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1967/10

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IN THE PRIVY COUNCIL

No. 34 of 1966

ON APPEAL  
FROM THE HIGH COURT OF AUSTRALIA

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
15 MAR 1966  
25 RUSSELL SQUARE  
LONDON, W.C.1.

B E T W E E N:

FREIGHTLINES & CONSTRUCTION HOLDINGS  
LIMITED Appellant

- and -

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

10

- and -

T.N.T. (SYDNEY) PTY. LIMITED (AND OTHERS)  
Interveners

C A S E FOR T.N.T. (SYDNEY) PTY.  
LIMITED AS INTERVENER

PART I

INTRODUCTORY

20 1. This Appeal is brought by Special Leave  
granted by Her Majesty by Order in Council dated  
28th July 1966 from a judgment and order of the  
Full Court of the High Court of Australia (Taylor,  
Windeyer and Owen JJ.) dated the 2nd May 1966  
whereby the High Court of Australia upheld with  
costs a demurrer by the Respondents to the whole  
of the Statement of Claim of the Appellant.

30 2. By its said Statement of Claim the Appellant  
sought a Declaration that the Road Maintenance  
(Contribution) Act 1958-1965 of the State of  
New South Wales generally, or in the alternative,  
certain specified sections and schedules thereof

was or were invalid by reason of the provisions of Section 92 of the Constitution of the Commonwealth of Australia. Alternatively, the Appellant sought a Declaration that the said Act could not validly apply in respect of motor vehicles owned by the Appellant and used exclusively in or for the purposes of inter-State trade, commerce or intercourse by reason of the said Section of the Constitution.

3. In its Statement of Claim, the Appellant alleged, so far as material, that it carried on business as an inter-State carrier of goods by road for reward, was the owner of "commercial goods vehicles" having a "load capacity" of more than four tons within the meaning of those expressions as defined by the Road Maintenance (Contribution) Act, and used the said vehicles for the purposes and in the course of the Appellant's business on journeys along public roads between various States of the Commonwealth and that the Respondent, the Commissioner for Motor Transport claimed that the Appellant was bound, pursuant to the said Act, to pay the charges imposed by Section 5 thereof, keep the records required by Section 6 thereof and deliver the records and pay the charges in accordance with Section 7 thereof. 10 20

4. The Respondents admitted these allegations of fact by demurring to the Appellant's Statement of Claim. 30

5. The High Court of Australia upheld the demurrer and gave judgment for the Respondents, holding that the Road Maintenance (Contribution) Act, in its application to motor vehicles used exclusively in the course of and for the purposes of inter-State trade and commerce, did not infringe Section 92 of the Constitution.

6. By Order in Council dated 21st December 1966 Her Majesty granted leave to this intervener to intervene in the Appeal to support the Appellant upon a petition showing that this intervener carries on an inter-State road transport business similar to that carried on by the Appellant, was Plaintiff in a cause in the High Court of 40

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10 Australia in which it was seeking similar relief to that sought by the Appellant in its cause, the subject of this Appeal, and that in bringing its said cause and in seeking leave to intervene in this Appeal, this intervener, as well as acting on behalf of itself, was acting as the representative of the interests of all other members of the Australian Road Transport Federation at the request and with the consent  
 10 of that body, the constituent members of which were the Associations in the respective Australian States which represented the great majority of all persons and companies in Australia engaged in the transport of goods by road on inter-State journeys.

20 7. This Appeal, raising as it does the validity of the Road Maintenance (Contribution) Act of the State of New South Wales having regard to the provisions of Section 92 of the Commonwealth of  
 20 Australia Constitution, poses, as the central question, whether a law which imposes a compulsory charge or levy or tax upon an individual as a condition of or by reason of his using the roads of a State can apply to him when he is making an inter-State journey by a vehicle being used for the carriage of goods for reward without infringing the freedom granted by Section 92.

30 8. So far as material, Section 92 provides that trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

9. The key provision of the Road Maintenance (Contribution) Act is Section 5 which does three things -

- (1) It levies a tax on the owner of every commercial goods vehicle of a load capacity of over four tons.
- 40 (2) It makes the tax payable if any public street is used by the vehicle.
- (3) It directly renders the owner liable to civil proceedings for recovery of the tax and, in

addition, when read with Sections 10 (1) (e) and 12 (1), renders the owner liable to criminal prosecution and penalties for non-payment of the tax.

It will be submitted that such a provision could have no application to the owner of a vehicle using public streets for the transportation of goods inter-State for reward without a contravention of Section 92 of the Constitution.

## PART II

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### GENERAL SUBMISSIONS

10. Legislative power to levy taxes upon an individual is restricted in the case of individuals engaging in inter-State trade, commerce and intercourse by the provisions of Section 92 which command absolute freedom for such activities. That freedom is necessarily invaded by a law which compels an individual to pay a tax as a condition of his engaging in or because he engages in an activity which is, itself, inter-State trade, commerce or intercourse. 20

11. To use a public road for the purpose of carrying goods inter-State by motor vehicles for reward is an activity of the very essence of inter-State trade, commerce and intercourse and a law which makes that activity the legal criterion for rendering the individual who engages in it liable to pay a compulsory levy to public funds cannot avoid infringing Section 92. 30

12. Such a law does not reconcile with Section 92 by levying its tax upon inter-State and intra-State road users without discrimination or by selecting a limited class of road user for a tax for special purposes, such as road maintenance, because the very activity which it selects as the legal criterion of liability is, so far as inter-State journeys are concerned, an activity declared free by Section 92, and, therefore, one to which the law cannot validly 40

apply.

13. Tested by the foregoing propositions, the Road Maintenance (Contribution) Act must be held to be invalid to the extent to which it purports to apply to persons engaged on inter-State journeys because the legal operation of sub-section (2) of Section 5 of the Act is to make the use of a public road the criterion of the liability to tax and the legal operation of the  
 10 quantifying formula in the First Schedule is to make the liability continue throughout the journey and to multiply the quantum thereof with each mile travelled.

14. Ignoring for the present, for the purposes of these general submissions, the differences in the grounds put forward by those Justices of the High Court who propounded the proposition, the general proposition upon which it has been held  
 20 (Contribution) Act does not infringe the freedom guaranteed by Section 92 is that the Act may be characterised as a law which attempts to fix a reasonable recompense or compensation for the use of public roads and for a contribution to wear and tear which the vehicles in respect of which the tax is levied may be expected to make or as a law making an exaction of a contribution towards expenditure necessitated by the activities of those who use public roads.

30 15. It is submitted that the Road Maintenance (Contribution) Act, upon examination, does not bear such a character and that, even if it did, the provisions of Section 92 would remain incompatible with such a law.

16. Section 92, by its very terms presupposes the existence of means of internal carriage of things and persons for the purposes of inter-State trade, commerce and intercourse and these means must be taken to include public roads  
 40 provided and maintained by Governmental action out of public funds as one of the ordinary functions of Government. Since the apparent object of Section 92 was the encouragement of national as distinct from internal State trade,

commerce and intercourse by conferring upon the former freedom in absolute terms, there is no warrant for taking the Governmental provision and maintenance of public roads as a basis for limiting the freedom guaranteed by Section 92 by permitting the use of such roads to attract liability for compulsory exactions for their maintenance from individuals using them in the activities to which the Section has granted freedom.

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### PART III

#### SECTION 92 - ESTABLISHED PROPOSITIONS

17. Some propositions of law have become well established by various decisions of the High Court of Australia and of the Privy Council and were restated, approved and applied by the Privy Council in Hughes & Vale Pty. Limited v. The State of New South Wales (No. 1) (1955) A.C. 241, 93 C.L.R. 1. It is submitted that the following of these established propositions are relevant in this Appeal:

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- (a) The freedom which is guaranteed by Section 92 is guaranteed to individuals.
- (b) The freedom includes freedom from legislative provisions which burden or restrict the individual's inter-State trade, commerce or intercourse.
- (c) The freedom is not confined to burdens or restrictions applied at State borders but extends to burdens or restrictions applied at any stage of inter-State trade, commerce or intercourse.
- (d) Section 92 is contravened only when a legislative Act operates to restrict or burden trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote.

