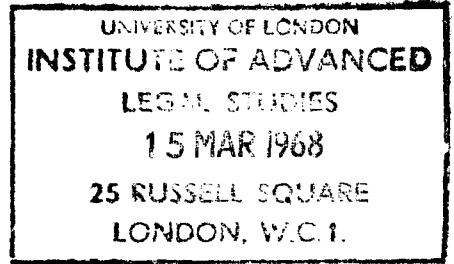


1967/10



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1.

IN THE PRIVY COUNCIL

No. 34 of 1966

ON APPEAL FROM THE FULL COURT
OF 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

10

-- and --

THE COMMONWEALTH OF AUSTRALIA
& OTHERS Interveners

CASE FOR THE RESPONDENTS.

INTRODUCTION.

Record

1. This is an appeal brought by special leave granted on the 20th day of July 1966 from a judgment and order of the High Court of Australia (Taylor, Windeyer & Owen J.J.) which upheld a demurrer by the respondents (defendants) to the Statement of Claim of the appellant (plaintiff).

Page 8

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2. By Writ issued out of High Court of Australia on the 8th day of March 1966 the appellant commenced against the respondents an action in the said High Court in its New South Wales Registry claiming that the Road Maintenance (Contribution) Act, 1958 (N.S.W.) was invalid or alternatively that certain sections and Schedules thereof were invalid or alternatively that the Road Maintenance (Contribution) Act, 1958 (N.S.W.) did not apply to certain motor vehicles owned by the plaintiff.

Pages 1 & 2

30

3. The Act referred to in the said Writ was amended by the Road Maintenance (Contribution) Amendment Act, 1964 (N.S.W.) and by the Decimal Currency Act, 1965 (N.S.W.) and was at all material times known as the Road Maintenance (Contribution) Act, 1958-1965.

Record

The said Act is hereinafter referred to as the N.S.W. Act.

Pages 3-5

4. By its Statement of Claim endorsed on the said Writ (as amended) the appellant alleged that the N.S.W. Act or alternatively certain provisions thereof was or were invalid or alternatively that the N.S.W. Act could not validly apply in respect of certain motor vehicles owned by the plaintiff.

THE N.S.W. ACT

5. The N.S.W. Act contains, inter alia, the following provisions: 10

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

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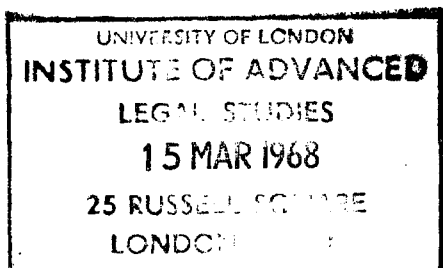
"Commercial goods vehicle" or "vehicle" means any motor vehicle (together with any trailer) which is used or intended to be used for carrying goods for hire or reward or for any consideration or in the course of any trade or business whatsoever. 20

.....

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

(a) the load or carrying capacity thereof as shown in the certificate of registration issued in respect thereof, or on the records kept, 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 30

(b) where in such certificate there is shown the tare weight of the motor vehicle or trailer and either the maximum permissible gross weight of the motor vehicle or trailer together with the load which may be carried 40



thereon or the aggregate weight of the motor vehicle or trailer, the difference between such gross or aggregate weight and the tare weight; or

10

- (c) where no such load or carrying capacity is shown in such 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 aforesaid of a similar motor vehicle or trailer registered under the Motor Traffic Act, 1909, as amended by subsequent Acts.

.....

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"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.

.....

30

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

- (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

40

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

Record

otherwise unladen; and

- (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.

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. 10

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.

(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. 20

(3) Any charge payable under this Act shall be a civil debt due to the Commissioner by the owner of the vehicle concerned and, without affecting any other method of recovery provided by this Act, may be recovered by the Commissioner in any court of competent jurisdiction.

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 streets in New South Wales. 30

(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.

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 (1st June, 1958) each owner of a commercial goods vehicle which has, during the period 40

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 -

10 (a) the record for such period which the owner is required to keep pursuant to section six of this Act certified as correct; and

(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.

20 (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 -

30 (a) the record for the previous month which the owner is required to keep pursuant to section six of this Act certified as correct; and

(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.

40 (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 payment 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 record or payment is by subsection one or two of this section required to be delivered to the Commissioner.

.....

Record

9. (1) The Commissioner shall pay -
- (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";
 - (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 the "Roads Maintenance Account". 10
- (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 maintenance of public streets in the County of Cumberland (including grants to municipalities and shires for that purpose).
- (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). 20
- (3) The costs of administration of this Act shall be met -
- (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; 30
 - (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.
- (4) The provisions of this section shall have effect notwithstanding anything contained in the Main Roads Act, 1924, as amended by subsequent Acts. 40

10. (1) Any person who -

(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

(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

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

(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.

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

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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 be paid by him to the Commissioner.

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(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.

.....

Record

FIRST SCHEDULE.

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

(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.

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

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SECOND SCHEDULE.

ROAD MAINTENANCE (CONTRIBUTION) ACT, 1958

Department of Motor Transport.

Certified Record of Journeys.

Owner

Address

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.....

Description of Vehicle.

Make of Truck.... Type...Regd.No...^{Tare}Weight.....cwt.

Load Capacity.....cwt.

Trailer: Type.....Regd.No.....^{Tare}Weight.....cwt.

Load Capacity.....cwt.

Statement of Journeys.

During month of.....19..

Date of Journey	Time of Starting	Was Trailer Used? (Yes or No.)	Vehicle Travelled			Time of Finishing	Road Miles Travelled in N.S.W.
			From	Via	To		

Details of Charges Payable.

10

Vehicle	Rate* per mile		Miles Travelled	Amount Payable
Without Trailer		Multiplied by		
With Trailer		Multiplied by		
TOTAL				

*Calculated in accordance with the First Schedule to the Act.

I,..... of.....
 (Name) (Address)

20

being the owner (or the authorised agent of the owner) of the vehicle described above and being aware that the inclusion of any false or misleading statement in this record or in the statement of journeys appearing in this document renders me guilty of an offence, hereby certify that this record contains a full and complete statement of all journeys made on public streets in the State of

Record

New South Wales during the period shown in the statement of journeys in this document, and I forward herewith a..... for the sum ofsuch sum being the amount of all charges due and payable in respect of all journeys of the vehicle during such period in so far as not already paid by me.

Signed.....

Date"

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THE NATURE OF THE PROCEEDINGS.

6. The relevant facts alleged in the Statement of Claim endorsed on the said Writ were:

- (i) the appellant carried on and had at all material times carried on business as an inter-State carrier of goods by road for reward;
- (ii) the appellant was and had been at all material times the owner of certain motor vehicles;
- (iii) those said motor vehicles had a "load capacity" within the meaning of the N.S.W. Act of more than four tons;
- (iv) the said motor vehicles were used for the purposes and in the course of the appellant's business exclusively on inter-State journeys;
- (v) during the course of many of the said journeys the said motor vehicles travelled along various public roads in New South Wales;
- (vi) the second named respondent at all material times administered the N.S.W. Act;
- (vii) the second named respondent claimed and continued to claim that the appellant was bound to comply with the provisions of Sections 5, 6 and 7 of the N.S.W. Act,

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7. The respondents demurred to the whole of the said Statement of Claim alleging that the N.S.W. Act and the relevant sections and schedules were valid and validly applied in respect of the appellant's vehicles.

8. On the 2nd day of May 1966 and after hearing only formal submissions on behalf of the appellant the High Court of Australia (Taylor, Windeyer & Owen. J.J.) gave judgment for the respondents on the demurrer and ordered that the demurrer be allowed and made an order for costs in favour of the respondents.

9. From the said judgment and order the appellant by petition sought special leave to appeal to the Privy Council and the matter of this application for special leave was argued before the Privy Council on the 20th day of July 1966.

10. The appellant claimed in its Statement of Claim and submitted in the High Court of Australia and argued before the Privy Council that the N.S.W. Act and the relevant sections thereof was or were invalid and inoperative by reason of Section 92 of the Commonwealth of Australia Constitution which provides that:

92. "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

The appellant also claimed that the N.S.W. Act did not validly apply in respect of motor vehicles owned by it used exclusively in or for the purpose of inter-State trade, commerce, or, intercourse. It sought declarations to that effect in its said Statement of Claim.

CONTRIBUTION ACTS IN AUSTRALIA.

11. The N.S.W. Act is based upon and follows the pattern of Part II of the Commercial Goods Vehicles Act, 1955 (No. 5931) (Victoria), now the Commercial Goods Vehicles Act, 1958 (No. 6222) as amended. While the corresponding

Record

sections of the said Acts are not identical they are similar in content and legal effect to the relevant provisions of the N.S.W.Act.

12. The Roads (Contribution to Maintenance) Acts 1957 to 1958 (Queensland) came into force on the 1st day of February 1958. The Road Maintenance (Contribution) Act 1963 (South Australia) came into force on the 1st day of July 1964 and the Road Maintenance (Contribution) Act 1965 (Western Australia) came into force on the 1st day of April 1966. These said Acts are based upon and follow the pattern of the Acts mentioned in the last preceding paragraph hereof and contain provisions similar in content and legal effect thereto.

10

13. The N.S.W. Act (and each of the other Acts mentioned in the last two preceding paragraphs hereof) makes the following legal provisions namely:

- (i) that the charge levied therein shall be payable towards compensation for wear and tear to public roads;
- (ii) that the moneys received from any charge levied therein shall be devoted only for maintenance of such roads;
- (iii) that the charge levied therein shall only become payable upon and as a result of use of a public road;
- (iv) the charge levied therein shall be calculated by reference to the amount of such use by the size of the vehicle so using the public road and upon no other criteria;
- (v) that the charge levied therein is imposed on large vehicles or vehicles which may reasonably be expected to be carrying heavy loads;
- (vi) that the charge levied therein is

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applied without discrimination to all vehicles which qualify as commercial goods vehicles using all public roads whether engaged in activities internal to the State or otherwise;

- 10 (vii) that in the imposition and collection of the charge levied therein no discretion is conferred upon the person administering the Act, i.e. the second named respondent;
- (viii) that the collection of the charge is based upon a simple recording formula in records to be kept by the owner of the relevant vehicle and from which only monthly payments by post need be made;
- 20 (ix) that the charge is imposed uniformly on all qualifying vehicles on all roads used by such vehicles;
- (x) that failure to comply with the requirements of the Act is made an offence punishable by fine.

