

**Freightlines and Construction Holding Limited** – – – *Appellants*

v.

**The State of New South Wales and the Commissioner of  
Motor Transport** – – – – – *Respondents*

*and*

**T.N.T. (Sydney) Pty. Limited and others** – – – – *Interveners*

FROM

**THE HIGH COURT OF AUSTRALIA**

---

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 10TH APRIL 1967

---

*Present at the Hearing :*

LORD REID  
LORD HODSON  
LORD PEARCE  
LORD WILBERFORCE  
LORD PEARSON

*[Delivered by LORD PEARCE]*

---

Since 1900 when the Constitution of the Commonwealth of Australia was founded there have been vast changes in road transport between the States. The roads themselves have very greatly increased in extent, elaboration, efficiency, and cost of maintenance. There has been a like increase in the extent, volume and weight of inter-State commercial traffic.

The broad problem raised by the present case and by the Transport Cases in general is this. To what extent, if at all, can inter-State commercial transport be lawfully required by the States (or by the Commonwealth) to contribute directly to the maintenance and up-keep of the road system which is vital to its existence and which is constantly and inevitably being worn away by its daily impact?

According to the appellants, it cannot be required to make any direct material contribution to the cost of road maintenance. Or, if it can, the contribution to the cost must bear so close a relation to the actual wear and tear caused to the particular roads by the particular vehicles on their particular journeys that for practical purposes it would be impossible to exact it. To hold otherwise, it is argued, would create an inroad into s. 92 which enacts that trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. And such an inroad would, it is said, lead to the erosion of that charter of absolute freedom which s. 92 has granted to inter-State commerce. This is the basis of the various arguments, so ably presented by the appellants' counsel; by which he seeks to show that the legal concept embodied in the Transport Cases since 1955 is wrong, and that it cannot justify those decisions.

The appellants, who carry on business as inter-State carriers and own commercial goods vehicles seek a declaration that the Road Maintenance (Contribution) Act, 1958-65 of the State of New South Wales is invalid generally, or invalid in respect of certain sections and schedules, by virtue of the provisions of s. 92 of the Constitution. That Act imposes upon owners of commercial goods vehicles (with a load capacity of over 4 tons)

a road charge at a rate per ton per mile of public streets travelled in New South Wales towards compensation for wear and tear to public streets caused by such travel. The respondents demurred to the statement of claim. The High Court following its own previously decided cases, one of which had already held that the provisions of the Act in question were valid, allowed the demurrer. On appeal to your Lordships leave to intervene was given to another carrier of commercial goods, who had an interest similar to that of the appellants. On the other side leave to intervene was given to the States of South Australia, Victoria and Tasmania, Queensland, and Western Australia. These States are closely interested since they have enacted legislation which is in all material respects similar to the legislation which is here attacked.

The Commonwealth of Australia has also intervened. It has not enacted similar legislation. But it is, equally with the States, bound by s. 92 (*James v. Commonwealth of Australia* [1936] A.C. 578). It is therefore concerned to maintain an interpretation of s. 92 which will enable it to pass similar legislation with regard to road maintenance charges, if it should wish to do so. It is also concerned to maintain an interpretation which will support the validity of certain legislation authorising the making of charges for aerodromes and other facilities and services used by persons engaged in inter-State trade, commerce, and intercourse. But it is conceded by the appellant's counsel that his arguments are not directed against and do not touch this latter class of legislation.

In addition to the appellants and respondents all the interveners have by their counsel made submissions on this interesting and important matter and their Lordships are much indebted for the careful arguments.

It has long been established that the words "absolutely free", strong as they are, cannot be read without any qualification. It is clear that s. 92 does not, for instance, give to inter-State goods the privilege of travelling on railways or ships without paying for their freight. Fifty years ago Sir Samuel Griffith C. J. said (*Duncan v. State of Queensland* (1916) 22 C.L.R. 556 at 573) "But the word 'free' does not mean *extra legem* any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law." Those words were quoted in *Commonwealth of Australia v. Bank of New South Wales* [1950] A.C. 235 where there was much discussion of the extent to which the words "absolutely free" should be qualified. It was there suggested (at 310) by way of general proposition that regulation of trade, commerce and intercourse among the States was compatible with its absolute freedom, and that s. 92 is violated only where an act operates to restrict commerce "directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote". And it was pointed out with justice that actual decisions on the matter were likely to be controversial and that although the decision was one for a court of law the problems were likely to be largely political, social or economic. This has certainly been so in the Transport Cases where there have been many differences of opinion.