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- (e) The object or purpose of an Act challenged as contrary to Section 92 is to be ascertained from what is enacted and consists in the necessary legal effect of the law itself and not in its ulterior effect socially or economically.
- 10 (f) Because a law applies alike to inter-State commerce and to the domestic commerce of a State it does not cease to contravene Section 92 if it prohibits, restricts or burdens inter-State commerce.
- 20 (g) The carriage of merchandise from one State to another is not a thing incidental to inter-State commerce but is "the thing itself, inseparable from it as vital motion is from vital existence." (It has also been established that "regulation" of trade, commerce and intercourse among the States is compatible with its absolute freedom but it is submitted that it is not arguable that the levying of a charge of the kind imposed by the Act in question in this Appeal could constitute "regulation" in the sense intended by the use of that word: Hughes & Vale Pty. Limited v. The State of New South Wales (No. 2) 93 C.L.R. 127 at pp. 163, 186-188, 204-206, 218-219, 240-241)

30 18. This intervener submits that all of the foregoing established propositions apply to the Road Maintenance (Contribution) Act and demonstrate its invalidity. The present case really poses the problem whether, notwithstanding the apparent invalidity of the Act, there is any sound basis for sustaining it. Dixon C.J. (with whom McTiernan and Fullager JJ. agreed) thus posed the problem in Commonwealth Freighters Pty. Limited v. Sneddon 102 C.L.R. 280 at p.295, when he said:

40 "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 Section 92 of the

Constitution".

Notwithstanding the presumption of invalidity thus stated, the High Court has, upheld the validity of the Act by the introduction and development in a series of cases of propositions which, with great respect, this intervener desires to submit cannot afford a sound basis for the application of Section 92 to inter-State road transport. The cases and the abbreviations which will be used in referring to them are as follows: Hughes & Vale Pty. Limited v, The State of New South Wales (No. 2) 93 C.L.R. 127 (Hughes & Vale (No. 2) ), Armstrong v. The State of Victoria (No. 2) 99 C.L.R. 28 (Armstrong), Commonwealth Freighters Pty. Limited v. Sneddon 102 C.L.R. 280 (Commonwealth Freighters), Boardman v. Duddington 104 C.L.R. 456 (Boardman), Breen v. Sneddon 106 C.L.R. 406 (Breen). 10

#### PART IV

#### BASIS OF THE HIGH COURT DECISIONS 20

#### Section A

#### Grounds for Justification of a Charge for the Use of Roads

DIXON C.J., McTIERNAN and WEBB JJ.

19. Their Honours in Hughes & Vale (No. 2) began by rejecting as any basis for supporting a charge for the use of roads that they were the property of the State. They also rejected the notion that roads could be regarded as a utility or a facility or a service provided by the State for reward to those who chose to use them. They gave as reasons for rejecting these ideas that, firstly, if the State could deal with roads on the basis of property there would be no reason why it should not exclude whom it thought fit and, secondly, that the roads of a State form one of the established everyday means of carrying on trade, commerce and intercourse and one of the basal assumptions of Section 92 was 30

that the ordinary means of carrying on trade, commerce and intercourse among the States would continue and this assumption must certainly be taken to cover the existence of highways even if the responsibility of providing them might rest upon the States. Their Honours said: "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  
 10 distinction whence in Australia they come. For it was part of the purpose of Section 92 to make that distinction impossible in such a matter".  
Hughes & Vale (No. 2) 171.

20. Notwithstanding their Honours rejection of the foregoing bases for making a charge for the use of roads, it is submitted that their Honours did go on to adopt as the ground for permitting a charge to be made that roads represented a  
 20 "physical facility" or a specific "physical service" (both expressions are used) provided by the State for road traffic and that they were so provided although the State was under no legal obligation to provide them: this concept was then coupled with the fact that inter-State traders used the roads for the purposes of their business and the conclusion was reached that it would not be incompatible with the freedom guaranteed by Section 92 for the State to demand a recompense for the actual use  
 30 made of these "physical facilities" or a remuneration for the provisions of the "physical service" so afforded by the State. Hughes & Vale (No. 2) 177-179.

21. It is submitted that there is a fundamental inconsistency between, on the one hand, rejecting the notions that the State can deal with the use of public highways on the basis of property or by regarding them as a utility or a facility or a service which the State provides for reward to  
 40 those who choose to use them and, on the other hand, adopting the notion that the provision of roads by a State is the provision of a physical "facility" or "service" justifying the imposition of a charge for their use. it is submitted that the rejection of the former must lead to the rejection of the latter as a basis

for reconciling the charge contemplated with the provisions of Section 92.

22. If State provision and maintenance of roads is the provision of a service or a facility so must be all other services and facilities provided and maintained by the State the use of which benefits the trader and, if a charge can be validly laid upon a trader because he uses the roads, there would seem no ground for distinguishing a charge laid upon him for the use of all services and facilities provided and maintained by the State as a condition of his right to use them. 10

23. It is submitted that Government provision and maintenance of roads which are laid open to public use are to be considered as part of the general community work of Government, no different from the provision of schools and hospitals, parks and recreation areas, police stations and law courts from the existence and maintenance of which the whole community benefits directly or indirectly and that a charge made for the use of them to members of the public who avail themselves of these general works of Government cannot validly be characterised as recompense or compensation for the rendering of a particular service to a particular individual. The intervener adopts with respect, the criticism which is made by Kitto J.: Hughes & Vale (No. 2) pp. 222-223. 20 30

24. If the existence of roads provided and maintained by a State entitles the State, consistently with Section 92, to impose a tax upon the inter-State trader as a condition of his being entitled to use them because the State has provided and maintains them, there would seem no basis for denying to the State the right for the same reason, to exclude him altogether from using them. This would seem to follow because, by permitting a charge to be levied as a condition of use where the road is provided and maintained by a State, the meaning which is given to Section 92 is that it does not prohibit burdens and restrictions being placed directly upon inter-State trading activities if they 40

involve the use of anything provided or maintained by a State. The intervener adopts, with respect, the statement of Taylor J.: "The plain fact is that the public roads of the State are not facilities the use of which may be withheld at will - or except upon payment of a charge to be assessed at the discretion of a licencing authority - without impairing the freedom of inter-State trade of the character under  
 10 consideration." Hughes & Vale (No. 2) p. 237.

25. Included in the concept put forward by their Honours is that the roads have been provided by the State although the State is under no legal obligation to provide them. Hughes & Vale (No. 2) p. 177. It is submitted that the observation that the State is under no legal obligation has no force in the context in which it is used and adds nothing to the concept which is being  
 20 postulated. It might equally be said that a State is under no legal obligation to provide an army or a police force. The fact is that for political social and economic reasons related to the general welfare of the community a State is expected to and does provide and maintain these and other services and works of Government, including roads, and, it is submitted, that, Section 92 finding its place in an instrument of Government, must be taken to assume that these  
 30 things will be done by Governments without legal obligation and to declare that nevertheless inter-State trade, commerce and intercourse shall be absolutely free in their use of them.

26. Their Honours appear to have been influenced towards adopting the concept expounded by them, by the approach to State taxes of the Supreme Court of the United States of America. Reference is made to the American phrase that "inter-State commerce must pay its way". It was said that in  
 40 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 unfree, they merely pay the price of freedom." The citation is given: "...to require that inter-State trade shall be protected from the ordinary

incidence of competitive business is to give - not an immunity from interference, but a specially privileged position". Hughes & Vale (No. 2) pp.172-193.

27. Upon these ideas mentioned by their Honours this Intervener would make three observations:

- (1) Nothing is to be gained in the present context from the experience in the United States under the doctrines expounded in its courts for its Constitution. Under those doctrines, inter-State commerce is not free. Constitutionally it can be totally prohibited so long as it is done by Federal and not by State law. The courts therefore are not concerned with the question whether inter-State commerce is free from burdensome or restrictive legislation; but only with the question whether State laws are invading a field of exclusive Federal power. As their Honours said: "It will be seen at once that Section 92 replaces all such doctrine with its unqualified declaration that trade, commerce and intercourse must be free".

