ... However I do adhere to the views in the joint judgment." (at 74). 25

"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. ... 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." (at 77). 30 35 40

"To conform to constitutional requirements the charge should be limited always to the actual cost of maintenance so far as that 45

5 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
10 cost of the relevant highways." (at 78).

(v) The following passages appear in the
judgment of Fullagar J.:

15 " ... I am of the same opinion now as I was
then," (i.e. when Hughes & Vale Pty. Ltd.
v. The State of New South Wales (No. 2)
was decided) "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." (at 82).

20 "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 permissible
25 (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. ... and the Courts have
30 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 and in substance, and is no
35 more than, a contribution towards the
maintenance of public highways."(at 82-3).

(e) The Appellant submits that there are
considerable difficulties in extracting
from the above passages any one consistent
40 test or set of conditions and respectfully
adopts the following statement of Kitto J.
in Armstrong v. The State of Victoria
(No. 2) (at 84-5-6):

45 "Their Honours ..." (viz. the judges who in
Hughes & Vale Pty. Limited v. The State of
New South Wales (No. 2) expressed their
acceptance of the principle in question)
"were necessarily speaking in abstract and

somewhat general terms, and it may be that notwithstanding what 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. . . . 5
 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; 10
 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 15
 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, 20
 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 25
 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 ideas." 30

23. The Appellant further submits that for the reasons appearing in Paragraphs 24, 25, 26, 27, 28 and 29 hereunder the Road Maintenance (Contribution) Act 1958-1965 does not comply with the conditions postulated 35
 by any of the Justices constituting the majority in Hughes & Vale Pty. Limited v. The State of New South Wales (No. 2) and Armstrong v. The State of Victoria (No. 2) as being necessary for the valid application 40
 of charges of the type imposed thereby to vehicles engaged in inter-State trade.

24. (a) The charge imposed by the Road Maintenance (Contribution) Act 1958-1965 is five-eightieths of one cent multiplied 45
 by the sum of the tare weight and forty per centum of the load capacity (in tons) of the vehicle concerned multiplied by the number of miles travelled along public streets in New South Wales. 50

5 (b) The figure of five eighteenths of one cent is quite unexplained and is not shown to have any relationship to any of the concepts accepted in any of the relevant judgments; any available arguments to support this figure would equally support a figure of, for example, five eighteenths of ten cents.

10 25. (a) The charge is imposed at a single rate for travel along any public streets in New South Wales without regard to their type or condition or to what (if any) wear and tear they may suffer or to what (if any) maintenance they may require.

15 (b) The proceeds of the charge are applicable to the maintenance of any public streets in New South Wales without reference to the streets in respect of which it was collected in any particular case.

20 (c) There is nothing to indicate that the average costs of general road care repair and maintenance in New South Wales is not greater than such costs in connection with roads used by vehicles engaged in inter-
25 State trade or that the moneys received by reason of the charges imposed by the said Act bear any relationship to any additional wear and tear caused or benefit derived by commercial vehicles in their use of the
30 roads over and above the wear and tear caused or benefit derived by other vehicles.

35 26. (a) Even on the assumption that at the time of its enactment the conditions existed which made the charges imposed by the Road Maintenance (Contribution) Act 1958-1965 consistent at that time with Section 92, there is nothing to limit the period during which the charge is to
40 be imposed to the period during which such conditions may continue to exist (since the Act is a permanent Act and contains no such limiting provisions), and there is no
45 provision in the Act for periodic adjustment of the rate of the charge so as to accord with changes in road maintenance costs.

(b) It is contrary to the fundamental

principles of British law for a statute to fluctuate between validity and invalidity by reason of or by reference to circumstances totally unconnected with the legislative process.

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(c) Accordingly, even on the assumption referred to in sub-paragraph (a) above, there is nothing to indicate continuing consistency with Section 92 and the Act is therefore invalid ab initio in its application to vehicles engaged in inter-State trade.

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27. (a) By virtue of Section 9 of the Act the charges collected thereunder are to be applied only "on the maintenance of public streets".

