

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE FULL COURT OF THE HIGH COURT OF AUSTRALIA

B E T W E E N :

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

30

CASE FOR THE INTERVENER,
THE COMMONWEALTH OF AUSTRALIA

1. The intervener, the Commonwealth of Australia, did not intervene in the hearing before the High Court of Australia but by Order of Her Majesty in Council dated 21st December 1966, leave was granted to the Commonwealth of Australia to intervene on the hearing of the Appeal.

THE QUESTIONS IN ISSUE.

2. The Appellant, by the submissions made in its petition seeking special leave to present this Appeal, seeks to raise two broad questions:

- (a) The effect of the provisions of section 92 of the Constitution of the Commonwealth of Australia upon the operation of legislative provisions of the character of those contained in the New South Wales Road Maintenance (Contribution) Act 1958-1965. 10
- (b) The proper approach to be adopted by the Courts in determining the constitutional validity of enactments in cases in which validity depends upon the existence or otherwise of particular facts.

THE COMMONWEALTH'S INTEREST IN THE QUESTIONS IN ISSUE.First Question.

3. (i) The Commonwealth of Australia is not at this date directly concerned, in the narrowest sense, as to the validity of the Act since the Commonwealth Parliament has not enacted legislation similar to the Road Maintenance (Contribution) Act 1958-1965. 20

(ii) But section 92 applies to legislation enacted by the Commonwealth Parliament as well as to legislation enacted by the Parliaments of the States. Accordingly, the interpretation to be placed upon section 92 will affect the legislative powers of the Commonwealth Parliament as well as the legislative powers of the Parliaments of the States. 30

(iii) Although the Commonwealth Parliament has not enacted legislation similar to the Road Maintenance (Contribution) Act, it is within the legislative powers of the Commonwealth Parliament to pass laws with respect to interstate trade and commerce. (Constitution, section 51(1)). In fact, Commonwealth legislation has been passed dealing with transport between States. (See the Navigation Act 1912-1966, sections 7 and 288). Legislation has also been passed by the Commonwealth Parliament 40

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

requiring payment of charges for the use of aerodromes, air routes and airway facilities maintained and operated by the Commonwealth (Air Navigation Charges Act 1952-1966, section 5).

10 (iv) Moreover, in enacting laws for the defence of the Commonwealth in wartime (Constitution, section 51(vi)) the Commonwealth Parliament may be compelled in the interests of national security to exercise a general control of land, sea and air transport. It has been held by the High Court that section 92 applies to wartime "defence legislation" of the Commonwealth.

(v) The Commonwealth is therefore concerned to maintain an interpretation of section 92 which will

20 (a) support the validity of legislation authorising the making of charges for aerodromes, airway facilities and other facilities and services used by persons engaged in interstate trade commerce and intercourse; and

(b) enable the Commonwealth, in the exercise of its legislative powers, to levy road maintenance charges similar to those provided for by the New South Wales Act, should it see fit so to do.

Second Question.

30 4. A decision on that question in favour of the Appellant for the reasons advanced by the Appellant is one which would have equal application to laws passed by the Parliament of the Commonwealth as well as to laws passed by the Parliaments of the States. The Appellant, in its submissions on this question in the petition for special leave to appeal, did not seek to draw any distinction between laws of the Commonwealth and laws of the States.

40 5. As the Parliament of the Commonwealth possesses legislative powers with respect to specific subject matters, a decision on the second broad question in favour of the Appellant for the reasons advanced by the Appellant will have an

application to the validity of Commonwealth legislation passed under powers limited by definition, whether according to subject matter, to purpose or otherwise where the validity of the exercise of the power depends upon the ascertainment of facts. Indeed, by reason of the fact that the Commonwealth's legislative powers are with respect to specific subject matters, a decision in favour of the Appellant on the second broad question for the reasons advanced by the Appellant may have a wider application to the validity of Commonwealth legislation than it will have to the validity of State legislation. 10

THE COMMONWEALTH'S SUBMISSIONS ON THE
INTERPRETATION AND APPLICATION OF SECTION 92.