Hughes & Vale (No. 2) 175.

- (2) There is no place under Section 92 for a concept that the inter-State trader must pay the price of freedom. For activities which are themselves inter-State trade, commerce and intercourse freedom is given without charge by Section 92 itself and to make him pay for it is a denial of the very terms of Section 92.
- (3) If the operation of Section 92 is to afford to the inter-State trader an immunity or privilege not enjoyed by those engaged in the domestic trade of a State, it is because Section 92 itself chose to adopt the expedient of granting an immunity or privilege to such traders in order to achieve its high object of promoting and encouraging a national trade in a

federation of States: see per Fullager J.,  
Hughes & Vale Pty. Limited v. The State  
of New South Wales (No. 1) (1953) 87 C.L.R.  
49 at p. 91, per Isaacs J., Foggitt Jones  
& Co. Limited v. State of New South Wales  
21 C.L.R. 357 at 365.

28. Further, it is submitted, that underlying  
the reasoning of their Honours is, perhaps, the  
apprehension that unless a charge of the kind  
10 postulated was permitted, avenues for raising  
revenue from commercial road users for the  
maintenance of roads in Australia would be  
unduly restricted. Apart from the inconsistency  
of such an approach with Section 92, it is  
submitted that there is no sound basis for such  
a fear. There are other avenues for raising  
such revenue from road users as such without  
offending Section 92. For example, customs and  
excise duties on motor vehicle fuel, sales tax  
20 on the purchase price of motor vehicles, their  
equipment and spare parts are common place taxes  
levied upon the road user which in their  
incidence represent a general relationship to the  
nature and the extent of road use. If it be  
said that under the Constitution such taxes are  
levied by the Commonwealth and not by the States,  
the fact remains that in Australia public  
revenues from such sources are amply available  
from road users to be applied for the maintenance  
30 of the roads upon which the national economy  
depends and no valid objection could be made if  
the effect of Section 92 was that the adequate  
maintenance of roads depended upon grants of  
finance by the Commonwealth to the States for  
this purpose since Section 96 of the Constitution  
confers specific power for the Commonwealth to  
grant financial assistance to any State on such  
terms and conditions as the Parliament thinks  
fit. The vice, so far as Section 92 is  
40 concerned, of the tax postulated by their  
Honours is that it is laid as a condition of  
engaging in the very activity the absolute  
freedom of which Section 92 guarantees, whereas  
taxes of the other kind mentioned above do not  
fasten upon such activities as the legal  
criterion of their operation but upon the  
importation and production of goods.

29. After stating the nature of the tax which their Honours thought might lawfully be imposed (a subject dealt with later in this case), their Honours went on to say:-

"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. To concede so much may appear to spell a departure from the principle that no tax or pecuniary burden can be imposed upon inter-State commerce as such. No tax or impost whatever can be laid upon the entry of goods or people into a State from another State or upon the passing of goods or people out of a State into another State. No part of the operation of Section 92 is less open to dispute than this. The purpose of the attempt to tax may be simply to raise revenue to carry on the services of the State and there may be no purpose of reducing the flow of commodities or of people across the border. But that cannot matter. Nor can it matter that the State needs the revenue in order to provide or maintain some or all of the services of Government which those engaged in inter-State trade enjoy in common with all others who find themselves within the State. Indeed it can make no difference if the revenue which a tax falling upon inter-State commerce produces is segregated and is expended in maintaining some part of the service of Government which is of special advantage to the particular trade taxed. For example the cost to a State of enforcing the law against the pillaging of cargo cannot be raised by a tax upon goods discharged from inter-State ships. Another example is a tax upon the transport of goods or passengers by road in order to meet the cost of enforcing the traffic laws. Such a tax would not seem consistent with Section 92 if the journeys are across State boundaries however much benefit inter-State traffic might derive for the enforcement of such laws."

Hughes & Vale (No. 2) 176-177

Notwithstanding this statement, their Honours expressed the view that different considerations

arose when the States demanded payment in respect of the use of a physical thing which the State provided although under no legal obligation to do so. To illustrate the point examples were given of a State owned wharf and wharfage charges made for its use by inter-State ships and Government aerodromes for which charges for their use were levied upon inter-State aircraft.

Hughes & Vale (No. 2) 177.

- 10 30. It is submitted that there is no analogy between the system of public roads thrown open to the use of the public generally and property of a State such as a wharf or an aerodrome. Kitto J. criticised this argument on the ground that the basis of the right to charge was that such works were the property of the State or Commonwealth and on the basis of property they were entitled to deny access either altogether or in default of payment and that the power to make
- 20 the charge depended itself upon the existence in the charging authority of a power of exclusion: Hughes & Vale (No. 2) 221. Section 92 precludes the exercise of such a power with respect to public roads and it is submitted that the principles stated in the passage last quoted from the judgment of their Honours have not been distinguished by their Honours' attempt to classify differently a tax imposed for the use of roads upon the basis that roads constitute physical
- 30 things provided by the State without any legal obligation to do so. It is submitted that the principles stated in that passage should have led their Honours to find no real distinction between taxes of the kind which they condemned as infringing Section 92 and taxes of the kind which they concluded might be permitted without infringing Section 92.

WILLIAMS J.

- 40 31. Williams J. began by postulating that a State was not legally bound to provide or maintain a road but that if it did Section 92 fastened its tentacles upon it and the State lost a large part of its sovereignty over it in that the inter-

State trade obtained all the immunity from State laws with respect to the use of the facility that Section 92 could confer, and in that inter-State movement must be left free although the freedom may be restricted by regulations relating to its conduct. His Honour recognised that at first sight it appeared to be illogical that a State could charge the inter-State carrier for the use of the road: Hughes & Vale (No. 2) 191. Notwithstanding the apparent lack of logic 10 in it, His Honour held that a State could charge an inter-State carrier for the use of a road which it constructed and maintained and His Honour appeared to find as the reasons for the right to make such a charge, (a) that the State provided at its expense facilities in the shape of roads the existence of which were essential to the success of the inter-State trader's business undertakings, (b) that "regulation" of the facility so provided included the making of a 20 charge which provided reasonable compensation for its use and (c) that Section 92 necessarily assumed that the inter-State trader would incur such expenditure as was necessary to achieve his purpose. Hughes & Vale (No. 2) 192.

32. It is submitted that for the reasons advanced in paragraphs 22 to 25 above, the fact that the roads essential for the existence of inter-State road transportation are provided at public expense does not justify the levying of a charge 30 as a condition of their use by inter-State traders. Because they are essential the trader has no choice but to use them if he wishes to trade. The fact that the individual who desires to engage in inter-State road transport has no choice but to use means provided and maintained at Government expense is a reason for postulating that Section 92, which must be taken to have assumed the existence of such means, intended that his use thereof was to be free from burdens, 40 including pecuniary imposts, laid upon him as a condition of that use.

33. Further it is submitted, with respect, that His Honour fell into error in regarding the levying of a charge as a form of "regulation" permitted by Section 92.

FULLAGAR J.

34. His Honour began by expressing the view that, in its relation to inter-State carriage of goods and passengers and to inter-State travel generally, the freedom which Section 92 protected was a freedom to come and go upon which no legislative or executive impediment might lawfully be placed: "Generally speaking, nobody is entitled to say whether I shall come and go between the  
 10 States or not, to impose conditions on my coming and going, or to exact a price for my coming or going. And this freedom is guaranteed to me for the whole of my inter-State journey, whether it be from Albury to Wodonga or from Cairns to Fremantle." Hughes & Vale (No. 2) 208.

