

Case 66 - 27, 1961

SECRET
COMMONWEALTH OF AUSTRALIA
68585

IN THE PRIVY COUNCIL

No. 3 of 1961

ON APPEAL

FROM THE FULL COURT OF THE HIGH COURT OF AUSTRALIA

BETWEEN :

CHARLES MacDONALD WHITEHOUSE
(Plaintiff) ... Appellant

- and -

10 THE STATE OF QUEENSLAND, THOMAS
ALFRED HILEY and ALAN WHITESIDE
MUNRO (Defendants) ... Respondents

- and -

THE ATTORNEY-GENERAL OF THE
COMMONWEALTH OF AUSTRALIA ... Intervener

CASE FOR THE RESPONDENTS

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INTRODUCTORY: (PARAGRAPHS 1 - 5)

20 1. This is an appeal, by special leave granted by Her Majesty in Council by Order in Council dated the 3rd August 1960, from a judgment of the High Court of Australia (Fullagar, Kitto, Taylor and Menzies JJ., Dixon C.J., McTiernan and Windeyer JJ. dissenting) delivered on the 26th February 1960 whereby the Respondents' demurrer to the whole of the Appellant's Statement of Claim was allowed, and the Appellant was ordered to pay the costs of the demurrer. pp.21-22 p.20

2. Two issues are raised in this appeal, namely:-

(1) Whether the Appellant is prevented from bringing this appeal by reason of the provisions of Section 74 of the Constitution of the Commonwealth of Australia, and,

30 (2) If the appeal is properly brought, whether Section 13(1) of The Liquor Acts, 1912 to 1958 of the State of Queensland is invalid because it

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imposes a duty of excise in contravention of the provisions of Section 90 of the Constitution of the Commonwealth of Australia.

3. (i) Section 74 of the Constitution of the Commonwealth of Australia provides as follows:-

"No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

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The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

..... "

- (ii) Section 90 of the said Constitution provides as follows:-

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"On the imposition of uniform duties of customs the power of the parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty

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lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the Thirtieth day of June One thousand eight hundred and ninety-eight, and not otherwise."

(iii) Section 93 of the said Constitution provides as follows:-

10 "During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides -

20 (i) The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State;

(ii) Subject to the last subsection, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs."

30 (iv) Section 51 of the said Constitution provides as follows:-

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to -

.....

(ii) Taxation; but so as not to discriminate between States or parts of States:

40 (iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:

..... "

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(v) Section 52 of the said Constitution provides as follows:-

"The Parliament shall subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to -

(i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes: 10

(ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:

(iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament." 20

(vi) Section 107 of the said Constitution provides as follows:-

"Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State as the case may be." 30

4. Section 18 of The Liquor Acts, 1912 to 1958 of the State of Queensland provides as follows:-

"(1) The fees which shall be charged, levied collected, and paid annually for the following licenses under this Act shall be respectively:- 40

(i) For every licensed victualler's license and every wine-seller's license - a sum equal to four per centum of the gross amount (including all duties thereon) paid or payable for or in respect of all liquor which

during the twelve months ended on the last day of June in the preceding year was purchased or otherwise obtained for the licensed premises;

(ii) For every packet license - ten pounds for every two hundred tons or part of two hundred tons of the registered tonnage of the vessel but not exceeding forty pounds;

10 (iii) For every spirit merchant's license - one hundred and twenty five pounds, and in addition, a further sum equal to four per centum of the gross amount (including all duties thereon) paid or payable to the licensee for all liquor which during the twelve months ended on the last day of June in the preceding year was sold or otherwise disposed of under such spirit merchant's license to persons other than persons licensed, at the time of the sale or disposal otherwise, under this Act or
20 any Act of law of any other State or of any Territory of the Commonwealth to sell liquor;

(iv) For a club license - a sum equal to four per centum of the gross amount (including all duties thereon) paid or payable for or in respect of all liquor which during the twelve months ended on the last day of June in the preceding year was purchased or otherwise obtained for the licensed
30 premises;

(v) For every bottler's license - seven pounds ten shillings;

(vi) For a billiard license or a bagatelle license - ten pounds for each and every billiard or bagatelle table.

(2) There shall be charged, levied, and collected from and paid by a registered brewer an annual fee not exceeding four per centum of the gross amount (including any duties thereon) paid or payable to such registered brewer for all liquor which during the period of twelve months ended on the last day of June in the preceding year was sold or disposed of by him to persons other than persons licensed under this Act or any Act or law of any other State or of any Territory of
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the Commonwealth at the time of the sale or disposal otherwise, to sell liquor.