MONEYS RECEIVED IN N.S.W. AND THEIR APPLICATION.

30 14. In pursuance of that legal provision of the N.S.W. Act which requires that the moneys raised by the charge levied therein should be devoted to the maintenance of public roads (Section 9 of the said Act) the said moneys are dealt with and expended under the provisions of the Main Roads Act, 1924-1963 by the Commissioner for Main Roads pursuant to the powers conferred upon him by that Act. By means of administrative procedures adopted for this purpose, the whole of the said moneys have at all material times been exclusively applied on the maintenance of public roads pursuant to the said provision and in particular have been used to finance programmes of maintenance work approved by the said
40 Commissioner. The moneys received and expended have always been considerably less than the total amount expended in N.S.W. for road maintenance work.

Record

15. Pursuant to the provisions of the N.S.W. Act there has been collected by the second named respondent since the 1st May 1958 (being the date of the commencement of the N.S.W. Act) the following annual sums calculated as at a year ending in each case on the 30th day of June:

<u>Year.</u>	<u>Receipts under Road Maintenance (Con-tribution) Act, 1958.</u>	
1957/58	A\$ 281,957 *	10
1958/59	A\$ 4,770,222	
1959/60	A\$ 6,290,067	
1960/61	A\$ 7,031,319	
1961/62	A\$ 7,205,158	
1962/63	A\$ 8,010,400	
1963/64	A\$ 9,232,202	
1964/65	A\$ 10,245,640	
1965/66	A\$ 11,035,114	

* Period 1st May - 30th June, 1958 only.
The Road Maintenance (Contribution) Act, 1958 became operative from 1st May, 1958.

20

Of the said total amounts so collected in each of the said yearly periods it is estimated by the said Commissioner that about 40 per centum thereof were collected in respect of vehicles engaged on inter-State journeys, but no record showing the exact amount or percentage is kept. The total of the amount so collected as aforesaid was paid to the Main Roads Fund as provided by Section 9 of the N.S.W. Act.

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PRINCIPLES OF VALIDITY.

16. Before proceeding to a discussion of the principles upon which the present case falls to be determined it can be said that the N.S.W. Act does not make payment of the charges levied thereby nor compliance with any other requirement thereof a condition precedent to

the use of public streets in New South Wales and that it has no legal effect of prohibiting the trade of the plaintiff or of any other person.

10 17. In these circumstances the test to be applied to determine the validity of the N.S.W. Act and of any of the impugned sections thereof as contravening or otherwise the provisions of Section 92 of the Constitution of the Commonwealth of Australia may best be referred to in the terms in which the principles were enunciated by the Privy Council in the Commonwealth & Ors. v. The Bank of New South Wales & Ors. (1950) A.C. 235; 79 C.L.R. 497. After asking the question "What is the freedom guaranteed by the section?" (that is to say Section 92), the Judicial Committee answered the question in the following terms ((1950)A.C. at p. 309; 79 C.L.R. at p. 639):

20 It is generally recognised that the expression "free" in s.92 though emphasised by the accompanying "absolutely," yet must receive some qualification. It was, indeed, common ground in the present case that the conception of freedom of trade commerce and intercourse in a community regulated by law presupposes some degree of restriction upon the individual. As
 30 long ago as 1916 in Duncan v. State of Queensland (1916) 22 C.L.R. 556, at p. 573, Sir Samuel Griffith C.J. said "But the word 'free' does not mean extra legem, any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law." And through all the subsequent cases in which s.92 has been discussed, the problem has been to define the qualification of that which in the
 40 Constitution is left unqualified. In this labyrinth there is no golden thread. But it seems that two general propositions may be accepted: (1) that regulation of trade commerce and intercourse among the States is compatible with its absolute freedom and (2) that s.92 is violated only when a legislative or executive act operates to

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restrict such trade commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social or economic. Yet it must be solved by a court of law. For where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States on the one hand and citizens and States on the other, it is only the Court that can decide the issue. It is vain to invoke the voice of Parliament." (emphasis added).

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18. In dealing with the problem raised by what had, by 1954, become known as the Transport Cases, the Privy Council applied the reasoning expressed in the judgment of the Bank Case referred to above. Thus in Hughes and Vale Pty.Limited v. The State of New South Wales (No. 1) (1955) A.C. 241; 93 C.L.R. 1 the Judicial Committee incorporated in its decision the propositions above referred to, and the further passage from the Bank Case relating to the difficulty of application of the test quoted in italics in the last preceding paragraph hereof ((1955) A.C. at p. 293; 93 C.L.R. at p.20):

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"The same difficulty arises in applying the other discriminatory test, that between a restriction which is direct and one that is too remote. Yet the distinction is a real one and their Lordships have no doubt on which side of the boundary the present case falls. It is the direct and immediate result of the Act to restrict the freedom of trade commerce and intercourse among the States.

40

"Their Lordships will not attempt to define this boundary. An analogous

10 difficulty in one section of constitutional law, viz., in the determination of the question where legislative power resides, has led to the use of such phrases as 'pith and substance' in relation to a particular enactment. These phrases have found their way into the discussion of the present problem also and, as so used, are the subject of just criticism by the learned Chief Justice. They, no doubt, raise in convenient form an appropriate question in cases where the real issue is one of subject matter as when the point is whether a particular piece of legislation is a law in respect of some subject within the permitted field. They may also serve a useful purpose in the process of deciding whether an enactment which works some interference with trade commerce and intercourse among 20 the States is, nevertheless, untouched by s.92 as being essentially regulatory in character. But where, as here, no question of regulatory legislation can fairly be said to arise, they do not help in solving the problems which s.92 presents. Used as they have been to advance the argument of the appellants they but illustrate the way in which the human mind tries, and vainly tries, to give to a particular subject matter a higher degree of definition than it will admit. In the field of constitutional law, and particularly in relation to a Federal Constitution, this is conspicuously true, and it applies 30 equally to the use of the words 'direct' and 'remote' as to 'pith and substance'. But it appears to their Lordships that, if these two tests are applied firstly, whether the effect of the Act is in a particular respect direct or remote and, 40 secondly, whether in its true character it is regulatory, the area of dispute may be considerably narrower. It is beyond hope that it should be eliminated."

Their Lordships in Hughes and Vale (No. 1) then went on to deal with what had been thought to be tests for validity of transport legislation in Australia and cited with approval what Dixon J. (as he then was) had said about those tests in

Record

McCarter v. Brodie (80 C.L.R. 432). They said ((1955) A.C. at p.296; 93 C.L.R. at p.23):

"Accepting as they do the views so clearly expressed by Dixon J., their Lordships are of opinion that the six conceptions dealt with in this passage can no longer be regarded as sound. In their opinion it follows that if the validity of the Transport Act is to be established in the present case, it can only be upon the ground that the restrictions contained therein are 'regulatory' in the sense in which that word is used in the Bank Case."

10

It is submitted that it is clearly evident that in their Lordships' approach to the problem created by the Transport Cases and to the Act the subject of the decision in Hughes and Vale (No. 1) they considered firstly whether the restriction imposed could be said to be a restriction directly imposed upon inter-State trade commerce or intercourse and only after applying this test went on to consider whether the legislation could be supported upon the ground that the restrictions were "regulatory" in the sense in which that word was used in the Bank Case. In this approach it is further submitted their Lordships correctly pointed out the path to be followed, and which was followed, by the majority of the Justices of the High Court in resolving the problems posed by the respective road maintenance contribution Acts.

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APPLICATION OF THE BANK CASE TEST OF REMOTENESS.

19. The propositions regarding a direct or remote impediment by which validity might be tested as so expounded by the Privy Council in the Bank Case and later adopted by the Board in Hughes and Vale (No. 1) formed a basis of discussion and was applied by Dixon C.J. in Hospital Provident Fund Pty. Limited v. State of Victoria 87 C.L.R. 1 at p.17. In dealing with the problem of whether the Act in question in the last mentioned case contravened the guarantee of freedom provided by Section 92, the Chief Justice in relation to this

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general proposition said:

10 "When in the Commonwealth v. Bank of New South Wales (1950) A.C. 235, at p.310; (1949) 79 C.L.R. 497, at p.639 their Lordships of the Privy Council lay it down as a general proposition that s.92 is violated only when a legislative or executive act operates to restrict inter-State trade commerce and intercourse directly and immediately as distinguished from creating some indirect or consequential impediment which may fairly be regarded as remote, the kind of distinction upon which this case appears to me to turn is suggested.

20 "If a law takes a fact or an event or a thing itself forming part of trade commerce or intercourse, or forming an essential attribute of that conception, essential in the sense that without it you cannot bring into being that particular example of trade commerce or intercourse among the States, and the law proceeds, by reference thereto or in consequence thereof, to impose a restriction, a burden or a liability, then that appears to me to be direct or immediate in its operation or application to inter-State trade commerce and intercourse, and, if it creates a real prejudice or impediment to inter-State transactions, it will accordingly be a law impairing the freedom which s.92 says shall exist. But if the fact or event or thing with reference to which or in consequence of which the law imposes its restriction or burden or liability is in itself no part of inter-State trade and commerce and supplies no element or attribute essential to the conception, then the fact that some secondary effect or consequence upon trade or commerce is produced is not enough for the purposes of s.92."