35. After observing that freedom under Section 92 was not denied by laws of a limited kind which regulated the individual's conduct as a traveller, or by reasonable charges which could  
 20 be regarded as "merely charges for a service rendered" such as for the use of a Government wharf or aerodrome or parking station, His Honour went on to deny the proposition that public roads in a State stand on the same footing as a wharf or an aerodrome or a parking station and that they constitute a "facility" owned by the State and made available by the State for the use of inter-State traders and others. He said:

30 " It may be true that the soil of all or most of the public highways in every State is vested in the State, but it is not by virtue of its ownership of the soil that the State has control of the public highways within its borders. It has that control by virtue of its constitution. And that control, like all its other powers, is subject to the constitution of the Commonwealth, which includes Section 92. When Section 92 speaks of trade commerce and intercourse  
 40 "whether by means of internal carriage or ocean navigation", it must be taken as contemplating movement among the States by any of the normal means of communication. Although long journeys by road were uncommon in 1900, those normal means would obviously include the Queen's highway. It is of the essence of a public

highway that it is a means of coming and going as of right, and coming and going by any public highway was and is one of the activities protected, as such, by Section 92. The ownership of the soil of the highway matters nothing: the protection is the same whether the soil be vested in the Crown or in a municipal corporation or in a private person. It may be that the State could do what any other owner of the soil, after dedication and acceptance, could not do, and could deprive a particular road of its character as a public highway, but, so long as a public highway remains a public highway, it is quite clear to my mind that a State, in relation to inter-State travel, cannot, consistently with Section 92, make a charge for its use as a highway or impose any other burden or impediment in respect of its use merely because it is a public highway." 10

His Honour also observed that because modern roads serve, directly or indirectly, the needs of the community as a whole, it was the natural function of Governments to provide and maintain them. Hughes & Vale (No. 2) 209-210. 20

36. It is submitted, with respect, that the foregoing propositions of Fullager J. correctly state the law, and, insofar as they deny that for the purposes of considering the validity of a charge upon inter-State road users public highway constitute "facilities" provided by the State and that there is an analogy between charges for their use and charges for services rendered in the form of Government wharves, aerodromes or the like, they deny the validity of the basis of both the joint judgment of Dixon C.J., McTiernan and Webb JJ. and the judgment of Williams J. 30

37. However His Honour went on to justify the making of some charge with respect to the use of public roads in the following passage:

" 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 40

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 upon to make a special contribution to their maintenance over and above their general contribution as taxpayers of State and Commonwealth." Hughes & Vale (No. 2) 201.

38. Although His Honour went on to state that in his view the proposition last quoted was not  
 10 inconsistent with what he had previously said with respect to public highways, it is respectfully submitted that it is inconsistent. It is submitted that there is no sound basis for saying that those who use public highways for the very purposes for which they were provided, namely, to serve the needs of and benefit the community as a whole, should be treated as standing in a "special and direct relation" to such roads and to derive a "special and direct benefit" from  
 20 them. But, even if, in respect of public highways, a distinction between community-benefit and user-benefit was tenable, freedom in absolute terms is hardly conferred by Section 92 upon the inter-State trader if he is to have it only when the benefit which he derives from the use of a public highway is equal to the benefit derived by the community as a whole from the existence of a public highway. It is further submitted, that the terms in which freedom is conferred by  
 30 Section 92 cannot be made to yield where it might be said that the burden or restriction which invades the freedom is "not unreasonable".

KITTO J.

39. In dissenting from the judgments of the majority on the present question, His Honour said:

"Neither in reason nor upon authority have I found it possible to reconcile the freedom which Section 92 decrees for trade commerce and intercourse among the States which the existence  
 40 in a State legislature of a power to make a compulsory levy upon an individual as a condition, or by reason, of his traversing the roads of the State in the course of an inter-State Journey".  
Hughes & Vale (No. 2) 216.

40. The propositions upon which His Honour's dissent was based may be summarised as follows:

- (1) A charge for the use of roads is not of the character of that form of "regulation" of conduct of inter-State traders which is pre-supposed and permitted by Section 92. Hughes & Vale (No. 2) 217-219
- (2) A law which demands a payment of money as a condition of engaging in an activity of trade commerce or intercourse among the States is a clear example of the kind from which Section 92 ordains that every individual shall be free: Hughes & Vale (No. 2) 219. 10
- (3) A charge for a use of a particular piece of property considered as a subject of ownership and a charge for personal services specifically availed of by a trader are reconcilable with Section 92 but a charge for the use of public roads is neither of these kinds. Hughes & Vale (No. 2) 220. 20
- (4) The contention in favour of a charge for the use of roads is not advanced by conceding to a road or to any other physical thing the character of facility because, if it is agreed that Section 92 precludes a State from relying upon the public ownership of roads as a ground for closing them to inter-State travellers, it can hardly be maintained that the Section leaves room for a State, having put the roads into such conditions as it sees fit, to rely upon the quality, or the desirability of maintaining their quality, as a ground for closing them to inter-State travellers. Hughes & Vale (No. 2) 222. 30
- (5) The decision of the Privy Council in Hughes & Vale Pty. Limited v. State of New South Wales (No. 1) (1955) A.C. 241, (1954) 93 C.L.R. 1, denies in relation to the States, not merely that ownership of the soil in roads enables a restriction to be placed upon their use without 40

infringing Section 92, but that there is no consideration which can reconcile with Section 92 an attempt, otherwise than by way of true regulation, to exclude inter-State travellers either absolutely or conditionally from the use of a public road. Hughes & Vale (No. 2) 222.

- 10 (6) Even if the charge were proportioned to the use actually made of the roads by the person who was made liable, it could not be equated to a charge for a particular service such as a traveller may receive from a ferry man because public roads are, in their nature for the use of all and sundry and are part of the general equipment of the community open to general use by the public at large and, to divide the cost thereof amongst those found to be availing themselves of them and then say that each apportioned part is the cost of a particular service, you obliterate the distinction between a general work of Government and a particular service rendered to an individual because a general facility is not a lot of particular facilities and a compulsory charge towards the cost of providing it is indistinguishable from a tax. Hughes & Vale (No. 2) 223.
- 20
- 30 (7) Such a charge is a fortiori a tax where the person who is subjected to the charge has no choice but to use the "facility", which is the case with respect to public roads. Hughes & Vale (No. 2) 223.
- 40 (8) The "facility" aspect of roads makes an appeal to a sense of fairness which has not relevance in the application of Section 92 but unfairness quite clearly is not a necessary feature of the burdens from which the Section creates an immunity, and the relevant freedom is given once for all, and not made available for purchase. "The Section is uncompromising in its decree, and its severe demand is not open to mitigation by reference to the just and equitable" (Hughes & Vale (No. 2) 224.

41. This intervener adopts, with respect, the reasons given by His Honour for denying validity to a charge of the kind proposed by the majority.

TAYLOR J.

42. In dissenting from the judgment of the majority on the validity of a charge of the kind proposed, the main ground given by His Honour was that the charge proposed was indistinguishable from the true concept of a tax and that the constitutional limitations arising from Section 92 10 upon the power to levy taxes precluded a tax which was made payable as a condition of engaging in or carrying on inter-State trade even if the tax was levied upon a limited class for special purposes: Hughes & Vale (No. 2) 239.

In His Honour's view -

- (i) For the purposes of Section 92, no valid distinction can be drawn between the raising of public revenue by the levying of taxes generally and the raising of a particular fund for special purposes by levying taxes specially upon those who are thought to obtain special benefits from the expenditure from the fund so raised. 20
- (ii) So far as Section 92 is concerned, no virtue is achieved by limiting such a tax to what can be said to be "reasonable" because Section 92 would then have to be given the meaning that, consistently with the freedom guaranteed, inter-State trade might be directly subjected to imposts and taxes as long as they were "reasonable": Hughes & Vale (No. 2) 237, 239. 30

43. This intervener submits, with respect, that the reasons given by His Honour are sound reasons for holding that a charge of the kind proposed by the majority would contravene Section 92.