In the case of *Hughes and Vale Proprietary Ltd. v. State of New South Wales* ([1955] A.C. 241—for convenience called *Hughes and Vale No. 1*) the Privy Council was called on to decide a transport case concerning the provisions of the State (Transport) Co-ordination Act of New South Wales requiring application to be made for a licence (which might be granted or refused at discretion by an executive official) and various consequential provisions applying to the operators of public motor vehicles engaged in inter-State trade. It was held that they contravened s. 92 and were therefore invalid.

Various Transport Cases which had been decided by the High Court came into question in *Hughes and Vale No. 1*. But in none of those could it be properly said that they imposed charges for road maintenance and nothing more. Nor on the view of the judges who upheld the validity of various acts in those cases was it necessary to rely on the argument that they dealt with road maintenance charges. The first of these Transport Cases was *Willard v. Rawson* (1933) 48 C.L.R. 316 where

the Court by a majority (Dixon J. dissenting) upheld a Victorian law requiring the registration of all motor-cars. Their Lordships expressed no opinion on the correctness of the case. It is however interesting to note that Dixon J. in his dissenting judgment said (at p. 334):

“If a statute fixes a charge for a convenience or service provided by the State or an agency of the State, and imposes it upon those who choose to avail themselves of the service or convenience, the freedom of commerce may well be considered unimpaired, although liability to the charge is incurred in inter-State as well as intra-State transactions. But in such a case the imposition assumes the character of remuneration or consideration charged in respect of an advantage sought and received.”

There one has a glimpse of the concept which he subsequently developed and elaborated.

It is also interesting to see that Mr. Fullagar as counsel in the case argued (at p. 318) that a reason for the invalidity of the registration fee under discussion was that it was not computed according to the mileage run on the roads and that the purpose was not to maintain the highway.

Next for consideration by the Board in *Hughes and Vale No. 1* came *Vizzard's* case ((1933) 50 C.L.R. 30) where the High Court had considered the very same statute which was then before the Board. The majority had held that it was valid, but Starke J. and Dixon J. had dissented on the ground that it contravened s. 92. Again in *Gilpin's* case (52 C.L.R. 189) and in *Bessell v. Dayman* (52 C.L.R. 215) the majority had upheld the Act, but Starke J. and Dixon J. had again dissented for the same reason.

The last of the Transport Cases considered by the Board in *Hughes and Vale No. 1* was *McCarter v. Brodie* ((1950) 80 C.L.R. 432) where a Victorian Act by which commercial goods vehicles could not operate on public highways unless licensed to do so under the Act had been held by the majority to be good. Dixon J. and Fullagar J. had dissented. The Board in *Hughes and Vale No. 1* upheld the dissenting judgments and thus endorsed the earlier dissenting judgments of Dixon J. It quoted at length from the judgment of Dixon J. in *McCarter v. Brodie* and accepted his view on the following six propositions as to mistakes which underlay the previous Transport Cases: The *Bank* case [1950] A.C. 235 had rejected as erroneous three of them which had often been put forward; (1) that s. 92 does not guarantee the freedom of individuals (2) that “if the same volume of trade flowed from State to State before as after the interference with the individual trader, then the freedom of trade among the States remained unimpaired” (3) that “because a law applies alike to inter-State commerce and to the domestic commerce of a State, it may escape objection notwithstanding that it prohibits, restricts or burdens inter-State commerce”. The *Bank* case had also settled (4) that “the object or purpose of an act challenged as contrary to s. 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” (5) that “the question what is the pith and substance of the impugned law, though possibly of help in considering whether it is nothing but a regulation of a class of transactions forming part of trade and commerce, is beside the point when the law amounts to a prohibition or the question of regulation cannot fairly arise” (6) it is erroneous to make a distinction between “on the one hand motor-vehicles as integers of traffic and on the other hand the trade of carrying by motor vehicles as part of commerce”. The carriage of goods and persons does not lie “on the circumference of the conception of commerce” but “at or near the centre”.

In the dissenting judgments, which were thus accepted and became good law, Dixon J. had been primarily concerned with what could *not* be done without contravening s. 92 rather than with what *could* properly be done. And the majority who were thus overruled had not, *ex hypothesi* (since they were content with the validity of the relevant acts), been concerned to explore such a question. In the new light thrown on the Transport Cases