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And very shortly after the advice of their Lordships of the Privy Council in Hughes and Vale No.1 had been announced the joint judgment of Dixon C.J., McTiernan, Webb and Kitto JJ. in Grannall v. Marrickville Margarine Pty.Limited 93 C.L.R. 55

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dealt with the same matter in the following terms at p. 78:

"If some fact or event or thing which itself forms part of trade, commerce or intercourse or forms an essential attribute of that conception (essential in the sense that without it you cannot bring into being that particular example of trade, commerce or intercourse among the States) is made the subject of the operation of a law which by reference to it or in consequence of it imposes some restriction or burden or liability, it does not matter how circuitously it is done or how deviously or covertly. It will be considered sufficiently direct or immediate in its operation or application to inter-State trade, commerce and intercourse. Provided the prejudice is real or the impediment to inter-State transactions is appreciable, it will infringe upon s.92: see Hospital Provident Fund Pty. Ltd. v. State of Victoria (1953) 87 C.L.R. 1. But generally speaking, it will be quite otherwise if the thing with reference to or in consequence of which the law operates or which it restricts or burdens is no part of inter-State trade and commerce and in itself supplies no element or attribute essential to the conception." 10
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20. The whole matter of the application of the principles as set forth and discussed in the Bank Case and in Hughes and Vale (No. 1) was further discussed in relation to the matter of charges upon transport activities by Dixon C.J. giving the joint judgment of himself McTiernan and Webb J.J. in Hughes and Vale Pty. Limited v. The State of New South Wales (No. 2) 93 C.L.R. 127 at p.159 et seq.: 40

"An attempt was made to support the validity of the provisions as a regulation of the inter-State carriage of goods by motor vehicle involving no real impairment of the freedom of inter-State movement. The argument seemed to depend more on

giving a meaning to the word 'regulation' than upon giving effect to s.92. It is a word which has naturally been employed in the repeated attempts that have been made in this Court to explain that the freedom which is postulated by s.92 for inter-State trade commerce and intercourse is freedom enjoyed in an ordered society where the relations between man and man and government and man are determined by law. The word has of course an important place in the judgments of the Privy Council in *The Commonwealth v. Bank of New South Wales* (1950) A.C. 235; (1949) 79 C.L.R. 497 and in *Hughes & Vale Pty. Ltd. v. State of New South Wales (No.1)* (1955) A.C. 241; (1954) 93 C.L.R. 1.

"The assumption made by s.92 is that, unless hampered or obstructed by legislative or executive interference, the people of Australia will engage in trade commerce and intercourse from one State to another. But that very assumption means that they will enter upon transactions and activities which are based upon the law and for the most part carried out under the superintendence and direction of the law. It is, for example, self-evident that the existence of a law of contract, property, tort, status, capacity, and the like forms an anterior assumption made by s.92. No doubt it is an illustration that does not touch this case. What is more in point, however, is that the assumption made by s.92 covers the general field of public law. Clearly enough the fact that a particular transaction takes place in the course of inter-State trade or forms part of inter-State trade is not enough to exclude the persons engaging in it from the operation of the provisions of public and private law which otherwise would apply. The point at which such laws must stop is when they involve a prohibition, restriction, impediment or burden which prevents, obstructs or prejudices the dealing across the border, or the inter-State passage interchange or whatever it may be. The burden or obstruction

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must be real: it will not be enough to discover some theoretical or speculative transgression over a metaphysical boundary of an area of immunity plotted from logic independantly of reality. But no real detraction from the freedom of inter-State trade can be suffered by submitting to directions for the orderly and proper conduct of commercial dealings or other transactions or activities, at all events if the directions are both relevant and reasonable and place inter-State transactions under no greater disadvantage than that borne by transactions confined to the State. 10

"In conception the distinction is clear between laws interfering with the freedom to effect the very transaction or to carry out the very activity which constitutes inter-State trade commerce or intercourse and laws imposing upon those engaged in such transactions or activities rules of proper conduct or other restraints so that it is done in a due and orderly manner without invading the rights or prejudicing the interests of others and, where a use is made of services or privileges enjoyed as of common right, without abusing them or disregarding the just claims of the public as represented by the State to any recompense or reparation that ought in fairness to be made. Clear as the distinction may be in conception, it may often be difficult to apply in the great variety of practical situations that arise in our complicated economic and governmental system. But it is natural to employ the word 'regulate' in any attempt to describe the distinction: for to speak of regulating the conduct of the given class of trade or commerce and say that regulation is not necessarily inconsistent with freedom to carry it on, states more briefly and more aptly the distinction that exists than perhaps can be done by the use of any other word. It is, however, significant that in the judgment delivered by Lord Porter on behalf of the Board in *The Commonwealth v.* 20 30 40

Bank of New South Wales (1950) A.C., at pp.310, 313; (1949) 79 C.L.R., at pp.639, 642 his Lordship speaks of an enactment being either 'regulatory or something more' and 'being essentially regulatory in character' and of the question being 'whether in its true character it is regulatory'. The word 'regulate' is anything but a term of fixed legal import: it may indeed be used not inappropriately to describe widely different conceptions. Nothing perhaps is more striking than the entirely different meanings that have been placed upon the legislative power of the Congress of the United States - 'To regulate commerce with foreign Nations, and among the several States, and with the Indian tribes' - and upon the legislative power of the Parliament of Canada conferred by the words - 'The regulation of trade and commerce'. It is the conception of distinction, not the word, that must be elucidated and applied. But as the word has been used so much in this connection not only in this Court but in the Privy Council it may be as well to recall that when it is used in authorizing ordinances or by-laws the first step to take in determining its effect is to ascertain precisely what is the subject to be regulated. As Isaacs J. said in *President &c. of the Shire of Tungamah v. Merrett* (1912) 15 C.L.R. 407: 'Regulation may include prohibition. It depends on what is to be regulated. The regulation of a subject-matter involves the continued existence of that subject matter, but is not inconsistent with an entire prohibition of some of its occasional incidents' (1912) 15 C.L.R. 407, at p.423. Where the word is used with reference to such a case as the present it would seem that the thing to be 'regulated' must be understood as being inter-State transportation of goods by motor vehicle. That at all events is the thing to be left free. Probably in s.17(2) of the statute the bracketed words '(being terms and conditions of a regulatory character)' have no more, and perhaps even

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less, effect than if 'subject to s.92 of the Constitution' had been written. At all events a difficulty exists in placing upon the word 'regulatory' any definite or certain meaning, if the meaning is sought within the four corners of the statute. It is perhaps desirable to repeat from the judgment of Isaacs J in James v. Cowan (1930) 43 C.L.R. 386, at p.417 the warning which the use in argument of a paraphrase by Griffith C.J. of s.92 drew from him. The passage begins with a quotation from the opinion of Lord Halsbury L.C. in the Gresham Life Assurance Society v. Bishop (1902) A.C. 287: "I deprecate a construction which passes by the actual words and seeks to limit the words by what is supposed to be something equivalent to the language used by the Legislature." I would say for myself that a paraphrase is especially dangerous in the case of a Constitution. In my opinion it would under the best of circumstances be unfortunate to adopt that or any other supposed verbal equivalent for the words of the Commonwealth Constitution itself' (1902) A.C. 287, at p.291.

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"In most questions concerning the consistency with s.92 of laws which in some way affect the conduct of any description of transaction or activity occurring in the course of inter-State trade commerce or intercourse there is nothing better calculated to open the way to a true solution than to distinguish between on the one hand the features of the transaction or activity in virtue of which it falls within the category of trade commerce and intercourse among the States and on the other hand those features which are not essential to the conception even if in some form or other they are found invariably to occur in such a transaction or activity."

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HISTORY OF JUDICIAL VIEWS OF ROAD MAINTENANCE CHARGES

21. In relation to the matter of making reasonable charges upon users of the roadways for the use of such roadways this had not gone unnoticed in the succession of cases which dealt with the nature and extent of charges which might and which might not be made upon such users for use of roadways by road transport. It is true to say that the matter of charges for the use of the roadways as such had often been discussed in association with and not untrammelled by problems relating to legislative attempts to co-ordinate internal means of transport by road and rail within the various States of Australia. The question of how it was possible to make a charge and if so upon what grounds upon a person using the roads for the purpose of inter-State transportation while still leaving that form of trade, commerce and intercourse absolutely free within the meaning of Section 92 had been the subject of judicial expression on various occasions. Thus in Willard v. Rawson (1933) 48 C.L.R.316 Mr. Fullagar of counsel (as he then was) submitted in argument that the particular registration fee there in dispute was invalid because it was not "computed according to the mileage run on the roads" and that "the purpose is not to maintain the highway". Starke J. in his judgment at p. 326 stated:

"Some regulation is necessary for the safety of the public and the maintenance of the roads and highways and, though such regulations may incidently affect inter-State transportation, the provisions of S.92 are not contravened by virtue of that fact merely....."

and Dixon J. (as he then was) at p.334 said:

"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

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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."

Further discussion occurred in the case of R. v. Vizzard Ex Parte Hill (1933) 50 C.L.R. 30, where it is to be noted that Starke J. in dealing with Willard v. Rawson (supra) indicated at p.55 of his judgment that upon the true interpretation of the Act there in question the object (i.e. the legal effect) of that Act was not restrictive of trade but protective - that is to say protective of the State highways. Further discussion took place in the cases of O. Gilpin Ltd. v. The Commissioner for Road Transport and Tramways (New South Wales) (1935) 52 C.L.R. 189, McCarter v. Brodie (1950) 80 C.L.R. 432 and in Hughes and Vale Pty. Limited v. The State of New South Wales (H.C.) 87 C.L.R. 49. In none of these cases was it necessary for the majority of Justices who upheld the validity of the various Transport Acts to rely upon the constitutional validity or otherwise of charges imposed for road maintenance, nor in the circumstances did the Acts enable the minority Justices to uphold the validity of the respective Acts upon the ground that they related to this and nothing else; until the case of Hughes and Vale (No.1) ((1955) A.C. 241; 93 C.L.R. 1) it could be said that the conception remained dormant. It is to be remembered that in his judgment in the case of Armstrong v. The State of Victoria (No. 2) 99 C.L.R. 28 (to which reference will be made hereafter) Dixon C.J. at pp.42-60 reviews the history of judicial opinion expressed in relation to the matter of charges for use of roads and, after citing the statement from his judgment in Willard v. Rawson (48 C.L.R. 316) set out above and making reference to a statement in his judgment in Gilpin's Case said: "It was not until the decision of the Privy Council in Hughes & Vale Pty. Ltd. v. The State of New South Wales (No. 1) that any question could arise as to the nature or extent of the conception underlying these statements.

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Now, as it appears to me, the developments that 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". (99 C.L.R. at pp.42-3). In relation to a charge similar to that imposed by the N.S.W. Act and levied in exactly similar fashion his Honour stated (99 C.L.R. at p.59):

"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 ((1933) 48 C.L.R. 316) was decided to the principles which, 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 (supra), 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) ((1955) 93 C.L.R. 127) and in Nilson's Case ((1955) 93 C.L.R.292)."