44. In subsequent cases, the views advanced by the members of the High Court in Hughes & Vale (No. 2) with respect to the justification of some form of charge being levied for the use of roads 40

consistently with Section 92 were adhered to by them with the following exceptions:

- 10 (a) In Armstrong, Webb J., being called upon in that case to pass judgment upon the Commercial Goods Vehicles Act 1955 of the State of Victoria, which was passed after Hughes & Vale (No. 2). whilst stating that he did adhere to the views to which he was a party in the joint judgment of the Chief Justice, McTiernan J. and himself in Hughes & Vale (No. 2) said that he did not find it easy to adhere readily to those views "Because of the undoubted fact that Section 92 prevents any haulier from being required to pay any charge for the right to enter upon and use the public roads on inter-State journey and use necessarily causes wear and tear of roads, and so might appear to preclude this charge." However
- 20 His Honour went on to hold that the charge imposed by the Commercial Goods Vehicles Act 1955 purporting to be based upon the views to which His Honour had subscribed was invalid: p. 74.
- (b) In Armstrong Dixon C.J. (at p. 38) (with whom McTiernan J. agreed) and Fullagar J. (at p. 82) acknowledged the force of the criticisms directed by Kitto J. in Hughes & Vale (No. 2) at the majority views in that
- 30 case and Fullagar J. whilst taking the view that the majority had fully considered the matter in Hughes & Vale (No. 2), and that the matter should not be now re-opened, emphasised and repeated his opinion that public highways were not to be regarded as facilities provided by a State in order to justify the exaction of a contribution towards their maintenance. Fullagar J. repeated the same emphasis in Commonwealth
- 40 Freighters at p. 296.

45. The only other Justices of the High Court who have been called upon to consider the validity of charges of the kind in question in this appeal, are Menzies J. and Windeyer J. who joined the Court after Armstrong had been

decided.

46. In Commonwealth Freighters Menzies J. expressed no view as to the basis upon which a charge for the use of roads could validly be imposed and based his judgment on the question whether there were distinctions to be found between the decision of the Court in Armstrong and the Act in question in Commonwealth Freighters.

47. In Commonwealth Freighters, Wideyer J. 10  
stated (at p. 302) that he accepted the judgments of the majority in Hughes & Vale (No. 2) and in Armstrong as settled law. However, His Honour, after accepting as "real", (although acknowledging logical difficulties and evidentiary difficulties in applying it), the distinction which the majority had postulated between a valid road maintenance charge consistent with freedom of trade commerce and intercourse, and a tax upon road users with which was an impediment to freedom, went on to support the distinction on the ground that it seemed to His Honour to accord with some historic doctrines of English law and with old practices with respect to tolls upon the users of highways. Commonwealth Freighters 303. It is submitted, with respect, 20  
that His Honour's account of the law and practices mentioned do not afford a basis for adopting the distinction and fails to give due weight to the purpose and terms of Section 92 30  
and the concept of that purpose as previously expressed by His Honour in Harris v. Wagner 103 C.L.R. 452 at p. 476.

## Section 2

### NATURE OF CHARGE SAID BY JUSTICES OF THE HIGH COURT TO BE PERMITTED BY SECTION 92

48. In Hughes & Vale (No. 2) certain propositions were put forward by the Justice who supported a charge for the use of roads as to the essential nature of the charge in order for it to be valid under Section 92. It is submitted that an examination of these propositions shows 40

that their Honours differed as to the essential elements for the validity of the charge said to be permissible.

49. The nature and elements of a valid charge as postulated by Dixon C.J., McTiernan and Webb JJ., were as follows:-

- 10 (i) The charge must be "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". p. 175.
- (ii) If the charge is imposed on the inter-State operation itself then it must be made to appear that it is such an attempt and, that it is so, must be evident from its nature and character. p. 175.
- (iii) Prima facie, it will present that appearance -
- 20 (a) If it is based on the nature and extent of the use made of the roads.
- (b) If the proceeds are devoted to the repair, upkeep, maintenance and depreciation of relevant highways.
- (c) If inter-State transportation bears no greater burden than the internal transport of the State.
- (d) If the collection of the exaction involves no substantial interference with the journey. p. 175-176.

30 50. Their Honours went on to elaborate as to some of the elements contained in the foregoing propositions and, it is submitted, to lay down the following limitations upon the charge permissible:-

- (a) The charge must be reasonable in that it must not place too great a burden on the traffic and must not be extravagant in its assessment.

- (b) It must be levied only in respect of the use of "relevant highways", that is to say, "certain roads", being (by inference) those particularly used or those particularly designed for use by heavy traffic.
- (c) The charge must not include any amount for the capital cost of new highways or other capital expenditure.
- (d) The amount of the charge must bear a relation to "actual use". 10
- (e) The proceeds must be devoted to repair, upkeep, maintenance and depreciation, and then, only of "relevant" highways.
- (f) The question whether the charge complies with the foregoing conditions must be decided upon a consideration of the statutory instrument or instruments by which it is imposed.

Hughes & Vale (No. 2) pages 176, 177-178.

51. It is submitted that their Honours, in formulating the elements of a permissible charge, manifested a concern to ensure by the limitations and safeguards laid down by them, that no invasion of the freedom guaranteed by Section 92, as they saw it, could occur. It is submitted that the principal features which emerged from the nature of the limitations and safeguards laid down were:- 20

- (i) The charge should represent and not exceed value for money, that is, that there should be, as nearly as practicable an equal relation between the amount paid and the wear and tear caused and the benefit derived from actual use of public highways by those liable to pay the charge. 30
- (ii) The revenue collected should not be capable of being diverted from the purpose which made its collection permissible, namely, repair and maintenance of the highways actually used by those who pay the charge. 40

(iii) Compliance with the limitations laid down for a permissible charge, must be manifested in the legislation which levies the charge, and such legislation must take a form which rendered the incidence and quantification of the charge examinable by the Court in order that the Court could itself be satisfied that the limitations were not exceeded or departed from.

- 10 52. Williams J. in Hughes & Vale (No. 2) formulated a test which, it is submitted, is, in certain respects, basically different from the one enunciated in the joint judgment. Whilst His Honour agreed that the charge must be "reasonable" he asserted that, so long as it was in fact reasonable, it would not matter for what purposes the revenue collected was applied. The nature of the charge which might be levied was said by His Honour to be:-
- 20 "...Such a charge as will, having regard to the benefit the carrier derives from the facility, not be an undue burden on him, and a charge will not be burdensome providing, looking at the matter broadly, the benefit flowing from the provision of the facility more than outweighs the burden flowing from the imposition of the out-going."
- His Honour agreed that the formula for the charge could not include an item relating to the cost of constructing new roads and added that it should be primarily based on the cost of keeping existing roads in repair. Hughes & Vale (No. 2) p. 194-195.
- 30
53. As to the "reasonableness" of the charge, His Honour expressly related this concept to the size and weight and other characteristics of the vehicle and said that to be reasonable the charge would have to be based mainly upon the extent of the wear and tear of the road over which the vehicle intended to travel would be likely to suffer from the projected journey.
- 40 After stating that all traffic caused some wear and tear and that he presumed that the heavier the vehicle the more wear and tear, he said:

"It is for the cost of this extra wear and tear, if any, that it would be reasonable to charge. Hughes & Vale (No. 2) 194.

54. His Honour expressly placed the onus on the plaintiff to prove that a charge was unreasonable and expressed the view that the Court would be disinclined to upset a charge that was reasonable on its face, and supported, if challenged, by a calculation based on some appropriate formula.

55. In contrast with the joint judgment, His Honour also held that the charge could include a reasonable contribution towards the cost of administering the Act and of policing the roads in the interests of law and order. Hughes & Vale (No. 2). 195. It is submitted, with respect, that by enlarging the concept of the permitted charge in this way, the basis of the charge postulated by His Honour was radically different from that postulated by the joint judgment and by Fullagar J. 10 20

56. Fullagar J., in Hughes & Vale (No. 2) appears to have conceived the nature of the justifiable exaction to be different again. In His Honour's view, the exaction was limited by the extent of the additional benefit which an inter-State trader derived from a road over and above the rest of the community as a whole. Hughes & Vale (No. 2) 210. Whilst acknowledging difficulties of quantification and incidence in the fixing of a contribution which would be valid, His Honour said:- 30

" Two 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 maintenance of the roads. "

Hughes & Vale (No. 2) 211.