(3) (Repealed by the Liquor Acts Amendment Act, 1958, S. 7.)

(4) For the purpose of enabling the Commission to assess the annual fees payable under this section, every registered brewer, licensed victualler, wine-seller, licensed spirit merchant, and licensed club shall, not later than the thirty first day of August in each and every year, make and if so prescribed, as prescribed, to the Commission in the prescribed form, or a form to the like effect, containing the prescribed information, a return in respect of all liquor purchased or otherwise obtained for his licensed premises, or, according as the return requires from the class of licensees to which a licensee belongs, and in the case of every registered brewer, sold or otherwise disposed of to persons other than persons licensed under this Act or any Act or law of any other State or of any Territory of the Commonwealth at the time of the sale or disposal otherwise, to sell liquor. 10 20

Every such return shall contain such information as may be prescribed, and the Commission may from time to time require such further information to be supplied as it deems necessary. Different returns may be prescribed for different classes of licensees. 30

A person to whom this subsection applies, who fails, within the time and otherwise as prescribed, to make a return complying with the provisions of this Act in that behalf in every respect, shall be liable to a penalty of not less than ten pounds nor more than one hundred pounds.

Such return as aforesaid shall be verified by statutory declaration, and, moreover, the Commission may require the holder of such license or any other person to present himself before the Commission for examination on oath concerning any particulars or concerning such other matters as it shall deem relevant. 40

Every return as aforesaid shall, unless the Commission otherwise orders, contain or be accompanied by a certificate in the prescribed form by a person who has audited the books, accounts and records of the business to which the return relates certifying that the information contained in the return is correct according to such audit.

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In the case of a licensed club failing to make any return required by this sub-section within the prescribed time, each and every member of the committee of management or other governing body thereof, by whatever name called, shall be liable to the penalty prescribed by this section.

(5) (i) The Commission shall assess the amount of any fee where such fee is to be assessed or fixed under this Act.

(ii) The Commission shall assess such sum as it thinks reasonable in any case -

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(a) Where no information is produced to the Commission, or the information produced is incomplete or insufficient to enable the Commission to determine the gross amount paid or payable for liquor purchased or sold or disposed of, as the case may be; or

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(b) Where there is no previous period of twelve months or information covering a period of twelve months cannot be produced; or

(c) Where a cancelled or surrendered license has been removed to another place or locality.

(iii) Where any license, in respect of which a fixed annual fee is payable is issued for a less period than one year a proportionate amount only of the particular fee chargeable on the particular kind of license, shall be payable by the licensee.

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(6) As soon as conveniently may be after an assessment has been made by the Commission, the Commission shall in the manner prescribed cause notice in writing of the assessment to be given to every person liable to pay the amount of the assessment.

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- (7) Payment of such assessment shall be demanded within such time as the Commission considers reasonable, and such notice as aforesaid shall state the time within which the assessment must be paid.

Any payment in respect of an assessment so demanded as aforesaid may be made to the Commission at Brisbane or to the clerk of petty sessions at a place appointed for holding courts of petty sessions in the district in which the premises concerned are situated, and if payment is not made within the time specified in the notice the Commission or such clerk of petty sessions may recover the amount of the assessment as a debt before the magistrates court for the district and notwithstanding that the amount of such assessment exceeds six hundred pounds: 10

Provided that, in the case of every license in respect of which a fixed annual fee is payable, the annual fee shall be paid by the licensee to the Commission at Brisbane or to the clerk of petty sessions aforesaid not later than the thirty first day of October in each year, and in default of payment the Commission or such clerk of petty sessions may recover same as a debt before the magistrates court for the district. 20 30

Notwithstanding anything herein contained, the Commission may at any time forfeit any license in respect of which any fee imposed under and in accordance with this section has not been duly paid and for the purposes of such forfeiture Section 47B of this Act, with all necessary adaptations thereof, shall extend accordingly.

- (8) (a) The first levy of fees under this section shall be for the year commencing on the first day of July, one thousand nine hundred and thirty six, and each subsequent levy shall be for each succeeding year. 40
- (b) The first annual period for which returns on which assessments are to be based are to be furnished shall be the

period of twelve months ending on the thirtieth day of June, one thousand nine hundred and thirty six, and each subsequent annual period shall be for the period of twelve months ending on the thirtieth day of June of each succeeding year."