THE PRINCIPLE ENUNCIATED IN HUGHES & VALE (NO. 2).

22. After the War the use of heavy vehicles became more and more a means of transportation in Australia, and deterioration of roadways by reason of the use of heavy vehicles became a major problem of expense in repair and maintenance of roads in order to be able to withstand the heavy loads being carried. The matter of obtaining finance for necessary reparation of damage to roads and the maintenance of roadways to enable them to continue to be available for use by road transport vehicles had become a problem that was urgent by 1954 in the economic and social development of the States of Australia, and in particular New South Wales, and one in respect of which judicial guidance to legislatures had become an urgent necessity. This situation prompted Williams J. to state, in Armstrong's

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Case (99 C.L.R. at p.63): "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."

23. By argument adduced on behalf of the State of New South Wales in the case of Hughes and Vale Pty. Limited v. The State of New South Wales (No.2) 93 C.L.R. 127 the High Court was invited to furnish this guidance. The problem adverted to in the last preceding paragraph hereof had become acute, the decision of the Privy Council in Hughes and Vale Pty. Limited v. The State of New South Wales (No. 1) having been delivered on 17th November 1954 and the State of New South Wales had by Act No.48 of 1954, assented to on 16th December 1954, attempted to meet the effect of the decision and the problem by providing, inter alia, for the payment of charges fixed having regard to a number of matters including: The cost of construction and maintenance of roads, the depreciation and obsolescence of roads, the necessity or desirability for the widening or re-construction of roads, the wear and tear caused by vehicles of different weights, types, sizes and speeds, the moneys available for the purpose of construction, maintenance, widening and re-construction of roads from sources other than charges imposed pursuant to the relevant section of the Act, and the amount expended or proposed to be expended from the Country Main Roads Fund established under the Main Roads Act, 1924-1954 (N.S.W.). In the ultimate decision the High Court held that the provisions included in the said Act were invalid by reason of the registration provisions associated therewith which in legal effect enabled prohibition of trade, commerce and intercourse among the States. However through a discussion that arose in relation to the said Act and upon the basis of the submissions made on behalf of the State of New South Wales, Dixon C.J., and McTiernan and Webb JJ. (in a joint judgment) and Williams J. and Fullagar J. (in separate judgments) expressed their respective views that in certain circumstances charges might validly be made for the use of highways

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while yet leaving trade, commerce and intercourse absolutely free within the meaning of Section 92, and gave a general indication of the true basis upon which such charges might be justified. It is desirable to look at the way in which the Justices explained the nature and validity of such charges.

10 24. The joint judgment (of Dixon C.J., McTiernan and Webb JJ.) states the problem in the following terms (93 C.L.R. at p.171):

20 "The provisions of s.18(4)-(6) present a problem which hitherto has not received consideration in this Court untrammelled by the conceptions held to be erroneous by the Privy Council in Hughes & Vale Pty. Ltd. v. State of New South Wales (No.1) ((1955) A.C. 241; (1954) 93 C.L.R. 1). It is the problem of saying how far if at all and on what grounds a pecuniary levy can be made directly upon inter-State transportation by road and yet leave that form of trade commerce and intercourse absolutely free.

30 "It seems to be clear enough that the question cannot be treated on the simple basis that the highways are premises of the State and that it can charge what it likes to those who wish to be admitted to their use. It is not on the basis of property that the State can deal with the use of the highways. Nor can they be regarded as a utility or a facility or a service, like the railways or the supply of electricity gas or water, which the State provides or supplies for reward to those who choose to use them. If the State could deal with the roads on the basis of property there seems to be no reason why it should not exclude whom it thought fit, at all events short of making an actual discrimination against inter-State commerce. The roads of a State form one of the established every-day means of carrying on trade commerce and intercourse. Just as s.92 assumed the existence of an ordered society governed by law in which the freedom

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that it guaranteed to inter-State trade would be enjoyed, so one of its basal assumptions was that the ordinary means of carrying on trade commerce and intercourse among the States would continue, that is until in the due course of progress they fell into obsolescence and were superseded by new means. The assumption must certainly be taken to cover the existence of the highways, even if the responsibility of providing them might rest upon the States. A highway, having come into existence, is there for use, according to the ordinary laws of the State, by the subjects of the Crown without distinction whence in Australia they come. For it was part of the purpose of s.92 to make that distinction impossible in such a matter. In this basal prior assumption of s.92 may be discerned the reason why the special ground upon which Williams J. ((1950) 80 C.L.R., at p.477) placed the Transport Cases was not found capable of sustaining them. Compare McCarter v. Brodie ((1950) 80 C.L.R., at p.477) with Hughes & Vale Pty. Ltd. v. State of New South Wales (No. 1) ((1955) A.C., at p.305; (1954) 93 C.L.R., at p.31).

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"But whilst it is not possible to justify the imposition of a charge for the use of the roads on the basis of property, if it includes inter-State commerce, there are other grounds which make it possible to reconcile with the freedom postulated by s.92 the exaction from commerce using the roads, whether the journey be inter-State or not, of some special contribution to their maintenance and upkeep in relief of the general revenues of the State drawn from the public at large. The American phrase is that inter-State commerce must pay its way. It is but a constitutional aphorism, but it serves to bring home the point that in a modern community the exercise of any trade and the conduct of any business must involve all sorts of fiscal liabilities from which, in reason, inter-State trade or business should have no immunity. Those who pay them are not

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unfree, they merely pay the price of freedom. Just as any commercial pursuit or activity must conform with the laws affecting its incidents, notwithstanding that it may form part of inter-State commerce, so it must discharge the fiscal liabilities which state law attaches to those incidents. No-one, for example, would say that s.92 gave a depot or terminal of an inter-State air service or road transport business immunity from rates or land tax. The aphorism, however, does not tell you where the application of this principle stops, even under the American doctrine which allows more latitude than our s.92 can admit. 'The appealing phrase that "interstate business must pay its way" can be invoked only when we know what the "way" is for which interstate business must pay.' - per Frankfurter J., Braniff Airways v. Nebraska State Board ((1954) 347 U.S. 590, at p.607). Needless to say, the principle has no application if there is a discrimination against inter-State commerce, if it is placed under any disadvantage in face of the State's internal commerce. The principle has no application to impositions the purpose of which is not to recoup the State or supply the means of providing the services, or a relevant service, of government, but to give effect to some social or economic policy, as for example to deprive road transport of an advantage in competing with railways.

"A distinction of much importance must be maintained between impositions upon things which are only incidental to or consequential upon carrying on the activity, as for instance a tax on the occupation of premises, a 'pay roll' tax, a profits tax, and impositions upon the thing itself. To exempt a business from the former because it has an inter-State character might go beyond preserving freedom of inter-State trade and amount to a privilege --'. . . to require that inter-State trade shall be protected from the ordinary incidents of competitive business is to give - not an

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immunity from interference, but a specially privileged position'."

Their Honours then proceed to state the solution to the problem and the principles upon which a charge for use may be based in the following way (93 C.L.R. at p.175):

"For the purpose of that provision (Section 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.

"The expression 'a reasonable compensation or recompense' is convenient but vague. The standard of 'reasonableness' can only lie in the severity with which it bears on traffic and such evidence of extravagance in its assessment as come from general considerations. In speaking of 'relevant highways' it is intended to mark the importance of recognizing the

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size of Australian States, as distinguished from most American 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 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) 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. It is needless to consider whether this necessarily means that the sub-sections are wholly void, so that it would be unnecessary to wait to see what is done under them. For in any case, they fall with the licensing provisions.

"All that is conceded to the State by what has been said is authority to exact a compensatory payment for the use of the highways notwithstanding that it is a use in the course of inter-State trade."

And then after pointing out what, in their Honours' view, would not be a charge able to be levied consistently with Section 92, they proceed (93 C.L.R. at p.177):

"But very different considerations arise when the State demands payment in respect of the use of a physical thing which the State provides although under no legal obligation to provide it. No one would

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doubt that, if coal is discharged from inter-State colliers through handling equipment and bins established by the State, the State may impose a proper charge by way of recompense or remuneration. But a State may build a wharf which inter-State ships cannot well do otherwise than use. Yet it seems undeniable that the State can require the ships to pay wharfage provided the wharfage charge is genuinely fixed as a fair and reasonable compensation for the use of the wharf. Government aerodromes constructed and equipped for traffic by air may be indispensable to inter-State aerial navigation; but because charges are levied for the use of them no one would say that air navigation among the States is not free. The fact is that we find nothing inconsistent with our conception of complete freedom of inter-State trade in the exaction, for the use of physical things like the foregoing, of a pecuniary charge, if in truth it is no more than a reward, remuneration or recompense. But when an exaction is compulsory, it must possess characteristics which distinguish it from a mere tax, falling upon inter-State trade. It is for this reason that the relation which the amount of the exaction bears to the actual use of the facility should appear, and that there should not be evidences of an attempt to achieve objects that go beyond the recovery of fair compensation for the actual use made of the facility. We are accustomed to the levy of charges for the use of such things as have been given as examples, coal-handling equipment, wharves and aerodromes, and accordingly we see in it nothing incongruous with freedom of trade. We are not accustomed to charges being made for the use of ordinary bridges; but it would strike few minds that there was any impairment of freedom of inter-State trade in placing a toll upon the use of some great bridge erected as a major engineering work, like that over Sydney Harbour. Must a highway

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be treated by the State for the purposes
 of s.92 as in a different category from
 wharves, bridges, aerodromes and special
 constructional works which inter-State
 trade uses? A modern highway is in fact
 a constructional work of a very substantial
 character indeed. It cannot be distin-
 10 guished 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. There is little
 exaggeration in saying that its
 association with the highways of the
 nineteenth century is a matter of history
 rather than of practical identity or
 20 resemblance. But highways have in
 Australia a very different history from
 wharves and analogous constructional
 works. At the time when s.92 was enacted,
 with very few, if any, exceptions, the
 highways of Australia were available with-
 out charge for the use of all persons as
 of right. It has not always been so in
 England. Even before the period of
 30 statutory tolls it was competent for the
 Crown to grant a franchise to take tolls
 over a road in consideration of the
 grantee keeping the road in repair: see
Lord Pelham v. Pickersgill (1787) 1 T.R.
 660 (99 E.R. 1306). Then of course there
 came the long history of turnpike roads
 governed by turnpike trusts constituted
 by statute. Is it an anterior assumption
 of s.92 that the roads of a State whatever
 form they take must be available without
 charge to all kinds of inter-State traffic?
 40 Is such an assumption part and parcel of
 the freedom which the provision guarantees?
 To give an affirmative answer to this
 question implies that in reference to inter-
 State commerce the law, that is to say
 the State law conferring upon the subjects
 of the Crown a right of free passage over
 highways is unchangeable. There seems to
 be no constitutional reason why this should
 be so. What is essential for the purpose

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of securing the freedom of inter-State transportation by road is that no pecuniary burden should be placed upon it which goes beyond a proper recompense to the State for the actual use made of the physical facilities provided in the shape of a highway. The difficulties are very great in defining this conception. But the conception appears to be based on a real distinction between remuneration for the provision of a specific physical service of which particular use is made and a burden placed upon inter-State transportation in aid of the general expenditure of the State. It seems 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."