by the decision in *Hughes and Vale No. 1*, the High Court (with Sir Owen Dixon now the Chief Justice) set itself to give some *obiter* guidance on how far it was practicable, in conformity with s.92, for the States to secure financial contributions towards the large cost of maintaining their roadways against the deterioration caused by the increased and increasing demands of heavy vehicles. In *Hughes and Vale Proprietary Ltd. v. The State of New South Wales (No. 2)* (93 C.L.R. 127, for convenience called *Hughes and Vale No. 2*) the particular statutes concerned were unanimously held invalid, but the judgments deliberately dealt with the wider aspects of the situation. The joint judgment of Dixon C.J., McTiernan and Webb JJ. describes the problem as being one "which hitherto has not received consideration in this Court untrammelled by the conceptions held to be erroneous by the Privy Council in *Hughes and Vale No. 1*. It is the problem of saying how far if at all and on what grounds a pecuniary levy can be made directly upon inter-State transportation by road and yet leave that form of trade, commerce and intercourse absolutely free." "In conception" it says at p. 160, "the distinction is clear between laws interfering with the freedom to effect the very transaction or to carry out the very activity which constitutes inter-State trade, commerce or intercourse and laws imposing upon those engaged in such transactions or activities rules of proper conduct or other restraints so that it is done in a due and orderly manner without invading the rights or prejudicing the interests of others and, where a use is made of services or privileges enjoyed as of common right, without abusing them or disregarding the just claims of the public as represented by the State to any recompense or reparation that ought in fairness to be made."

The judgment goes on to point out that the question cannot be dealt with on the basis of the ownership of property, nor on the basis of a facility or service, like railways, electricity, gas, or water. The roads of a state being an established everyday means of carrying on commerce, were one of the basic assumptions of s. 92.

"But whilst it is not possible to justify the imposition of a charge for the use of the roads on the basis of property, if it includes inter-State commerce, there are other grounds which make it possible to reconcile with the freedom postulated by s. 92 the exaction from commerce using the roads, whether the journey be inter-State or not, of some special contribution to their maintenance and upkeep in relief of the general revenues of the State drawn from the public at large. The American phrase is that inter-State commerce must pay its way. It is but a constitutional aphorism, but it serves to bring home the point that in a modern community the exercise of any trade and the conduct of any business must involve all sorts of fiscal liabilities from which, in reason, inter-State trade or business should have no immunity. Those who pay them are not unfree, they merely pay the price of freedom. Just as any commercial pursuit or activity must conform with the laws affecting its incidents, notwithstanding that it may form part of inter-State commerce, so it must discharge the fiscal liabilities which State law attaches to those incidents. No one, for example, would say that s. 92 gave a depot or terminal of an inter-State air service or road transport business immunity from rates or land tax. The aphorism, however, does not tell you where the application of this principle stops, even under the American doctrine which allows more latitude than our s. 92 can admit. 'The appealing phrase that "interstate business must pay its way" can be invoked only when we know what the "way" is for which interstate business must pay.'—per Frankfurter J. in *Braniff Airways v. Nebraska State Board* ((1954) 347 U.S. 590, at p. 607). Needless to say, the principle has no application if there is a discrimination against inter-State commerce, if it is placed under any disadvantage in face of the State's internal commerce. The principle has no application to impositions the purpose of which is not to recoup the State or supply the means of providing the services, or a relevant service, of government, but to give effect to some social or economic policy,

as for example, to deprive road transport of an advantage in competing with railways.

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

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

"For the purpose of that provision (s. 92) it may perhaps be said with some confidence that if a charge is imposed as a real attempt to fix a reasonable recompense or compensation for the use of the highway and for contribution to the wear and tear which the vehicle may be expected to make it will be sustained as consistent with the freedom s. 92 confers upon transportation as a form of inter-State commerce. But if the charge is imposed on the inter-State operation itself then it must be made to appear that it is such an attempt. That it is so must be evident from its nature and character. *Prima facie* it will present that appearance if it is based on the nature and extent of the use made of the roads (as for example if it is a mileage or ton-mileage charge or the like); if the proceeds are devoted to the repair, upkeep, maintenance and depreciation of relevant highways, if inter-State transportation bears no greater burden than the internal transport of the State and if the collection of the exaction involves no substantial interference with the journey. The absence of one or all of these *indicia* need not necessarily prove fatal, but in the presence of them the conclusion would naturally be reached that the charge was truly compensatory.

The expression 'a reasonable compensation or recompense' is convenient but vague. The standard of 'reasonableness' can only lie in the severity with which it bears on traffic and such evidence of extravagance in its assessment as come from general considerations. In speaking of 'relevant highways' it is intended to mark the importance of recognizing the size of Australian States, as distinguished from most American States. It is for the use of certain roads that it is supposed the recompense is made, and not for the use of roads of an entirely different character many hundreds of miles away. It may of course be immaterial if the charge is based on average costs of road care, repair and maintenance, which may well give a lower rate than if it were based on the costs in connection with the highway used. It does not seem logical to include the capital cost of new highways or other capital expenditure in the costs taken as the basis of the computation. It is another matter with recurring expenditure incident to the provision and maintenance of roads. The judgment whether the charge is consistent with the freedom of inter-State trade must be made upon a consideration of the statutory instrument or instruments by and under which it is imposed. The fault with s. 18 (4)–(6) is that these provisions confer an authority which *ex facie* gives no assurance that the charge imposed under it will conform with what amount to constitutional necessities. It is needless to consider whether this necessarily means that the sub-sections are wholly void, so that it would be unnecessary to wait to see what is done under them. For in any case, they fall with the licensing provisions.