It is submitted, that, in line with the views expressed in the joint judgment, His Honour was contemplating a charge, which, in quantum, was equably related to wear and tear of the roads by those called upon to pay the charge and that, 40

in this respect, its nature must be manifested in the legislation imposing the charge.

PART V

APPLICATION OF ORIGINAL CONCEPTS IN CASE ON PARTICULAR ACTS

57. It is submitted that in dealing with the validity of legislation imposing a charge for the use of roads which came into force after Hughes & Vale (No. 2), the judgments which  
 10 upheld these Acts involved basic departures from the concepts originally laid down.

58. In Armstrong, the validity of the Commercial Goods Vehicles Act 1955 (Victoria) was in question. Dixon C.J., McTiernan, Williams and Fullagar JJ., with Webb, Kitto and Taylor JJ. dissenting, held that the provisions of the Act which imposed a charge for the use of roads did not infringe Section 92. The provisions in question were similar to those contained in the  
 20 Act the subject of this Appeal.

59. Certain features of the Act in question in Armstrong which are common to the Act in question in this Appeal, were acknowledged by the Court:

- (i) The rate of tax stood in the Act as an unexplained figure. As Dixon C.J. observed in Commonwealth Freighters (p. 291):

30 " The statute did not show that there had been any examination or investigation of the costs of maintaining highways. It did not show that an attempt had been made to distinguish between the main arteries of inter-State goods traffic and other highways. It did not show on its face any reliance on facts, on attempts to ascertain facts, on estimations or on sources of information of any description in support of the characterisation of the charge imposed....Nor did it show on its  
 40 face any reliance upon such things in support of the reasonableness of the rate."

- (ii) The one flat rate was charged for all types of vehicles and in respect of the use of all types of roads and upon the whole journey, irrespective of the type or quality of the road traversed or the wear and tear caused or likely to be caused by the vehicle for the use of which the charge was levied.
- (iii) The charge was permanently imposed and not made subject to review for any change in relevant circumstances. 10
- (iv) The charge was related to 40% of load capacity, whether the vehicle was loaded or not, this relationship being one irrelevant to any concept of benefit of use of or wear and tear on roads.

60. It is respectfully submitted that for those of their Honours who in Armstrong's case upheld the validity of the Victorian Act, there was involved a substantial abandonment of many of the concepts originally regarded by them as essential to validity. It is submitted that:- 20

- (1) Dixon C.J., McTiernan and Fullagar JJ., departed from the principle that the elements of validity must be manifested upon the face of the legislation itself.
- (2) Dixon C.J. and McTiernan J. must be taken to have abandoned and limitation to "relevant highways" and the restriction that the amount should relate to actual use of those highways. 30
- (3) Dixon C.J. and McTiernan J. appear to dispense with the requirement that the charge should appear to be measured by wear and tear and costs of maintenance.
- (4) Williams J. must be taken to have abandoned his concept of reasonableness by which the charge was to be related to the size weight and other characteristics of the vehicle and the extent of wear and tear that the road used by it would be likely to suffer 40  
from its journey and the concept that it was

the cost of extra wear and tear over and above that occasioned by lighter vehicles for which it would be reasonable to charge.

- 10 (5) Fullagar J. must be taken as having abandoned the idea that the charge must be limited to a charge for the extra benefit derived by the commercial road user over and above that derived by the community as a whole and that to be valid a real connection - a relation of quid pro quo - must appear between the charge and the maintenance of roads.

61. In Armstrong, Webb J. found that an application of the principles stated in the judgment in Hughes & Vale (No. 2) to which he had been a party led to the view that the Victorian Act must be held invalid. The grounds of His Honour's decision were:

- 20 (1) Conformity to the constitutional requirements of a valid charge must appear in the Act.
- (2) There was nothing in the Act which showed how the multiplier, one-third of a penny per ton, was arrived at. "If the figure were one-third of a shilling the reasoning in support of an assurance ex facie would necessarily be the same, which negatives any such assurance."
- 30 (3) There was no assurance on the face of the Act that only the cost of maintenance of relevant highways was taken into account in assessing the charge or that the costs of maintenance of public roads generally was not greater than the cost of maintenance of relevant highways.
- (4) The charge, like the Act, was of indefinite duration.
- 40 (5) The charge did not conform with constitutional requirements or the joint judgment in that it was not limited to the actual cost of maintenance and the Act contained no

formula for ascertaining wear and tear on relevant highways and supplied no figures and did not indicate the source of the figures for the calculation and did not provide for reviews periodically to ensure that the charge would never substantially exceed maintenance cost of the relevant highways.

It is submitted, that His Honour correctly applied the principles stated in the joint judgment in denying validity to the Victorian Act. 10

62. In condemning the Victorian Act, Webb J. drew attention to the views previously expressed by Williams J. and Fullagar J. respectively and said: "However with great respect, I leave it to their Honours to decide whether the Commercial Goods Vehicles Act provides for a valid charge, according to their views as expressed above." Armstrong 78-79. It is respectfully submitted that neither of their Honours successfully answered the challenge implicit in this statement of Webb J. 20

63. Kitto J. and Taylor J. adhered to the views expressed by them in Hughes & Vale (No. 2) and Kitto J. agreed with the conclusion of Taylor J. that the character of the charge imposed by the Victorian Act was simply a tax for general road maintenance, which he considered to be irreconcilable with Section 92. Taylor J. expressed doubt whether the charges could be regarded as consistent with the views previously expressed by Williams and Fullagar JJ. in that they were not charges for extra damage done to roads by heavier traffic nor were they charges commensurate with any benefit which the owners of heavier vehicles may be said to receive over and above that which is derived by the community as a whole. Armstrong p. 91. 30

64. In Armstrong's Case evidence was adduced by the State of Victoria with a view to showing that the amount charged was reasonable and otherwise complied with the requirements laid down in 40

Hughes & Vale (No. 2). It is submitted that it is not clear to what extent the Justices who upheld the validity of the Victorian Act regarded this evidence as essential to the decision. It is submitted that Dixon J., having stated that there was no positive ground on the face of the legislation for associating the quantum of the rate with the actual cost of maintenance and upkeep of Victorian roads, and then having referred to the evidence which was before the Court and then having stated "on the whole I think the defendants made out their case that the rate . . . was in fact of an order imposing upon the class of vehicles and owners falling within its application no more than a reasonable charge by way of compensation or recompense to the use actually made of roads" (Armstrong p. 50) must be taken to have founded his judgment upon the evidence adduced and to have regarded the State as carrying an onus to satisfy the Court by such evidence.

65. It is submitted that it is not clear from the judgment of Fullagar J. what part the evidence adduced in Armstrong was thought to play in the issue before the Court as to the validity of the Act in question. He said (at p. 83) that the charge was not shown to be quantitatively unreasonable either in the sense of being out of proportion to the actual cost of maintenance or in the sense of imposing a practically prohibitive burden. This suggests that His Honour thought that those complaining of the charge were entitled to call evidence to establish its invalidity and carried the onus of so doing. However His Honour went on to say: "It is to be added also that the State adduced evidence to show the actual basis on which the amount of the charge had been arrived at" and concluded that this evidence showed that there had been a "real attempt to fix a reasonable recompense or compensation". From this it would appear that His Honour did take the evidence into account in upholding the charge.