Williams J. in his judgment expressed his views as to the reason for the validity of such charges in the following terms (93 C.L.R. at p.188):

"It necessarily follows from the decision of the Privy Council that the regulation of the inter-State carriage of passengers or goods by road which is compatible with s.92 cannot be very extensive. It must be mainly confined to laws and executive acts relating to the safe use of the roads and to the care and preservation of the roads. The safe use of the roads depends primarily on adequate rules controlling the movement of vehicles on the roads, such as rules relating to the efficiency of the driver, keeping to the left, overtaking, speed, use of lights, sounding horns etc. Such rules would obviously require to be rules which applied uniformly to all traffic on the roads whether intra-State or inter-State and would properly be included, as indeed they are, in a code of regulations relating to traffic generally. The proper construction and equipment of vehicles for the various forms of carriage for which they

are used whether passengers or goods is also important on the question of safety. The States must have power to limit, within reason, the length, width, height and weight of vehicles, loaded and unloaded, which may use the roads, and to require that their mechanical efficiency should be adequate, and that the loads they carry should be properly secured. The States must have power to prevent the roads suffering excessive wear and tear from being used by vehicles which they are not built to carry."

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"To-day the roads are mainly used by fast-moving motor traffic and modern roads which are necessary to accommodate such traffic, complete as they must be with an adequate pavement, bridges, culverts and other components, are expensive undertakings to construct and maintain. The traffic on such roads must be carefully regulated in the interests of safety. Such regulation requires that the necessary rules should be enacted to control the identification and movement of the vehicles on the roads, that the necessary aids for this purpose such as traffic lights and various signs beside or on the roads should be installed, and that the roads should be adequately policed to ensure that the traffic laws are obeyed. By constructing and maintaining such roads and providing such incidentals the States provide an organized facility for modern trade commerce and intercourse by land. If the Commonwealth or a State provides aerodromes and all the incidental services necessary to make air traffic feasible and safe it provides an organized facility for trade commerce and intercourse by air. If the Commonwealth or a State dredges harbours, builds wharves and provides aids to navigation it provides an organized facility for trade commerce and intercourse by sea. Section 92 provides that trade commerce and intercourse among the States

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shall be absolutely free. But there is nothing in the Constitution, or in s.92 in particular, which requires the Commonwealth or a State to provide any such facilities. Section 92 assumes, no doubt, that Australia will move with the times and that means of communication between the States appropriate to modern conditions will be constructed, organized and maintained. In this respect I can see no reason why s.92 should not apply in the same way to all these facilities. They are all provided for use by the public and must therefore be made available to those members of the public who wish to use them for the purposes of inter-State trade commerce or intercourse. The right of the Commonwealth or a State to control their use is to make such regulations relating to their use as are compatible with s.92. The instant question is whether the Commonwealth or a State can charge such members of the public for their use. I can find nothing in the judgment of the Privy Council to suggest that they cannot. Their Lordships have held that a State has not an absolute discretion to decide who shall and who shall not use its roads for inter-State purposes. They have not decided that a State has not a wide power to regulate the use of its roads so long as the roads are open for use by all persons who can comply with the regulations. And they have not decided that such regulations cannot include a reasonable charge for the use of the roads. A person who wishes to engage in inter-State trade commerce or intercourse is necessarily put to expense in order to achieve his purpose. A person wishing to engage in the trade of carrying passengers or goods by road must purchase or otherwise acquire the necessary motor vehicles to do so. He must pay for the petrol and oil that such vehicles consume and for their maintenance and he must incur a variety of other incidental expenses. The trader must incur this expenditure in order to carry on his trade. But all this expenditure would be useless unless the

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States provided the necessary road facilities. The trader enjoys the use of these facilities in common with other users of the roads, whereas the vehicles which he operates upon them are his own private property. But the existence of the necessary road facilities is as essential to the success of his undertaking as the acquisition and upkeep of the necessary vehicles.

"Section 92 does not say that a person is entitled to engage in inter-State trade commerce or intercourse free from expense. It assumes that such a person will incur such expenditure as is necessary to achieve his purpose. If the Commonwealth or a State provides a facility which he requires to use for that purpose there is, in my opinion, nothing in the section which says that the Commonwealth or a State shall not include in the regulation of that facility a charge that provides a reasonable compensation for its use. Of all the public works undertaken by the Commonwealth or States to provide the necessary modern facilities for trade commerce and intercourse the construction and maintenance of the roads is probably the most costly. A reasonable charge to compensate the Commonwealth or a State for the benefit that is conferred on the trader, be it in relation to traffic on land or in the air or by sea, whether it be called a tax, a levy or a charge or otherwise labelled, is not in truth a tax on the inter-State operation but compensation for the provision of facilities without which the operation could not be carried on at all. Attempts were made to draw a distinction between the provision of a road and the provision of facilities for traffic by sea or air. It was even sought to draw a distinction between the provision of a road so far as it passed over dry land and the provision of bridges by means of which it spanned intersecting streams. It was not seriously contended that a member

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of the public who wished to use an aerodrome or wharf provided by the Commonwealth or a State could not be charged a reasonable fee for its use. Nor was it seriously contended that a State could not impose a reasonable toll as a condition of passing over a bridge. But it was contended that roads are in a special position, mainly because, as I understand the argument, at the date of the Constitution in 1901 the roads of the States were public roads over which all members of the public were entitled to pass and repass in person or with vehicles free of charge. Be that as it may, the Constitution leaves to the State complete power to legislate with respect to their roads, except in so far as they are deprived of that power by s.92. It cannot be said that there is anything new in the principle that it is reasonable that those who use the roads should contribute to their maintenance."

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Fullagar J. in his judgment came to the conclusion that the charges purported to be the subject of the 1954 New South Wales legislation, or charges of that nature, were permissible in certain circumstances envisaged by him. He said (93 C.L.R. at p.208):

"Nor is it any denial or qualification of this freedom to come and go to say that nobody is bound affirmatively to facilitate my coming and going or to supply me with the means of coming or going. Nobody is bound to provide for me a ship or an aeroplane or a motor car. Nor is anybody bound to provide for me a wharf or an aerodrome or a parking station. If a government or a governmental instrumentality does provide any of these things, it is clearly entitled to make at least a reasonable charge for the use thereof, and the making of such a charge cannot be said to interfere with my freedom to come and go: cf. Melbourne Harbour Trust Commissioners v. Colonial

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Sugar Refining Co. Ltd. (1926) V.L.R.

140. This, however, is, of course, subject to the proviso that the charges made do not involve any discrimination against me as an inter-State trader or traveller. If they do, they assume at once a different aspect, and can no longer be regarded as merely charges for a service rendered. They impose a special burden on me as an inter-State trader or traveller, and they do therefore interfere with my freedom to come and go."

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"There is, however, another aspect of the matter. Large, fast moving, and often very heavy, road vehicles provide to-day, in Europe, America and Australia, a normal and necessary means for the transportation of goods and passengers. Such vehicles require, for their safe, efficient and economical use, roads of considerable width, and of a hardness and durability beyond what was achieved by John McAdam. Because such roads serve, directly or indirectly, the needs of the community as a whole, it is the natural function of Governments to provide and maintain them. That function has been assumed in Australia by the States, acting directly or through a statutory instrumentality, as one of their constitutional functions, though large sums have been paid to the States by the Commonwealth for assistance in the performance of this function under a series of Commonwealth Acts, of which the latest is the Commonwealth Aid Roads Act 1950.

Such roads, as I have said, serve directly or indirectly the needs of the community as a whole. But, because the users of vehicles generally, and of public motor vehicles in particular, stand in a special and direct relation to such roads, and may be said to derive a special and direct benefit from them, it seems not unreasonable that they should be called

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upon to make a special contribution to their maintenance over and above their general contribution as taxpayers of State and Commonwealth. Among those who so use those roads are persons who use those roads exclusively for the inter-State carriage of goods or passengers. Does s.92 mean that such persons must be exempt from making any contribution towards the maintenance of the roads which they use? I do not think it does. It does not appear to me to be inconsistent with anything I have said above to say that such persons 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. So regarded, the exaction of a contribution towards the maintenance of the highways of a State does not appear to me, necessarily and of its very nature, to offend against s.92. Such a view derives support, I think, from the view taken in a considerable number of cases in the United States, although, as has often been pointed out, there is no s.92 in the Constitution of the United States, and the question of the validity of such charges arises there in connection with a constitutional doctrine which has not been adopted here.

Serious difficulties in respect of both quantification and incidence may attend the fixing of a contribution which will be valid, although the learned Solicitor-General for Victoria stated in another case that the difficulties were in fact

10 less than might be supposed. It is perhaps
 15 unwise to attempt to anticipate these. Two
 20 things, however, may be 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 main-
 25 tenance of the roads. Subject to those two
 points, I think that a fair degree of lati-
 tude must be allowed in prescribing the
 incidence of a charge, and that practical
 30 considerations attending the collection of
 a charge must be borne in mind in consider-
 ing its validity."