6. The Commonwealth adopts and repeats the submissions contained in the Respondents' Case as to the proper interpretation of section 92, the compatibility with section 92 of charges of the kind imposed by the Road Maintenance (Contribution) Act and the criteria by reference to which the validity of charges of that kind are to be determined. 20

7. The Commonwealth contends that it is an erroneous conception of section 92 to regard it as invalidating all charges levied on persons engaged in interstate trade and commerce. It has not been suggested that the making of a charge by a Government for the use of facilities, services or property provided by a Government in the course of interstate trade and commerce by persons engaged in that trade and commerce is inconsistent with section 92. The judgments in Hughes & Vale Pty. Ltd. v. State of N.S.W. (No. 2) 93 C.L.R. 127 and Armstrong v. State of Victoria (No. 2) 99 C.L.R. 28 correctly proceed upon the basis that section 92 has no application to the making of charges for the use of facilities, services or property provided for the benefit inter alia of persons engaged in interstate trade and commerce and used by them in the course of that interstate trade and commerce. The dissenting Justices, Mr. Justice Kitto and Mr. Justice Taylor, do not question the correctness of this proposition. 30 40

8. If it be accepted that there is a category of charges to which section 92 has no application, the

10 problem arises of defining the boundaries of that category. There is no a priori reason for confining the category to charges made for the use of facilities, services or property in the strict sense. The category, so the Commonwealth submits, includes charges made and applied for the purpose of maintaining or continuing benefits or advantages provided, as well as charges made for the use of services, facilities or property. The common characteristic of all charges included in the category is that the charges are made in connection with or are applied for a purpose which facilitates, rather than impedes, interstate trade and commerce. For section 92 is directed at burdens imposed upon interstate trade and commerce, not with pecuniary charges made for the purpose of facilitating that trade and commerce.

20 9. The Commonwealth respectfully submits that the passage from the joint judgment of the Chief Justice, Mr. Justice McTiernan and Mr. Justice Webb in Hughes & Vale Pty. Ltd. v. The State of New South Wales (No. 2) 93 C.L.R. at 177 quoted in paragraph 24 of the Respondents' Case correctly states the law. And the Commonwealth contends that the charge provided for by the Road Maintenance (Contribution) Act, being a charge made towards compensation for wear and tear caused to public streets in New South Wales and applied to the maintenance and repair of the roads, and thereby
30 facilitating trade and commerce, including interstate trade and commerce, is a charge of a kind that is not obnoxious to section 92.

THE COMMONWEALTH'S SUBMISSIONS AS TO ONUS AND PRESUMPTION APPLYING TO FACTS UPON WHICH CONSTITUTIONAL VALIDITY OF A STATUTE DEPENDS.

40 10. The Commonwealth joins issue with the Appellant's submission that there will arise for determination on the hearing of this appeal important questions concerning the validity of a statute which depends for its validity on the existence of particular facts, including questions as to the presumption to be applied in the absence of evidence as to the existence of those facts, and the effect (if any) of a determination of the constitutional validity of a statute upon the question of the constitutional validity of the same or some other statute arising in another case.

11. The Commonwealth makes the following submissions in relation to those questions:-

- (a) No question could or did arise before the High Court of Australia as to the existence or otherwise of particular facts in connection with the Road Maintenance (Contribution) Act 1958-1965 for the reason that the Appellant did not in its statement of claim allege the existence of any facts the effect of which would be to invalidate the Act. The only case for invalidity pleaded by the Appellant was that the Act was, as a matter of law, invalid. 10
- (b) As no issue arose on the pleadings as to the existence or otherwise of particular facts affecting the validity of the Act no question could or did arise as to the application of any presumption in relation to those facts. 20
- (c) The validity of the Road Maintenance (Contribution) Act 1958-1965 is not dependent upon the existence of particular facts. The validity of the Act is to be determined by reference to the legal operation of the Act as ascertained by a consideration of its terms in the light of the fixed objective background facts of the situation in which the Act operates, these facts being the only facts relevant to the validity of the Act. 30
- (d) The validity of the Act does not depend on the reasonableness of the charge in relation to the cost of repairing actual damage done to the roads. The validity of the Act is, however, to be determined by reference to the quantum of the charge in so far as the quantum of the charge throws light on the nature and character of the Act. 40
- (e) A decision of the High Court of Australia upholding the validity of a statute in the light of the fixed objective background facts in which that statute operates is a decision binding upon the High Court in

relation to the validity of another statute the nature and character of which is indistinguishable from the nature and character of the statute firstly referred to.