66. Taylor J. (with whom Kitto J. agreed on this point) expressed the view (Armstrong p. 89) that if the test was whether, upon ascertainable

criteria, the charge could be said to be reasonable, it would, in His Honour's view, be impossible to form a judgment on the critical question without evidence of the material matters. It is submitted, with respect, that this view is plainly right if the criteria of validity as laid down in Hughes & Vale (No. 2) were to be accepted. His Honour went on to review certain aspects of the evidence that had been adduced and found two vital deficiencies: 10

- (1) The evidence showed that the computations on which the rate had been based took into account the cost to the State of maintaining 80,000 miles of roads of all classes whereas State highways and main roads constituted little more than 13,000 miles of those roads and there was nothing to give the slightest indication of the extent to which either those or other roads of the State were used by inter-state traffic. His Honour said (p. 91): 20

"Nevertheless the computations proceed on the basis that it is fair and reasonable to make a charge against the owners of vehicles engaged in inter-state traffic based upon maintenance costs for every mile of roadways in Victoria. At this stage the computations, in my opinion, entirely break down for even if it may be said that charges may be imposed upon vehicles operated in the course of inter-state trade to compensate for the damage they occasion to the roads which they use, I find it impossible to accept the proposition that a general charge for the maintenance of all roads throughout the State is compatible with Section 92." 30

- (2) The Act imposed the charge not only upon vehicles registered in Victoria but upon all other heavy vehicles entering the State in the course of inter-state trade but the evidence showed that the rate was based upon the number of heavy vehicles registered in Victoria and ignored altogether visiting vehicles. The omission of this factor 40

affected a matter most material in estimating both percentage of road maintenance properly attributable to the use made of the roads in Victoria by heavy vehicles and to the striking of a proper rate of charge for the purpose of recouping maintenance costs. His Honour concluded that in these circumstances the computation failed to take into account matters which were vital to the question whether the charges were reasonable and left that question completely unresolved with the result, as His Honour said (p. 92) "the evidence fails to satisfy me, upon any view that has so far been taken, that the exaction prescribed . . . is or can be said to be no more than "reasonable"." His Honour added that the result of the legislation would be to require the owners of heavier vehicles entering Victoria from other States to make what was, in substance, a general contribution to road maintenance throughout the State.

67. In Commonwealth Freighters the Road Maintenance (Contribution) Act 1958 of New South Wales which is in issue in this Appeal fell to be considered by the High Court (Dixon C.J., McTiernan, Fullagar, Kitto, Taylor, Menzies and Windeyer JJ.) This Act, so far as material simply reproduced the provisions of the Victorian Act, with one exception, namely, the definition of "public street" (to be mentioned later). One point to be remarked upon is that although it cannot be assumed that in New South Wales the number of vehicles, the nature, quality and distances of roads and other relevant circumstances were the same as those in Victoria and although the New South Wales Act was later in point of time than the Victorian Act, the New South Wales Act adopted precisely the same rate and formula for computing the charge which it levied. No evidence of any kind was adduced to the Court to explain the rate adopted or the incidence of the charge levied.

68. The Court upheld the validity of the Act and, it is respectfully submitted, in doing so, the

Court finally abandoned the limitations and safeguards which it had previously regarded as essential to the validity of legislation imposing a charge upon inter-state traders for the use of roads. In particular, it is submitted that the Court wholly abandoned the concept that the constitutional limitations which it had postulated in respect of such a charge must be manifest and that the legislation must take a form which made its incidence and quantification examinable by the Court to ensure that the freedom guaranteed by Section 92 was not being invaded. It is submitted that Dixon C.J. was clearly uneasy about this aspect of the matter when he said (at p. 293):

"this Court bears the ultimate responsibility of preserving the freedom of inter-state trade commerce and intercourse from encroachments and impairments and it would be unwise to view without misgiving the possibility of States, under cover of the judgments of the majority of the Court in Hughes & Vale (No. 2) and in Armstrong, levying taxes involving an impairment of that freedom as those judgments seek to define it."

(Cf. per Webb J., Armstrong p. 77).

69. It is submitted that in Commonwealth Freighters a criterion of validity previously considered as essential was also disregarded in upholding the validity of the New South Wales Act. It would seem that Dixon J. still regarded this criterion as essential when he said (at p. 294): "The essential restriction of the use of the money collected to the maintenance of highways is accomplished by Section 9 which speaks unfortunately of public streets." In this Act, the expression "public street" was defined to include any place at the time open to or used by the public on the payment of money or otherwise. As Dixon J. observed (p. 294) the definition literally permitted the application of the revenue collected by a charge under the Act for the use of roads outside the scope of the maintenance of public highways for vehicles notwithstanding that under the Court's previous

decisions it was essential that the proceeds of the charge should be confined to that purpose. It is submitted that this feature of the Act was enough to condemn it as invalid even if the principles expounded by the Court were accepted to be right, yet, the Act was held to be valid.

70. As to the examinability of the propriety of the charge with respect to Section 92 the following matters emerge from Commonwealth  
 10 Freighters:

- (1) Dixon C.J. (p. 295) having expressed the view that it was right to begin with the presumption that to levy a compulsory contribution to the revenue of the State was a tax and if it was laid upon the transportation of goods inter-state was inconsistent with Section 92, His Honour said that a scrutiny of the Act raised a counter-presumption that the charge  
 20 possessed a foundation bringing it within the doctrine explained and adopted in Armstrong's Case and foreshadowed in Hughes & Vale (No. 2), His Honour went on to say that no material before the Court weakened or overturned the counter presumption and that the Court should act on it and uphold the validity of the Act. It is submitted that it is implicit in His Honour's approach that it was permissible to  
 30 a party who desired to challenge the propriety of the charge laid by an Act to adduce evidence to establish its invalidity.
- (2) Menzies J. (p. 302) whilst holding that the New South Wales Act could be upheld without evidence before the Court, said that where a decision concerning validity had been reached upon findings of fact it would be open to the Court to consider the matter again upon the representation that the  
 40 significant facts were no longer as they were. It is submitted that Menzies J. also implicitly indicated that a party could call evidence to challenge the validity of a charge.

(3) Windeyer J. quoted in his judgment (at p. 307) a statement of Williams J. which had been quoted in the majority judgment in Hughes & Vale (No. 2): "It is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation." It is submitted that on this principle evidence would be admissible to challenge the validity of a charge. 10

71. In Boardman, the Roads (Contribution to Maintenance) Acts 1957-1958 (Queensland) were challenged. So far as material, this legislation simply adopted the provisions of the Victorian and New South Wales Acts including precisely the same rate and formula although, again, it is submitted that it was not to be presumed that the relevant conditions in Queensland were the same. The legislation was held to be valid. 20

72. Dixon C.J. (at p. 464 - 465) observed that the analogy afforded by the relevant conditions of Queensland was remoter still from those of Victoria than were the conditions of New South Wales and that the natural inference was that New South Wales and Queensland had adopted the same rate of contribution to road maintenance simply because it had been upheld. His Honour observed: 30

"But it is impossible to avoid the impression that more progress towards the satisfactory solution of the difficulties might have been made by an independent attack upon them by New South Wales and by Queensland based upon the facts and circumstances and the costs prevailing in those respective States."

His Honour took the legislation on its face as affording a counter presumption against invalidity (as he had done in Commonwealth Freighters) and reached the conclusion that this counter presumption should prevail. In the light of the previous decisions, the other members of the Court agreed with the decision of 40

the Chief Justice. It is respectfully submitted that this decision carried the failure to adhere to the original concepts of a valid charge and, particularly, to the requirement of examinability of the legislation in order to ensure that the charge was within the limits postulated, one step further.

10 73. In Breen, the appellant had sought to adduce evidence before a Magistrate when prosecuted for an offence under the Road Maintenance Contribution Act (New South Wales) in order to overturn the "counter-presumptions" which in the absence of evidence to the contrary, members of the Court in Commonwealth Freighters and Boardman had found to establish the validity of the Act, The Magistrate rejected the evidence and, in this, he was upheld by the High Court. It is submitted that some of the views expressed in the judgments in this case would, if correct,  
20 place the Act in question in this Appeal, and other like Acts, virtually beyond the possibility of successful challenge from a practical point of view.