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

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

“ But very different considerations arise when the State demands payment in respect of the use of a physical thing which the State provides although under no legal obligation to provide it. No one would doubt that, if coal is discharged from inter-State colliers through handling equipment and bins established by the State, the State may impose a proper charge by way of recompense or remuneration. But a State may build a wharf which inter-State ships cannot well do otherwise than use. Yet it seems undeniable that the State can require the ships to pay wharfage provided the wharfage charge is genuinely fixed as a fair and reasonable compensation for the use of the wharf. Government aerodromes constructed and equipped for traffic by air may be indispensable to inter-State aerial navigation; but because charges are levied for the use of them no one would say that air navigation among the States is not free. The fact is that we find nothing inconsistent with our conception of complete freedom of inter-State trade in the exaction, for the use of physical things like the foregoing, of a pecuniary charge, if in truth it is no more than a reward, remuneration or recompense. But when an exaction is compulsory, it must possess characteristics which distinguish it from a mere tax, falling upon inter-State trade. It is for this reason that the relation which the amount of the exaction bears to the actual use of the facility should appear, and that there should not be evidences of an attempt to achieve objects that go beyond the recovery of fair compensation for the actual use made of the facility. We are accustomed to the levy of charges for the use of such things as have been given as examples, coal-handling equipment, wharves and aerodromes, and accordingly we see in it nothing incongruous with freedom of trade. We are not accustomed to charges being made for the use of ordinary bridges; but it would strike few minds that there was any impairment of freedom of inter-State trade in placing a toll upon the use of some great bridge erected as a major engineering work, like that over Sydney Harbour. Must a highway be treated by the State for the purposes of s. 92 as in a different category from wharves, bridges, aerodromes and special constructional works which inter-State trade uses? A modern highway is in fact a constructional work of a very substantial character indeed. It cannot be distinguished from the facilities that have been mentioned either in cost, the technical and engineering skill it demands or the general purpose it serves. It is an engineering work of a major description designed to carry heavy motor vehicles between distant places. There is little exaggeration in saying that its association with the highways of the nineteenth century is a matter of history rather than of practical identity or resemblance. But highways have in Australia a very different history from wharves and analogous constructional works. At the time when s. 92 was enacted, with very few, if any, exceptions the highways of Australia were available without charge for the use of all persons as of right. It has not always been so in England. Even before the period of statutory tolls it was competent for the Crown to grant a franchise to take tolls over a road in consideration of the grantee keeping the road in repair: see *Lord Pelham v. Pickersgill* (1787) 1 T.R. 660 (99 E.R. 1306). Then of course there came the long history of turnpike roads governed by turnpike trusts constituted by statute. Is it an anterior assumption of s. 92 that the roads of a State whatever form they take must be available without charge to all kinds of inter-State traffic? Is such an assumption part and parcel of the freedom which the provision guarantees? To give an affirmative answer to this question implies that in reference to inter-State commerce the law, that is to say the State law conferring upon the subjects of the Crown a right of free passage over highways is unchangeable. There seems to be no constitutional reason why this should be so. What is

essential for the purpose of securing the freedom of inter-State transportation by road is that no pecuniary burden should be placed upon it which goes beyond a proper recompense to the State for the actual use made of the physical facilities provided in the shape of a highway. The difficulties are very great in defining this conception. But the conception appears to be based on a real distinction between remuneration for the provision of a specific physical service of which particular use is made and a burden placed upon inter-State transportation in aid of the general expenditure of the State. It seems necessary to draw the distinction and ultimately to attempt to work out the conception so as to allow of a charge compatible with real freedom because it is no more than a fair recompense for a specific facility provided by the State and used for the purpose of his business by the inter-State trader."