10 12. The proper approach on the part of the Court to the ascertainment of facts upon which the constitutional validity of a statute depends was correctly stated by the Chief Justice, Sir Owen Dixon, in his judgment in Breen v. Sneddon 106 C.L.R. at 411-412 where His Honour said

20 "Certain distinctions must be clearly maintained in dealing with the contention of the appellants. One of them of importance is really very obvious. It is the distinction between, on the one hand, ordinary questions of fact which arise between the parties because one asserts and the other denies that events have occurred bringing one of them within some criterion of liability or excuse set up by the law and, on the other hand, matters of fact upon which under our peculiar federal system the constitutional validity of some general law may depend. Matters of the latter description cannot and do not form issues between parties to be tried like the former questions. They simply involve information which the Court should have in order to judge properly of the validity of this or that statute or of this or that application by the Executive Government of State or Commonwealth of some power or authority it asserts. In Commonwealth

30 Freighters Pty. Ltd. v. Sneddon 102 C.L.R. 280 the following passage in what I said deals with the question: 'Highly inconvenient as it may be, it is true of some legislative powers limited by definition, whether according to subject matter, to purpose or otherwise, that the validity of the exercise of the power must sometimes depend on facts, facts which somehow must be ascertained by the court responsible for deciding the validity of the law. In Griffin v. Constantine 91 C.L.R. 136, in order to decide the validity of the law there impugned some knowledge was necessary of the nature and history of methylated spirits but it was considered proper to look at books to obtain it. In Sloan v. Pollard 75 C.L.R. 445, cf., at pp. 468, 469 facts were shown about

40

arrangements between this country and the United Kingdom which gave constitutional validity to an order. In Jenkins v. The Commonwealth 74 C.L.R. 400 the validity of the statutory instruments was upheld on evidence as to the place of the mineral mica in electronic devices used in naval and military defence. There is no need to multiply examples. All that is necessary is to make the point that if a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court as best it can, when the court is called upon to pronounce upon validity'".

10

13. The function of the High Court is to determine the validity of the legislation that is challenged and that determination is made by reference to the character of the impugned legislation. If it becomes necessary to ascertain facts in order to characterise that legislation and determine the question of validity, then it follows from the fact that the determination of the High Court on the question of validity is not subject to review in another case, that the ascertainment of facts upon which the determination of validity was based is not itself open to review in the absence of evidence demonstrating that the material facts have altered. Mr. Justice Menzies said in Breen v. Sneddon 106 C.L.R. at 421-422

20

30

"In Australian Communist Party v. The Commonwealth 83 C.L.R. 1, Kitto J. said: 'Although it is only in litigation between parties that the Court may decide whether Commonwealth legislation is valid, it is upon the validity of the legislation in relation to all persons that the Court has to pronounce. The question is whether the legislation forms part of the law of the Commonwealth. Since it is impossible to affirm the validity of a measure upon a particular basis of fact unless that basis of fact can be seen to be common to all persons, it cannot be material, for the purpose of considering validity, to decide an issue of fact which is of such nature as to admit of different findings in different cases'. These observations seem to me to apply with

40

compulsive force in the case of proceedings before a magistrate bound by a decision of this Court to hold that the Act which it is sought to impugn is valid. The magistrate could not upon any view of the facts hold the Act invalid or inapplicable to vehicles being used in inter-State trade nor does it seem to me that any so-called findings of fact by a magistrate based upon his view of such evidence as the parties or one of them might adduce relating to the effect of the Act upon inter-State operations could afford any foundation for this Court reviewing its earlier decisions. These decisions determined the character of the legislation in question here rather than its economic effect upon those using commercial vehicles to carry goods inter-State, and although background facts of a general character are necessarily material for reaching such decisions, facts of that character are always for this Court's ultimate determination and once so decided are not open for review in other courts."

14. If, contrary to the submissions already made by the Commonwealth, a question concerning onus and presumption falls to be considered, a distinction should be drawn between cases in which the ascertainment of facts is necessary to a determination of the question whether a statute constitutes a valid exercise of a legislative power with respect to a particular subject matter, that is whether there is a sufficient connection between the statute and the subject matter of the power, and cases, including this Appeal, in which the ascertainment of facts may be relevant to a determination of the question whether a statute infringes the provisions of section 92. Whatever may be the position in cases of the first class, if the ground of invalidity urged in cases of the second class rests upon the existence of particular facts, the onus of establishing those facts lies upon the person who asserts their existence.

A. F. MASON

IVOR J. GREENWOOD

No. 34 of 1966

IN THE PRIVY COUNCIL

O N A P P E A L
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 -

T.N.T. (SYDNEY) PTY. LIMITED
and THE COMMONWEALTH OF
AUSTRALIA & OTHERS Interveners

CASE FOR THE INTERVENER,
THE COMMONWEALTH OF AUSTRALIA

COWARD, CHANCE & CO.,
St. Swithin's House,
Walbrook,
London E.C.4.

Agents for:

THE CROWN SOLICITOR of the
Commonwealth of Australia.