74. Dixon J. (p. 412) said: "It is for the Court to say whether factual information is required before it can or will decide on the constitutional validity of a law or of its application to a given situation." He afterwards observed that in Commonwealth Freighters the  
30 Court undertook a full consideration of the validity of the Act and of its application to inter-state transportation and goods and decided in favour of validity without calling for any further evidence of a factual character. It is submitted with respect that His Honour's judgment leaves it quite unclear whether the leave of the Court is required before evidence can be adduced before it to challenge the propriety of the charge imposed by the New  
40 South Wales Act or whether upon a suit properly instituted the Court will determine for itself whether it should call for further factual information to enable it to make such determination, or whether the matter is closed once and for all by the decision of the Court in Commonwealth Freighters which was reached "in the

absence of evidence to the contrary".

75. Kitto J. (pp. 415-417) regarded the previous decisions as establishing that a law imposing a road charge was outside Section 92 if it was in truth and in substance a law for the exaction of a recompense or compensation for wear inflicted upon roads by their use - a contribution towards expenditure necessitated by the activities of those who use public highways and that the question had come down to 10 whether the legislation imposing the charges was of that kind and that this meant that reasonableness of amount was not the criterion of the compatibility of road charges with the freedom declared by Section 92. He observed that if it were, there would have had to be in each case that has arisen a comparison of the cost of repairing actual damage done with the amount payable in respect of the use which caused that damage; and that such a comparison has 20 never been held necessary. He reached the conclusion that, although the quantum of a charge may be material in considering the question of the nature of the law which imposes it - for the amount may by its very magnitude suggest the answer - there can be no materiality in a comparison of the charge with the actual or probable costs of road restoration or maintenance, or to any other measure of the damage done by the impact of traffic upon roads; because once the 30 nature of the law has been determined, there is no remaining question for which an opinion as to the reasonableness or unreasonableness of the charge can have significance. In His Honour's opinion this view led to the result that the evidence sought to be achieved before the Magistrate was irrelevant.

76. Taylor J. (at pp. 419-420) said that it was difficult to see how an issue of fact could be excluded if the attack on the legislation was 40 to rest wholly or partly upon a claim that the amount of the charge was unreasonable or excessive. He went on to say:

"But I am by no means clear whether the criterion, as first stated as a new concept in Hughes &

Vale (No. 2) has developed to the stage where mere proof that the charge itself is unreasonable in fact is sufficient to invalidate the legislation if, upon its face, the legislation is capable of being regarded as an attempt to impose a reasonable charge."

10 77. It is submitted that in Breen, the concept of "reasonableness" and of an equable relation between the quantum of the charge and the amount of use and wear and tear on roads as elements essential to its validity was, in effect, finally abandoned by the Court. Dixon C.J. (p. 412), in speaking of the use of the word "reasonable" as a description of a test to which the charge must conform, said: "It would be quite erroneous to suppose that something like a quantum meruit is involved." As indicated above, Kitto J. (416) reached conclusions which he said "necessarily mean that reasonableness of amount is not the criterion." Menzies J. 20 (pp. 421-422) treated the previous decisions as determining the "character of the legislation" and the evidence in Armstrong as "re-inforcing" the conclusion derived from an examination of the Act itself that it was a "real attempt" to fix compensation for wear and tear on roads caused by heavy vehicles. No mention is made of "reasonableness". Windeyer J. expressed preference for the expression "proper" as to the amount that could be levied by way of road charge and stated that in his view what was involved in 30 all previous formulations was that "the amount of the charge . . . must have some rational relation to the cost of maintaining roads in a condition fit for the traffic they have to bear and it must not be, in a practical sense, an impediment." He added "whether or not it has this character is a question to be decided by this Court. It may decide it on such factual information as it thinks fit."

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78. In Breen's Case it is submitted that Windeyer J. introduced a new and wider concept as to the purposes for which revenue collected by a road charge could be applied. His Honour (p. 424) criticised the phrase "wear and tear" and indicated that a charge could, in His Honour's

view, be validly applied to the strengthening and widening of bridges and culverts and to the improvement of road surfaces and the making of gradients less steep. It is submitted that this expanded concept is in conflict with the earlier concept of the joint judgment in Hughes & Vale (No. 2) that charges could not validly be levied or applied to cover the cost of construction of roads or other capital costs.

PART VI

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CONCLUSIONS

This intervener respectfully submits:

79. That no sound basis is to be found in the judgments in the cases reviewed above for upholding in the face of Section 92 the validity of a law imposing a charge upon a person as a condition of his use of public highways in the course and for the purposes of his trade of transporting goods inter-State by motor vehicle.

80. That so far as the Road Maintenance (Contribution) Act of New South Wales is concerned, the result of the decisions reviewed is that a law which - 20

- (1) is not a general law regulating the conduct of persons,
- (2) expressly selects a form of trade protected by Section 92 and the persons desiring to engage therein as the subject of its application,
- (3) expressly selects as the legal criterion of its operation the very act of engaging in that form of trade, 30
- (4) directly makes a liability to pay a tax the consequence of a person engaging in the trade selected,
- (5) quantifies the liability by an unexplained and virtually unexaminable rate and by a

formula patently not restricted to use or wear and tear of roads,

(6) permits the application of the proceeds of the tax to purposes having nothing to do with the activities in respect of which it is levied, and

(7) is permitted to characterise itself as a law exacting "compensation for wear and tear caused to public streets" simply by saying  
10 so,

is not to be regarded as infringing the absolute freedom guaranteed by Section 92 to inter-State trade commerce and intercourse if it applies to persons using public highways to transport goods inter-State by motor vehicle for reward.

81. That such a law clearly does infringe Section 92 and the cases to the contrary must be regarded as having been wrongly decided.

20 82. That even if, contrary to the submissions of this intervener, there is some basis upon which a law could consistently with Section 92 levy a tax charge or impost on the owner of a motor vehicle by virtue of his use of public highways in inter-state trade commerce or intercourse the Road Maintenance (Contribution) Act, 1958-1965 is not such a law.

30 This intervener therefore submits that the decision of the High Court of Australia is erroneous and ought to be reversed, that this Appeal should be allowed and the order of the High Court set aside and in lieu thereof the respondents' demurrer should be dismissed and a declaration should be made that the Act does not apply to owners of commercial goods vehicles whilst such vehicles are engaged on journeys in the course of and for the purposes of inter-state trade, commerce or intercourse for the following amongst other:

#### R E A S O N S

40 (a) Because the Road Maintenance (Contribution) Act 1958-1965 has no valid application to

owners of commercial goods vehicles travelling in the course of and for the purposes of inter-state trade.

- (b) Because the statutory provisions here in question operate directly and immediately to burden inter-state trade and cannot be sustained as being regulatory.
- (c) Because the statutory provisions here in question violate the provisions of Section 92 of the Constitution by requiring the payment of a tax as a condition of or by reason of the use of public streets by commercial goods vehicles engaged in inter-state trade. 10
- (d) Because the statutory provisions herein question violate Section 92 of the Constitution, by making the criterion of liability to tax the use of a public street by the owner of a commercial goods vehicle engaged on an inter-state journey for reward. 20
- (e) Because a State may not consistently with Section 92 of the Constitution levy a charge by way of reasonable recompense or compensation for the use of public roads or as a contribution to wear and tear which the vehicles in respect of which the tax is levied are alleged to make to such roads or exact a contribution towards expenditure alleged to be necessitated by the activities of those who use public roads whilst such vehicles are engaged in inter-State trade. 30
- (f) Because even if consistently with Section 92 of the Constitution a State is entitled to impose a tax on the owner of a vehicle using a public road in the course of inter-State trade the statutory provisions herein question do not impose such a permissible tax.

K.J. HOLLAND  
ANDREW ROGERS

No. 34 of 1966

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE HIGH COURT OF  
AUSTRALIA

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BETWEEN:

FREIGHTLINES & CONSTRUCTION  
HOLDINGS LIMITED Appellant

- and -

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

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C A S E

FOR T.N.T. (SYDNEY) PTY.  
LIMITED AS INTERVENER

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