Williams J. spoke to a somewhat similar effect. Fullagar J. (93 C.L.R. at 208) said:

"Nor is it any denial or qualification of this freedom to come and go to say that nobody is bound affirmatively to facilitate my coming and going or to supply me with the means of coming or going. Nobody is bound to provide for me a ship or an aeroplane or a motor car. Nor is anybody bound to provide for me a wharf or an aerodrome or a parking station. If a Government or a governmental instrumentality does provide any of these things, it is clearly entitled to make at least a reasonable charge for the use thereof, and the making of such a charge cannot be said to interfere with my freedom to come and go: cf. *Melbourne Harbour Trust Commissioners v. Colonial Sugar Refining Co. Ltd.* [1926] V.L.R. 140. This, however, is, of course, subject to the proviso that the charges made do not involve any discrimination against me as an inter-State trader or traveller. If they do, they assume at once a different aspect, and can no longer be regarded as merely charges for a service rendered. They impose a special burden on me as an inter-State trader or traveller, and they do therefore interfere with my freedom to come and go.

\* \* \* \* \*

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

Such roads, as I have said, serve directly or indirectly the needs of the community as a whole. But, because the users of vehicles generally, and of public motor vehicles in particular, stand in a special and direct relation to such roads, and may be said to derive a special and direct benefit from them, it seems not unreasonable that they should be called upon to make a special contribution to their maintenance over and above their general contribution as taxpayers of State and Commonwealth. Among those who so use those roads are persons who use those roads exclusively for the inter-State carriage of goods or passengers. Does s. 92 mean that such persons must be exempt from making any contribution towards the maintenance of the roads which they use? I do not think it does. It does not appear to me to be inconsistent with anything I have said above to say that such persons may be called upon to make a contribution towards the cost of

maintaining something from which they may fairly be regarded as deriving a benefit over and above that which is derived by the community as a whole. In making such a contribution they are not really paying a price for their coming and going. They are paying a price for something which makes their coming and going safer, easier, or more convenient than it would be if the highways which they use were allowed to fall into disrepair or decay. So regarded, the exaction of a contribution towards the maintenance of the highways of a State does not appear to me, necessarily and of its very nature, to offend against s. 92. Such a view derives support, I think, from the view taken in a considerable number of cases in the United States, although, as has often been pointed out, there is no s. 92 in the Constitution of the United States, and the question of the validity of such charges arises there in connection with a constitutional doctrine which has not been adopted here.”

Kitto J. expressed, and gave clear and detailed reasons for, the view that the States could *not* validly make any charge for the use made of roads by vehicles engaged in inter-State trade. Taylor J. also expressed similar reasoned views but he said that in cases where by reason of their weights and construction vehicles are calculated to work destruction of such a nature to roads that they ought not to be on them at all, the States may validly prohibit their use on the road. In such cases it is legitimate for the States to stipulate for payment of a charge as a condition of relaxing such prohibition.

In *Armstrong v. State of Victoria* No. 2 99 C.L.R. 28 the majority Dixon C. J., McTiernan, Williams and Fullagar JJ. (Webb, Kitto and Taylor JJ. dissenting) repeated their views and amplified them. In that case the High Court had an actual statute to consider, framed within the principles adumbrated *obiter* in *Hughes and Vale* No. 2. The Act there under consideration was for practical purposes identical with the Act which is being considered in the present case. Evidence was called whose nature appears by inference from the judgments. The Act was held valid by the majority. The learned Chief Justice (in his judgment with which McTiernan J. agreed) pointed out that the liability to pay accrued from the actual use of the road and the amount was quantified by the length of the journey. Payment was not exacted as a condition precedent to carrying the goods or entering upon or continuing the journey (p. 40). At p. 43 he observed:

“When it is said that a toll upon a bridge, to take the example mentioned, does not burden inter-State commerce it does not mean that the payment is not borne by the traffic or that the payment is so small that its incidence cannot be felt. It means that the payment is of such a kind that it is no impairment of the freedom of commerce or of movement if you are required to make it. . . .”

After referring to tolls on bridges, charges on aerodromes, and tonnage rates on ships berthing at wharves, he says,

“Although the payments are exacted under the authority of the law from parties engaged in inter-State commerce who must incur the charges if they are to pursue the inter-State transactions, yet there is no detraction from the freedom of inter-State commerce. The reason, as I venture to suggest, simply is that, without the bridge, the aerodromes and airways, the wharves and the sheds, the respective inter-State operations could not be carried out and that the charges serve no purpose save to maintain these necessary things at a standard by which they may continue. However it may be stated, the ultimate ground why the exaction of the payments for using the instruments of commerce that have been mentioned is no violation of the freedom of inter-State trade lies in the relation to inter-State trade which their nature and purpose give them. The reason why public authority must maintain them is in order that the commerce may use them, and so for the commerce to bear or contribute to the cost of their upkeep can involve no detraction from the freedom of commercial

intercourse between States. It is not because the charges are consensual for plainly they are imposed by law; if the conditions are fulfilled that the law prescribes, a liability arises. It is not because they are based on property. Indeed the instruments of commerce in question are public works often subject to and complicated by a combination of authorities.