25. The views expounded by the five Justices in
Hughes and Vale Pty. Limited (No.2) as to the
 ability of the legislature to impose charges upon
 the use of roadways were not essential for the
 20 decision by those Justices in that case and
 were not made the basis or the ratio decidendi
 for the eventual conclusions reached by them as
 to the validity of the Act and sections then
 in question. It is clear that the five
 Justices mentioned above were doing no more in
 that case than adumbrating in the views expressed
 by them the principle which was later to be more
 clearly defined, and it was sufficient that
 in answer to the submissions addressed to the
 30 Court on that occasion that it should be
 indicated that for various reasons a charge of
 the nature being debated might be supported
 if it complied with certain tests or was
 imposed in a certain manner. Indeed the
 absence of necessity of precisely defining the
 principle by which a charge might validly be
 imposed as a recompense for the actual use made
 of a facility such as a highway was expressly
 adverted to in the joint judgment. Their
 Honours stated at p.179:

40 "The difficulties are very great in
 defining this conception. But the
 conception appears to be based on a real
 distinction between remuneration for the
 provision of a specific physical service
 of which particular use is made and a
 burden placed upon inter-State trans-
 portation in aid of the general expenditure

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of the State. It seems 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."

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But that a charge such as that postulated would not operate to restrict trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which might truly be regarded as remote, or which might be classed as regulatory, was clearly evident to the five Justices.

THE PRINCIPLE REFINED IN ARMSTRONG'S CASE

26. A charge upon the use of highways bearing the indicia of validity as discussed in Hughes and Vale Pty. Limited (No.2) was imposed by Part II of the Commercial Goods Vehicles Act 1955 (Victoria) and came forward for decision in the case of Armstrong v. The State of Victoria (No.2) 99 C.L.R. 28.

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27. In upholding the validity of the charge imposed by the said last mentioned Act upon the very grounds (i) that there is a description of charge for using its roads that a State might impose upon transport including inter-State transport without contravention of Section 92 and (ii) that the charge imposed by this Act was a charge of the permissible description, the majority of the High Court consisting of Dixon C.J., McTiernan, Williams and Fullagar JJ. assigned more specific reasons for the views which they had formed. For example, Dixon C.J. at p.43 stated:

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"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

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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

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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 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."

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In his judgment the Chief Justice incorporated the passages contained in the joint judgment in Hughes and Vale Pty. Limited (No.2) covered by pp. 171-179 of the report of that case (93 C.L.R.) which includes the passages previously referred to herein, and proceeded at p.47 as follows:

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"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) concludes 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

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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."
(93 C.L.R. at p.179)

10 At p.63 of his judgment (99 C.L.R.) Williams J. reaffirms the correctness of the proposition expounded in Hughes and Vale Pty. Limited (No.2) by five out of the seven Justices of the Court "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 highways by his vehicles" upon the following basis, namely:

20 "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 Section 92."

30 Webb J.(p.74) agreed with the views that had been expressed in the joint judgment in Hughes and Vale Pty. Limited (No.2) and added as a further basis for validity of imposition of a charge of the nature imposed by the Victorian Act the additional reason: "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." Fullagar J. at p.82 also explained the basis of the decision in Hughes and Vale (No. 2) as follows :

40 "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,

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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 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) (1955)* 93 C.L.R. 127 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) (1955)* 93 C.L.R., at p.208." 10 20

McTiernan J. agreed with the judgment of the Chief Justice.

THE BASIS OF THE PRINCIPLE

29. In resolving the first question of the specific problem raised by the challenge brought forward in Armstrong's Case (see para.28 above) namely: "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 Section 92", it is clear that the majority of the High Court applied the principle hereinbefore adverted to as to whether the burden placed by the charge was compatible with the freedom of inter-State trade, commerce and intercourse as guaranteed by Section 92 in a way that is adequately described in the joint judgment in Hughes and Vale (No.2) 93 C.L.R. 127 at p. 162 in the following terms, namely: 30 40

10 "In most questions concerning the consistency with S.92 of laws which in some way affect the conduct of any description of transaction or activity occurring in the course of inter-State trade commerce or intercourse there is nothing better calculated to open the way to a true solution than to distinguish between on the one hand the features of the transaction or activity in virtue of which it falls within the category of trade commerce and intercourse among the States and on the other hand those features which are not essential to the conception even if in some form or other they are found invariably to occur in such a transaction or activity."

20 For it is clear that the majority in Armstrong's Case formed the view that where a legislature places a charge upon use of highways related properly (i.e. in the manner discussed) to maintenance of highways then no burden is directly imposed upon trade, commerce and intercourse because damage caused to roads by vehicles is not an essential attribute of trade, commerce and intercourse as such. The charge is made with reference only to compensation for the damage (even if such charge invariably falls upon traders who use highways). But where a legislature imposes a charge upon use of highways which is not so related and which, for example, is levied as a condition precedent to going onto roads at all (as in the case of a registration charge), then there is being selected a criterion of trade, commerce and intercourse for the imposition of the charge, namely the movement of the vehicle as such, or in the words of Fullagar J. the "coming and going", and in such a case the persons operating the vehicle are paying a price for the mere privilege or right of movement. Put another way, what is being charged for is not the road or the mere use of the road, but is the repair and maintenance which keeps the road in a condition fit for use. The distinction made by each of the Justices in Armstrong's Case is between charge upon use as a damage factor in the sense just mentioned (i.e. causing wear and tear) as distinct from charge upon use as mere movement - when movement of the latter sort is by a trader then a charge upon use as a trader. In the latter case the charge may perhaps be described as a privilege tax by whatever name labelled whereas in the former case the criterion or characteristic selected for charge is damage use. Hence it is that once a charge ceases to be tied to compensation and takes on the characteristic of something in addition to, or different from, compensation for damage, then it is possible to

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categorise it as a charge upon movement and no longer upon damage use, and when that movement is movement by a trader, then a burden upon a trader which in his inter-State trade is inconsistent with the freedom protected by Section 92. The concept as thus expounded in the joint judgment in Hughes and Vale (No.2) and by Dixon C.J. in Armstrong's Case is perhaps best stated by Fullagar J. in Armstrong's Case 99 C.L.R. 28 at p.82 when His Honour says: "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 and in substance, and is no more than, a contribution towards the maintenance of public highways." (emphasis added). The character to which his Honour is referring was an exaction of a contribution towards the maintenance of something which could be used as of right.

30. A charge imposed by reference to damage use (difficult though this may in practice be to compute) does not saddle trade with a burden because such a charge only enables that which is a pre-requisite of trade to be available. Where damage results from and is in a broad sense proportionate to use, then one rational way of compensating for such damage is to make a charge based upon such use. But damage resulting from the use charged for in this way is no more an essential attribute of trade than is the use of petrol or tyres an essential attribute of trade. Each may be (and all may be) a sine qua non of efficiently conducting a business of trading, but this does not mean that they or any of them are by Section 92 rendered free from an appropriate tax or charge upon them as such. The damage to roads, it is true, is the result of use, and where that use is in the course of trade, commerce and intercourse, then it is the result of use in the course of trade, commerce and intercourse. But this does not render the damage something which forms part of trade, commerce or intercourse or an essential attribute of that conception, nor the compensation for that damage computed upon use a burden upon trade, commerce and intercourse.

Indeed Kitto J. is correct in his statement of the principle where he says in Hughes and Vale (No. 2) 93 C.L.R. 127 at p.217: "It seems clearly to follow that a law cannot be obnoxious to the freedom unless it fixes upon such a characteristic of a given course of conduct and makes it a criterion of its application"; and His Honour recognises the distinction sought to be made between damage use of and movement upon a roadway in Armstrong's Case 99 C.L.R. 28 at p.85 where he says:

"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 upon 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."

But in refusing to accede to the principle expressed by the other Justices (except Taylor J.) set out above that a charge for use as damage compensation may be valid, His Honour prefers to rely for the absence of justification for such a charge upon his view that the same cannot be said to be regulatory, and on this he founds his views in Hughes and Vale Pty. Limited (No.2) and his decision in Armstrong's Case. In the passage which appears in Hughes and Vale (No.2) at p.218 His Honour defined the way in which according to the authorities a law may be said to be regulatory and so not to infringe the constitutional guarantee of freedom provided by Section 92, and proceeds to state at p.220 that: "To make a charge for the use, even by a trader, of any such provision is, to my mind, remote from regulation in the relevant sense of the word." In Armstrong's Case His Honour confirmed the views expressed by him in Hughes and Vale No.2 and stated the same concept in a passage appearing in his judgment at p.85. But as has been set out above, it was not necessary for the Justices delivering the joint judgment in Hughes and Vale (No.2) and the four Justices in Armstrong's Case

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to hold the said charge to be valid upon the basis of valid regulatory provisions. It can be seen that Kitto J. failed to deal with the basis upon which those four Justices decided the validity of the relevant Statute in Armstrong's Case, and in addition upon which Webb J. decided that validity ought to be determined. So far as His Honour's views about the validity of the relevant provisions in that particular case as being "regulatory" are concerned, it is submitted that they were not correct, and this will be dealt with hereafter. 10
 Nor is it likely that legislative provisions of the nature that were under discussion in those cases could be supported if in fact they amounted to a privilege tax, as appears to be the conclusion formed by Taylor J. as to their nature in his judgment in Hughes and Vale (No.2) 93 C.L.R. 127 at pp.236-239 and in Armstrong's Case (99 C.L.R. 28) where His Honour affirmed the views expressed by him in the former case (see 20
 p. 87). His Honour appeared to regard the incidence of the provisions there under discussion (i.e. in Hughes and Vale (No.2)) as a charge imposed as a condition precedent to the use of a facility, the use of which might be withheld at will - or only upon payment of a charge to be assessed at the discretion of a licensing authority. But it is conceded by all the Justices constituting the majority in Armstrong's Case (and, it is submitted, by Webb J. as well) that such a tax or charge 30
 could not be sustained, and it is further held by them (and by Webb J.) that that was not the true nature of the charge levied by the provisions of the relevant Act in Armstrong's Case. Likewise that is not a basis nor effect of the charge levied by the legislation under review in the present case.