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(b) By Section 3(1) of the Act the phrase "public street" is defined to mean "any street, road, lane, bridge, thoroughfare, footpath, or place open to or used by the public, and includes any place at the time open to or used by the public on the payment of money or otherwise."

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(c) The charges collected under the Act can therefore be applied partly or wholly on the maintenance of things quite unrelated to public roads, e.g. public art galleries, public baths, public parks, public houses, public zoos and in short "any place at the time open to or used by the public on the payment of money or otherwise."

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28. (a) No necessary connection is apparent between the wear and tear caused to a road by a vehicle and the load capacity of that vehicle (as opposed to the actual weight of its load).

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(b) The rate of charge imposed by the Road Maintenance (Contribution) Act 1958-1965 is calculated by reference to the load capacity and not the actual weight of the loaded vehicle using the road.

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29. (a) It is submitted that prima facie a statutory levy imposed upon the passage of vehicles carrying goods from State to State along public roads (being an ingredient of

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inter-State trade) is inconsistent with Section 92 of the Constitution, and that the contrary of this proposition would be inconsistent with the approach to analogous questions made by the Privy Council in Hughes & Vale Pty. Limited v. The State of New South Wales (1955 A.C. 241).

(b) Before such a levy can be held to be not inconsistent with Section 92 the necessary countervailing factors must be found in the terms of the Statute itself, in matters of which the Court may take judicial notice or in facts which may be pleaded and proved.

(c) For the reasons set forth in Paragraphs 22 to 28 inclusive above, no sufficient countervailing factors are to be found in the terms of the Road Maintenance (Contribution) Act 1958-1965, or in any matters of which the Court may take judicial notice.

(d) In the present case the Respondents have not seen fit to allege any facts to support the validity of the Act.

(e) Consequently the presumption of invalidity remains unrebutted.

J. CONCLUSIONS.

30. The Appellant therefore submits that the decision of the High Court of Australia is erroneous and ought to be reversed, that this appeal should be allowed and the order of the High Court set aside, and in lieu thereof the Respondents' demurrer should be over-ruled and a declaration should be made that the Road Maintenance (Contribution) Act 1958-1965 is invalid by reason of the provisions of Section 92 of the Constitution of Australia or, alternatively, that the said Act does not, by reason of the provisions of the said Section of the Constitution, apply in respect of motor vehicles owned by the Appellant and used exclusively in or for the purposes of inter-State trade commerce or intercourse for the following amongst other:

R E A S O N S

- (a) Because the Road Maintenance (Contribution) Act 1958-1965 cannot validly apply in respect of motor vehicles engaged in inter-State trade by reason of the provisions of Section 92 of the Constitution; 5
- (b) Because the Road Maintenance (Contribution) Act 1958-1965 burdens the inter-State trade of the Appellant; 10
- (c) Because a State cannot consistently with the provisions of Section 92 of the Constitution, impose charges as a condition of or by reason of the use of public roads by vehicles engaged in inter-State trade and commerce and the Road Maintenance (Contribution) Act 1958-1965 purports to impose such charges on such vehicles; 15
20
- (d) Because the application of the charge imposed by the Road Maintenance (Contribution) Act 1958-1965 to the act of driving the particular motor vehicle along a public street is made the consequence of that act of driving being or liable to be of a commercial or trading character which, in the case of vehicles engaged in inter-State trade or commerce, is contrary to Section 92 of the Constitution. 25
30
- (e) Because, even if a State may, consistently with the provisions of Section 92 of the Constitution, impose charges of the type imposed by the Road Maintenance (Contribution Act 1958-1965 upon the fulfilment of certain conditions, the necessary conditions are not fulfilled or have not been shown to be fulfilled in respect of the charges imposed by the said Act. 35
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WILLIAM DEANE

M.H. McLELLAND

No. 34 of 1966.

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE HIGH COURT OF
AUSTRALIA.

B E T W E E N :

FREIGHTLINES & CONSTRUCTION
HOLDING LIMITED Appellant.

- and -

THE STATE OF NEW SOUTH
WALES and THE COMMISSIONER
FOR MOTOR TRANSPORT
Respondents

- and -

SIX INTERVENERS.

CASE FOR THE APPELLANT

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