Once however it appears that, under colour of the law, the charge is imposed not for the purpose of obtaining a proper contribution to the maintenance and upkeep of the work but for the purpose of adversely affecting the inter-State commerce, then whatever its guise it is called in question by s. 92 as an infringement of the freedom of trade commerce and intercourse among the States."

After incorporating the passage quoted above from the judgment in *Hughes and Vale No. 2* the learned Chief Justice continued:

"The passage which as I have already said must be read into this judgment from that in *Hughes and Vale Proprietary Ltd. v. State of New South Wales (No. 2)* concludes with a reference to the difficulties necessarily arising in working out the distinction between, on the one hand, recompense or remuneration for the provision of a specific physical service of which particular use is made and on the other hand, a burden placed on inter-State transportation in aid of the general expenditure of the State. The careful argument in this case on the part of the plaintiffs was of course not directed to diminishing or solving the difficulties; but it had a particular value as an exposure of latent questions to which any practical measure must give rise. Nevertheless I am confirmed in the view that it is 'necessary to draw the distinction and ultimately to attempt to work out the conception so as to allow of a charge compatible with real freedom because it is no more than a fair recompense for a specific facility provided by the State and used for the purpose of his business by the inter-State trader'."

Williams J. agreed and confirmed his views as set out in the joint judgment in *Hughes and Vale No. 2*.

Fullagar J. said (at p. 82):

"What is permissible (whether you call it a 'compensation' or a 'recompense' or what you will) is the exaction of a contribution towards the maintenance of something which can be used as of right. The distinction is, to my mind, both real and important. For, if what is permissible were of the former character, the States must obviously be very much at large. If, on the other hand, what is permissible is of the latter character, the powers of the States are defined, and the Courts have a power of investigation and ultimate control, which can be exercised to prevent an infringement of s. 92, the final question in each case being whether what is exacted is in truth and in substance, and is no more than a contribution towards the maintenance of public highways."

And again at p. 83:

"Every one of the indicia (*i.e.*, as suggested in *Hughes and Vale 2*) is present here. The charge is based on ton-mileage, and is thus related on its face to the nature and extent of the use made of roads. Section 30 of the Act requires all moneys received by the board to be paid into the Country Roads Board fund to the credit of a special 'Roads Maintenance Account' and money to the credit of that special account is to be applied only to the maintenance of public highways. Inter-State transport bears no greater burden than the internal transport of the State. And the collection of the charge involves no interference with any inter-State journey. It is to be added that the charge is 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. 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. Anything even approximating to mathematical accuracy is obviously out of the question, but the evidence does, I think, establish that there is what Frankfurter J. (in *Capitol Greyhound Lines v. Brice* 339 U.S. 542 at 550) has called 'a relationship between what is demanded and what is given by the State'. It shows, I think, that there has been a 'real attempt to fix a reasonable recompense or compensation'."

The last of this important trilogy was *Commonwealth Freighters Proprietary Ltd. v. Sneddon* 102 C.L.R. 280, which dealt with the validity of the New South Wales Act here in question. The Act was unanimously held to be valid. The learned Chief Justice restated his previous views. He concluded at 293:

"In *Armstrong's* case I considered that notwithstanding the unsatisfactory basis of the information upon which, in the circumstances I have summarised, the conclusion must rest, the realities of the case clearly were that a contributory charge had been levied for the maintenance of highways sufficiently uniform in its incidence, reasonably proportionate to the wear and tear involved and otherwise conforming with the tests accepted by a majority of the judges for a charge consistent with true freedom in carrying on trade, commerce and intercourse."

And again at p. 294,

"The basal reason in the distinction upon which these cases rest is that the constant flow of traffic involves equally constant recurring charges to uphold the surface on which it continues to travel and that it is no impairment of its liberty so to travel if a charge is levied commensurate with the use and attrition for the purpose of upholding the surface."

Kitto and Taylor JJ. held that the Court was bound by *Armstrong's* case and therefore no longer dissented.