31. It is perhaps important to note at this point and in this respect the circumstances in which Barwick C.J. in his judgment in Harper v. The State of Victoria (1966-67) 40 A.L.J.R.49 expressed his agreement with the statements made by Kitto J. at pp. 217-219 of the report of his judgment in Hughes and Vale (No.2) 93 C.L.R. 127. In Harper's Case the four Justices, who were clearly of the view that the legislation in question was valid, based their decisions squarely upon the conclusion that no characteristic of inter-State trade or commerce and that no essential attribute of that conception was 40

10 in any way burdened or restricted thereby. None of these Justices mention the matter of regulatory legislation because, of course, this never arose if the view which they formed as to the legal effect of the legislation was correct. It is submitted that this view is clearly correct, as it is difficult to envisage, as is so clearly pointed out by their Honours, how the retail sale of eggs which had been imported into Victoria or their possession in Victoria for retail sale could be said to be part of an importer's inter-State trade. However Barwick C.J. in his dissenting judgment took the view that the sale within Victoria being, as he put it, "an indispensable and inseparable concomitant or conclusion of the inter-State commercial operation", was burdened by the legislation in question "unless the statute can in relation to its prohibition of sale by retail of eggs not marked and stamped by the Board be characterised as regulatory in its nature..." It is therefore clearly in this context of his discussion of how far a statute can be regulatory without infringing the freedom guaranteed by Section 92 that His Honour turns to the passage previously referred to in the judgment of Kitto J.; indeed His Honour proceeds after reference to this passage (40 A.L.J.R. at p.53, second column):

30 "No doubt the very expression of the concept has its difficulties: its application is certain to give rise to considerable divergences of opinion. But limitations on the activities of inter-State traders are not compatible with that freedom upon which the Constitution insists merely because they appear reasonable in the interests of the public as a whole or of the public regarded as consumers of goods, or as reasonable administrative expedients to ensure compliance with laws which might in their general provisions be thought to be no more than regulatory."

40 But for reasons already discussed in paragraphs 29 and 30 hereof when Kitto J., in Hughes and Vale (No.2) in determining the validity of the legislation before the Court, had regard only to the question whether it could be categorised as regulatory or not His Honour departed from the line of reasoning upon which the majority of Justices in that case primarily preferred to determine the matter, and upon which five Justices

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proceeded to determine the validity of the relevant statute in Armstrong's Case.

32. It is true that Webb J. in Armstrong's Case (99 C.L.R. at p.74) adverted to the possibility that the charge there under discussion might be held to be valid as being a regulatory provision imposed by the legislature when he stated that: "...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." And it is also true that Williams J. in his judgment in Hughes and Vale (No.2) adverted to a similar conception of the validity of the legislation being supportable as regulatory. While it is conceded that views might differ upon the aspect of regulation, should it be necessary to decide the question of validity upon the basis of the test as laid down in the Bank Case, it is clear that the four Justices forming the majority in Armstrong's Case based themselves upon the fact that the charge levied imposed no direct burden or impediment upon trade, commerce or intercourse as such, and that Webb J. in essence agreed with this approach. But should it be necessary to decide the question of validity as being one concerning the imposition of a regulatory charge, then the reasoning of the Justices who would support its validity on this basis is to be preferred to that of Kitto and Taylor JJ.

33. In this regard it is to be noted that in Hughes and Vale (No.1) ((1955) A.C. 241; 93 C.L.R.1) their Lordships of the Privy Council after applying the test as to whether the Transport Act there in question directly burdened inter-State trade were of the opinion (at p.23) that:

"... it follows that if the validity of the Transport Act is to be established in the present case, it can only be on the ground that the restrictions contained therein are 'regulatory' in the sense in which that word is used in the Bank Case"

and adopted in discussing this opinion a passage from the judgment of Fullagar J. in McCarter v. Brodie (which they cited) which passage contained

the following statement (93 C.L.R. at p.25):

10 "The question is sometimes raised whether a
 State - or the Commonwealth for that matter,
 since the Commonwealth is equally bound by
 s.92 - can, consistently with s.92, make a
 charge for the use of trading facilities, such
 as bridges and aerodromes, provided by it.
 The answer is that of course it can. The
 great bridge over Sydney Harbour was erected at
 huge expense to facilitate trade commerce and
 intercourse between all places north of the
 Harbour and all places south of the Harbour.
 The collection of a toll for the use of the
 bridge is no barrier or burden or deterrent to
 traders who in its absence, would have to take
 a longer or less convenient or more expensive
 route. The toll is no hindrance to anybody's
 freedom, so long as it remains reasonable, but
 it could, of course, be converted into a
 20 hindrance to the freedom of trade. If the
 bridge authority really wanted to hamper any-
 body's trade, it could easily raise the amount
 of the toll to an amount which would be pro-
 hibitive or deterrent. It would not be
 possible a priori to draw a dividing line
 between that which would really be a charge for
 a facility provided and that which would really
 be a deterrent to trade, but the distinction,
 if it ever had to be drawn, would be real and
 30 clear, and nobody need worry about it in
 advance. Nothing but futile exaggeration of the
 difficulties of s.92 can result from an insistence
 on imagining border-line cases which are
 excessively unlikely to arise in practice. If
 we are ever actually called upon to say whether
 a money exaction is really a charge for a
 facility provided or really a burden on some-
 body's freedom to conduct a trade or business
 or engage in intercourse, human affairs are
 40 such that we are unlikely to experience any
 very serious difficulty in making a decision.

 "It is clear enough that such provisions as
 I have been considering are properly regarded
 as regulatory in character, and therefore
 within the category which their Lordships have
 held to involve no violation of s.92".

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And it is to be further noted in this connection that Dixon C.J. in Armstrong's Case (99 C.L.R. 28 at p.54) also made reference to a passage from the judgment of Fullagar J. in McCarter v. Brodie and dealt with it in the following way:

"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 (1950) C.L.R. 432 regarded the passage as a correct statement by me of the reasons underlying the decision in Willard v. Rawson (1933) 48 C.L.R. 316 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 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, but I have thought it proper to express my view of that case'. (1950) C.L.R. at p.500. In Hughes & Vale Pty. Ltd. v. State of New South Wales (No.1) (1953) 87 C.L.R. at p.102 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 (1955) 93 C.L.R. 292 at p.304, Willard's Case 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."

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THE PRINCIPLE AND TESTS OF VALIDITY SUMMARISED.

34. As a result of the decision in Armstrong's Case it was possible with exactitude and finality to formulate the principle upon which legislation imposing a charge as compensation for wear and tear of highways resulting from road use thereof was able to be supported as being consistent with Section 92, and the tests by which any given legislation was able to be measured against that principle. This principle and these tests are perhaps best summarised by Fullagar J. in his judgment in Armstrong's Case (99 C.L.R. 28) at p.83 as follows:

"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' (1955) 93 C.L.R., at p.175, 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 (1955) 93 C.L.R., at pp. 175, 176. 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

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of the State. And the collection of the charge involves no interference with any inter-State journey."

PRACTICAL DIFFICULTIES ASSOCIATED WITH CONFORMING LEGISLATION.

35. In expressing their views as to the principle upon which a charge compatible with the freedom guaranteed by Section 92 might be imposed upon users of highways as a compensatory provision, the Justices who formed the view in favour of such validity were aware that there were mechanical difficulties likely to be associated with legislation imposing such a charge, and mechanical difficulties which might in some circumstances go to the validity or otherwise of the particular legislation under review. Thus in arriving at a figure for a damage factor itself the difficulties are apparent from the various judgments and are perhaps best stated by Williams J. in Armstrong's Case 99 C.L.R. 28 at p.71 where his Honour said:

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"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 weigh-bridge 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."

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Further, for example, in meeting the requirement "that there should be a reasonable relation between the charge and the purpose, viz. a contribution to upkeep connected with the use made of the roads and the consequential wear and tear" validity may depend upon a change in the factual situation, as was recognised by Dixon C.J. in Armstrong's Case at p.48 where his Honour said:

10 "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
20 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."

That these difficulties have caused diverging views as to validity is recognized by the respondents, but the difficulties are in fact no more than the difficulties of working out in practice the application of the principle in the particular circumstance. These practical difficulties are recognized and
30 are the subject of discussion in the case of Commonwealth Freighters v. Sneddon 102 C.L.R. 280 but did not prevent the Court from reaching a decision in that matter nor from applying the true basis for upholding the validity of the particular charge there in question upon the ratio decidendi of the decision of the majority in Armstrong's Case. Thus in Commonwealth Freighters v. Sneddon (102 C.L.R. 280) Kitto J. at p.296 stated:

40 "I am unable to see any reason for thinking that this appeal should succeed if it be assumed that the conclusion reached by the majority of the Court on the main question in Armstrong v. State of Victoria (No.2) was correct. I therefore agree in dismissing the appeal."

36. Following the decision in Armstrong's Case

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(99 C.L.R. 28) an attempt was made to have the Privy Council hold that the principle enunciated in the judgments of the majority Justices in that case was wrong and that the Victorian Act should be held to be invalid or that certain sections thereof should be. In an application made for special leave to appeal to the Privy Council from the decision given in Armstrong's Case it was sought to be emphasised that two of the Justices who constituted the majority of the Court in that case, namely Williams and Fullagar JJ. had enunciated a test for determining the validity of the particular statute which was basically at variance with the test enunciated by the other three Justices constituting the majority, and further that the basic reasoning underlying the conclusion formed by Williams J. was at variance with and rejected by the judgment of Fullagar J. It was sought to have the Privy Council hold that the reasons advanced for invalidity in the judgments of Kitto and Taylor JJ. were correct, and emphasis was placed upon the mechanical difficulties referred to above in paragraph 35 hereof. The Privy Council after hearing argument refused special leave to appeal and dismissed the petition for special leave.

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37. The decision of the Privy Council was given on the 12th day of November 1957. It is submitted that as the matter was one of great public interest and importance their Lordships comprising the Judicial Committee at that time must have been of the view that the judgments of the majority of the Justices of the High Court of Australia were either right or did not admit of sufficient doubt as to justifying the granting of special leave. It is submitted further that this was so because there was, for the reasons hereinbefore pointed out, no real divergence of view as to the basis of validity of the Act in question. Refusal of leave may properly be regarded as an approval by the Board of that basis. It is further submitted that the mere mechanical difficulties, being matters essentially dependant for their resolution upon the social and economic situation in Australia, were not made and should not be made the subject of special leave to appeal, and that the same were and should be left to the Courts in Australia to work out as a matter of application of the principle so approved

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by that Board.

DECISIONS SUBSEQUENT TO ARMSTRONG'S CASE.