Menzies J. did not question the rationale of *Armstrong's* case. But he considered and refuted the argument that since the Victorian case of *Armstrong* had been decided in the light of factual evidence as to the reasonableness of the charges as they related to the Victorian roads, this New South Wales Act could not be properly held valid without similar evidence; and that since the charges in the two acts were identical, the Victorian evidence supporting the charges gave a *prima facie* indication of unreasonableness, since charges which were reasonable in respect of Victoria were unlikely to be reasonable in respect of New South Wales. He said at p. 301:

"Any decision that a statute is constitutional or unconstitutional, however it may have been reached, is necessarily one of law and is, in the absence of special circumstances, of binding authority. Where such a decision has been reached simply by process of construction and comparison no difficulty arises about the binding authority of the decision in subsequent cases. Where, however, the decision has depended in part upon findings of fact there is room for argument. Where the facts which have entered into the decision were ascertained by judicial notice there would seem to be no sound reason for not according the decision the same authority as if it had depended upon nothing more than a comparison between the challenged legislation and the constitution because the only matters of which judicial notice can be taken are those considered too notorious to require proof, that is, matters beyond controversy. Where, however, the facts which have entered into the decision have been ascertained from evidence there is more room for doubt whether the decision so reached has binding authority except in cases where precisely the same facts are established. This problem, like the more fundamental problem of the place of evidence in constitutional cases, is not a matter for

unnecessary generalization, because it is possible to envisage cases where a decision based upon findings of fact could properly be called into question, but to deal with the case in hand I am not in doubt that if after taking evidence in an action the Court has decided that a State law leaves trade, commerce and intercourse among the States absolutely free and so does not contravene s. 92, its decision on that point of law so long as it stands puts the matter at rest. Where a decision concerning validity has been reached upon findings of fact it would, of course, be open to the Court to consider the matter again upon the representation that the significant facts are no longer as they were, but this is another matter which need not be considered here."

Those observations seem to their Lordships, with respect, to contain good sense. But in this area sharply defined questions of fact in the foreground blend imperceptibly in the middle distance with the broader and more distant matters of which a tribunal may take judicial notice. And as at present advised it seems to their Lordships that these are matters peculiarly within the province of the High Court and they therefore make no further comment on them.

There is an interesting judgment of Windeyer J. (at p. 302) who had not been concerned with previous Transport Cases, in which he examines and adopts their rationale, supporting it by its accordance with "some historic doctrines of English law and with old practices which can, I think, be regarded as in harmony with the freedom which s. 92 assures". He then went on to consider from medieval times the situation with regard to highways, bridges, ferries and tolls.

Three later cases were cited to their Lordships, *Boardman v. Duddington* (104 C.L.R. 456), *Breen v. Sneddon* (106 C.L.R. 406) and *Allwrights Transport Ltd. v. Ashley* (107 C.L.R. 662) in which the High Court followed the same line of reasoning. They added little or nothing to the argument save in so far as the appellants' counsel claimed *Allwrights* case as an indication of the undesirable lengths to which the heresy which he was attacking could go. There it was held that it was not relevant that the total amount of charges collected in respect of a particular highway exceeds the amount expended on its upkeep. "What matters," said the joint judgment, "is that a rate is adopted by the State . . . and is expended only upon the maintenance of highways, using the word 'maintenance' in the widest sense."

Thus there has been evolved a legal concept, which has become established by the authority of the High Court in several decisions. It has been worked out by careful, thoughtful judgments in which those of the learned and very distinguished Chief Justice Sir Owen Dixon have naturally played the leading part. It is conceded that, broadly speaking, it is fair and reasonable in its practical effect. But the appellants rightly contend that if it offends against the charter of freedom contained in s. 92 it cannot stand. And naturally Mr. Deane for the appellants largely bases his arguments on the clear and careful judgments of Kitto J. and Taylor J. who, as long as it was open to them, maintained that such exactions from inter-State trade were inconsistent with the absolute freedom conferred by s. 92.

Mr. Deane's argument runs thus. Admittedly there is some qualification of the words absolutely free; and freedom of inter-State traffic under s. 92 has certain implied restrictions. Traffic must be regulated by rules; and if an exaction is truly regulatory, *e.g.*, if registration is necessary for control of traffic and a compulsory payment for licences goes towards paying the costs of registration machinery, this does not offend s. 92. But the charge under consideration cannot be described as regulatory. Nor in fact do the supporters of its validity rely on its regulatory nature. Again there is admittedly a right to charge for facilities. But this is limited to charges based on a right of property with a consequent power to exclude. Railways (or aerodromes) which are owned by the State and from which the public may by right of property be excluded are

thus different from highways where the public (including inter-State traffic) go as of *right*. This right is one of which the trader is a beneficiary, and if the inter-State trader can be charged for this he may be charged for all the benefits provided to him by the State. Any charge for a right to go on the roads is irreconcilable with freedom. (See Kitto J. *Hughes and Vale No. 2* 93 C.L.R. at 221-3; Taylor J. at 237-8.) This is a mere tax on the movement of the trader, movement which he is entitled to make as an integral and all important part of his inter-State trade.

“If it is conceded that a person enjoys a constitutional immunity from all charges upon his going inter-State by road, I do not see how it can be asserted, without contradicting the concession, that that person is not immune from a charge imposed and measured by reference to an aspect, or a necessary incident or consequence, of his going inter-State by road.”

(per Kitto J. *Armstrong's case* at 86.) To impose such a charge, it is argued, is inconsistent with *Hughes and Vale No. 1*.

The arguments thus shortly summarised are formidable and their Lordships have given them careful consideration. But in their opinion they do not invalidate the legal concept contained in the judgments of Sir Owen Dixon and other members of the Court in the three relevant Transport Cases. The appellants' argument assumes that if the charge is not regulatory in the strict sense and is not a charge for facilities in the strict sense, it cannot be made. It assumes that the qualifications which admittedly have to be made in the words “absolute freedom”, cannot include a charge which does not come strictly within either of those categories. It denies a right to charge towards the upkeep of something which the trader can use as of right. Yet there is admittedly a framework within which the freedom operates, a framework which one may describe in the apt words of Kitto J. in *Breen v. Sneddon* (106 C.L.R. 406 at 415), “as circumscribing an individual's latitude of conduct in the interests of fitting him into a neighbourhood—a society, membership of which entails, because of its nature, acts and forbearances on the part of each by which room is allowed for the reasonable enjoyment by each other of his own position in the same society”. This framework partly consists of rules (and charges therefor) of strictly regulatory nature, and partly consists of charges for facilities (*e.g.*, railways and wharves). One may ask why the framework should not also consist of a duty to contribute directly to the cost of that which the trader, while using the highway as of right, consumes by the wear and tear which he inflicts on it. The framework within which the trader's freedom operates is nowhere indicated with any precision or at all. Its extent is a matter of inference and common sense. Mr. Deane argues *in terrorem* that the judgments attacked might be extended to cover charges for other matters of which the trader should properly be a beneficiary in exercising his freedom under s. 92. But the Transport Cases have rightly been treated in the High Court as cases in isolation from other aspects of the freedom of inter-State trade.

Their Lordships accept the judgments of Sir Owen Dixon and the other judgments of the High Court to the like effect in the three relevant Transport Cases as being a correct development and exposition of the law. In their view the Act here in question is valid, and does not on the general point offend against s. 92.

Apart from their general contention the appellants relied on three subsidiary matters.

Mr. Deane argued that since the Act expressly puts a burden on commercial vehicles (or private vehicles acting commercially) as such, it discriminates against commerce and thus the burden becomes one which offends against the freedom under s. 92, even if a burden on all private citizens' and traders' vehicles alike would not do so. Their Lordships cannot accept that contention. Once it is established that the charge towards the wear and tear of the roads is allowable as part of the framework within which the freedom of s. 92 runs, it does not cease to be so because

it is put only on that section of the transport which causes the heaviest wear and tear. If it is not a burden on freedom within the meaning of s. 92, it does not become one merely because it is (on a common sense computation and with no discriminatory malice) laid on those who may be considered the proper persons to bear it.

It was further argued that, granted the general right to impose such a charge in certain circumstances, there was no evidence to support this particular charge and the onus should be on the State in this connection. Their Lordships would refer to their comment on the passage from the judgment of Menzies J. quoted above.

Finally it was argued (by Mr. McLelland) that since a factual situation was necessary to the validity of these charges and since, even assuming that it now existed, yet it might not continue to exist, the Act was invalid. For when an act depends for its validity on transient circumstances it is valid *only* if it refers to them; and it is invalid, if it is passed in general terms, thus claiming a permanence to which it is not entitled. In support of this proposition he referred to various decisions in the United States of America. The hypothesis on which the proposition is based is that the cost of road maintenance in New South Wales may diminish to such an extent that the charge exacted can no longer be regarded as bearing a reasonable relationship to the cost of road maintenance and the wear and tear of traffic. Whether this attractive hypothesis has sufficient relation to reality and instils into the factual situation any element of transience, their Lordships do not venture to estimate. This again seems to be a matter peculiarly within the province of the High Court and their Lordships are content to accept their view of the matter.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay to the respondents their costs of this appeal.

In the Privy Council

---

**FREIGHTLINES AND CONSTRUCTION  
HOLDING LIMITED**

v.

**THE STATE OF NEW SOUTH WALES  
AND THE COMMISSIONER OF MOTOR  
TRANSPORT AND T.N.T. (SYDNEY) PTY.  
LIMITED AND OTHERS**

---

DELIVERED BY  
LORD PEARCE