38. Following upon the refusal by the Privy Council to grant leave in Armstrong's Case, the State of New South Wales enacted the Road Maintenance (Contribution) Act, 1958, which was assented to on the 18th day of April 1958, with a commencing date of 1st May 1958. A challenge was brought to the validity of this Act in 1958 and was disposed of in the High Court in the case of Commonwealth Freighters Pty. Limited v. Sneddon 102 C.L.R.280. In that case apart from a challenge to the whole basis of the validity of the Act (see argument at p.283) reliance was heavily placed upon the matter of the mechanical difficulties referred to above, and a number of arguments in that respect were adduced to the Court by Counsel for the road hauliers in support of the submission that the Act was invalid in its relevant sections or was so invalid in its application to inter-State journeys. Indeed the matter of mechanical difficulties of application of the principle of road maintenance charges was specifically adverted to in the judgments of Menzies J. and Windeyer J. who had for the first time come to the problem as Justices of the High Court. And any difficulty connected with its application was not sufficient to prevent all the Justices in that case from upholding the validity of the Act then in question. After examination of the various matters put forward to support invalidity it was held unanimously by the Justices that the difficulties (if any) were not sufficient to render the Act invalid. But it is also of great importance to note that Menzies and Windeyer JJ. expressed no dissent from the principle as it had been enunciated in Hughes and Vale (No.2) and applied in Armstrong's Case. Indeed Windeyer J. in his judgment in Commonwealth Freighters (102 C.L.R. 280) at pp. 302-303 said:

"This case, therefore, squarely raises the question whether the Act is invalid so far as it purports to affect inter-State trade and commerce. I, of course, accept the judgments of the majority in Armstrong's Case (No.2) (1957) 99 C.L.R. 28 and the pronouncements of the majority in Hughes and Vale Pty.Ltd.

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v. State of New South Wales (No.2) (1955)
 93 C.L.R. 127 as settled law. There are in
 those judgments some differences in the
 expression of the fundamental concept; but
 I read the statements as explanatory rather
 than definitive or formalised. The distinction
 taken between a valid road maintenance charge
 consistent with freedom of trade commerce and
 intercourse, and a tax upon road users which is
 an impediment to freedom, can, no doubt, be
 criticised as amorphous; but I accept it as real,
 although I appreciate that there are logical
 difficulties and evidentiary difficulties in
 applying it. I would add that I accept the
 majority judgments the more readily because
 the distinction they make - however it should
 be precisely formulated - does seem to me to
 accord with some historic doctrines of English
 law and with old practices which can, I think,
 be regarded as in harmony with the freedom which
 s.92 assures." 10 20

39. Again following upon the decision of the Privy
 Council in Armstrong's Case The Roads (Contribution
 to Maintenance) Act of 1957 (Queensland) was assented
 to on the 17th day of December 1957 and came into
 force on the 1st day of February 1958. Since the
 decision in Commonwealth Freighters v. Sneddon
 (102 C.L.R. 280) the other Acts mentioned in para-
 graph above have been enacted, and various
 decisions have been given in relation to the matter
 of the validity of various Acts in force in the
 States of Australia. Thus in the case of Boardman
v. Duddington 104 C.L.R. 456, in which judgment
 was delivered in 1959, the Queensland Act was made
 the subject of a challenge, as in the case of
Allwrights Transport Ltd. v. Ashley 107 C.L.R. 662
 (judgment delivered in 1962); and in Breen v.
Sneddon 106 C.L.R. 406 (judgment delivered in 1961)
 a further attempt to render exempt motor vehicles
 engaged in inter-State trade from the provisions
 of the N.S.W. Act was unsuccessfully made. In
 each of the three last-mentioned cases no real
 challenge to principle was made and the cases were
 argued upon the basis of invalidity of the Acts or
 their application by reason of the mechanical
 difficulties referred to in paragraph 35 above.
 It is to be seen again in these decisions that
 difficulties of factual application of the principle 30 40

held to be applicable by the High Court were apparent and sought to be relied upon. However in each of the cases since Armstrong's Case the High Court of Australia has been unanimous in its decisions that the various Acts have imposed valid charges upon the owners of qualifying vehicles notwithstanding the use of the vehicles in inter-State trade and commerce.

10 40. One of the questions raised when dealing with the mechanical application of the principle enunciated and explained in the cases from and including Hughes and Vale (No.2) (93 C.L.R. 127) relates to the matter of evidence or factual elucidation of compliance with the indicia by which the Act is to be tested in the manner indicated in the various judgments. In this regard Dixon C.J. in Commonwealth Freighters Pty. Ltd. v. Sneddon (102 C.L.R. 280 at p.295) adopted what is submitted to be the correct approach to the problem:

20 "I think that it is right to begin with the presumption that to levy a compulsory contribution to the revenue of the State is a tax and if it is laid upon the transportation of goods from one State to another it is inconsistent with s.92 of the Constitution. When, however, a scrutiny of the measure shows that it professes to be a contribution to the maintenance of the highway, that the application of the money raised

30 is in substance and in purpose confined to the maintenance of highways, that it is a mileage rate calculated by reference to the use made of the highway, that it is computed by reference to weight and load capacity, that it is confined to heavier traffic, that it is uniform as between intra- and inter-State traffic, that in the absence of evidence or information to the contrary it did not carry on its face any impression of harshness,

40 excessiveness or arbitrariness or disproportionateness to what had already been upheld in the case of Victoria, then all these raise a counter-presumption that the charge possesses a foundation bringing it within the doctrine explained and adopted in Armstrong's Case (No. 2) (1957) 99 C.L.R. 28 by a majority of the Judges and foreshadowed in the judgments of the

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majority in Hughes and Vale Pty. Ltd. v. State of New South Wales (No. 2) (1955) 93 C.L.R. 127. No material before the Court weakens or overturns that counter-presumption and we should act on it and uphold the validity of the application to inter-State journeys of the Road Maintenance (Contribution) Act 1958 (N.S.W.) in its material provisions."

Menzies J. also dealt with the problem in the following way (at pp.301, 302): 10

"....I would say that the evidence in Armstrong's Case (No.2) (1957) 99 C.L.R. 28 did no more than reinforce the conclusion that was derived from an examination of the Act itself, namely, that it was a real attempt to fix compensation for wear and tear. However this may be, I am not ready to accept the notion that when this Court has decided that a statute is valid in a case where the decision was based upon or was influenced by a finding of fact anyone can contest the validity of the statute again on the footing that unless the same facts are proved in the subsequent proceedings the earlier decision is not to be treated as having binding authority in the later case. Any decision that a statute is constitutional or unconstitutional, however it may have been reached, is necessarily one of law and is, in the absence of special circumstances, of binding authority. 20 30 40

.....

"In this case evidence that might afford the basis for a conclusion that the Act is not what it appears to be because the charge is excessive or for some other reason was not tendered, and in these circumstances it is not necessary and I do not think it is desirable to consider what evidence might properly have been taken into consideration." 40

The matter was again dealt with by the Justices of the High Court in Breen v. Sneddon (106 C.L.R. 406), particularly in the judgment of the Chief Justice at pp.410-414.

41. No attempt was, in the present case, made to introduce any factual material by the use of which the validity of the N.S.W. Act might have been challenged and so the question of any challenge based upon the proper place of any such material in a constitutional decision is not in this appeal a matter that can be adequately dealt with by the Board or ruled upon in the abstract. Further it is submitted that such a question is not one which warrants any judicial assistance from the Board and is proper to be left to the High Court of Australia to work out in the terms of what Dixon C.J. described as one of the "latent questions to which any practical measure must give rise" (Armstrong's Case 99 C.L.R. at p.47)

42. In the present case, from the decision of the High Court in which this appeal is brought, no new problems of mechanical application arise and nothing that would indicate that the decision is wrong by reason of the application of the principle to the facts existing at the time the action was commenced. Moreover it has been twice held by the High Court that the specific Act (and relevant sections) forming the subject matter of this appeal is and are valid and there is nothing that would tend to indicate that since 1961 the N.S.W. Act has lost any of the indicia of validity which it then was held to possess, although as shown by Dixon C.J. in Breen v. Sneddon (106 C.L.R. 406 at p.413) the High Court is fully alive to its duty of preventing impairment of the freedom of inter-State trade by an imposition which is a tax upon that trade although imposed under the guise of a charge conforming with those indicia.

CONCLUSION..

43. Therefore it is submitted that by reason of the history and nature of the decisions by the High Court of Australia in the cases above referred to the principle involved in the matter of a road maintenance charge has for a number of years been regarded as having been worked out on constitutional lines within the framework of the previous decisions of the High Court and consistently with the earlier decisions of the Privy Council

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44. The Respondents therefore respectfully submit that the appeal herein should be dismissed with costs, for the following, among other

REASONS

- (i) BECAUSE the principle that a charge may be made upon users of roads for maintenance caused by wear and tear resulting from the use without such charge operating to restrict the freedom of trade commerce and intercourse among the States is correct; 10
- (ii) BECAUSE the tests or indicia adopted by the High Court for measuring the validity of any such charge are correct;
- (iii) BECAUSE a charge so made and measuring up to the said tests or indicia is properly to be regarded as placing no real burden upon trade commerce and intercourse, and hence no burden upon inter-State trade commerce and intercourse, because it is indirect or remote; 20
- (iv) BECAUSE a charge so made and measuring up to the said tests or indicia ought properly to be regarded as being regulatory only of trade commerce and intercourse among the States;
- (v) BECAUSE the Privy Council has already decided that the principle and the tests or indicia is and are plainly right or not admitting of sufficient doubt as to justify leave to appeal against their application in a particular case when it and they first formed the ratio decidendi of a case in the High Court; 30
- (vi) BECAUSE since 1959 the High Court has unan-
imously held the principle and tests or indicia to be correct and has unan-
imously applied the same to determine validity of Acts having a similar legal effect enacted by various State legislatures for the purpose of 40

67.

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obtaining some compensation for road
damage.

H.A. SNELLING

MICHAEL M. HELSHAM

MERVYN HEALD

Counsel for the Respondents.

No. 34 of 1966

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF 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 --

THE COMMONWEALTH OF AUSTRALIA
& OTHERS Interveners

CASE FOR THE RESPONDENTS

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