The provisions of certain other sections of the said Acts are set forth in an Appendix to this Case.

- 10 5. The Appellant's statement of Claim as amended delivered the 19th December 1958 alleged the following facts:- pp. 4-6
- (a) The Appellant is and was at all material times the holder of a Licensed Victualler's Licence in respect of premises at Brisbane in the State of Queensland pursuant to the provisions of the said Acts. p.4, ll.15--20
- 20 (b) The Appellant, in the course of conducting his business as a Licensed Victualler, purchases liquor within the meaning of the said Acts for re-sale to the public in the course of such business, and sells such liquor to the public. p.4, ll.27--33
- 30 (c) All liquor purchased by the Appellant as aforesaid is liquor coming within the terms of Section 18(1) of the said Acts, being liquor purchased or otherwise obtained for the licensed premises of the Appellant, and the same is purchased only for re-sale and is in fact resold, other than an insignificant quantity of such liquor which is requisitioned by the cook at the hotel and added to foods and supplied to customers in that form. p.5, ll.8-16
- (d) Since 1956 the Licensing Commission, constituted under the said Acts, has charged, levied and collected, and the Appellant has been required to pay and has paid or caused to be paid, by way of licence fees in respect of the said hotel the sum of £4,117.12.10 calculated on a percentage basis on such liquor as aforesaid in accordance with the said provisions of Section 18(1) of the said Acts. p.5, ll.23--30
- 40 (e) The Appellant intends to continue to carry on the business of a Licensed Victualler and to sell and dispose of liquor in the course of such business. p.5, ll.36--38
- (f) The Respondents, by the said Licensing Commission, intend to continue to require the Appellant to p.5, ll.39--44

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pay the aforesaid fees calculated on a percentage basis and to prevent the Appellant from carrying on his said business unless such fees are paid by the Appellant.

p.6,11.7-9

The statement of claim claimed, inter alia, a declaration that the provisions of Section 18(1) of the said Acts are invalid.

pp.7-9

With their defence, the Respondents entered a demurrer to the whole of the statement of claim on the ground that the said Section 18(1) was not invalid and did not impose a duty of excise.

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p.9,11.16-27

DECISION AND REASONS OF THE HIGH COURT:
(PARAGRAPHS 6-17)

6. The said demurrer was heard and determined by the High Court of Australia on the 21st and 22nd May 1959 and the 26th February 1960 immediately after the similar case of Dennis Hotels Pty. Ltd. v. State of Victoria (1960) A.L.R.129 (hereinafter referred to as "the Victorian case"). The Respondents' demurrer was allowed with costs by a majority of the Court (Fullagar, Kitto, Taylor and Menzies JJ., Dixon C.J., McTiernan and Windeyer JJ. dissenting).

p.20

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7. The learned Judges except for Dixon C.J., did not give detailed reasons for their decisions but concluded that the case was in pari materia with the Victorian case and relied upon the reasoning of their judgments therein.

p.10,11.24-28

8. Dixon C.J. held that the Queensland legislation differed in not unimportant respects from that of Victoria but that the "fees" charged on licensed victuallers constituted a tax which was a duty of excise and accordingly outside the legislative powers of the State by reason of Section 90 of the Constitution. The provisions of Section 18 of the Liquor Acts operated to impose on liquor at a point in the course of its distribution to the consumer a tax of four per centum on its wholesale value. The fees were a tax calculated by reference to the purchases or sales of liquor by wholesale. The legislation showed a system that the liquor when purchased had to bear the tax, so that, with certain minor exceptions, liquor could not go forward through normal channels of distribution to the consumer without bearing this tax. He held that the essence of an excise is that it taxes goods. However, he held that the system of legislation showed that it was the

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p.12,11.30-34

p.13,11.27-32

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p.14,11.20-47

- goods that were taxed, and the tax was not aimed at the man who was taxed. The machinery of the legislation was based on the reality of the connection between the business of the person taxed and the distribution of the liquor. There was an indirectness in the tax because the percentage naturally formed part of the cost of the liquor and carried all the characteristics of an excise, including the susceptibility of being passed on or the natural tendency to be regarded as cost to be recovered "from" the goods. The tax was not prevented from being an excise because it could be described as a payment for the grant by the State of the monopoly right of distributing liquor. The tax was not levied upon production as such, but Section 90 of the Constitution was not limited to taxes imposed only at the point of production, as had been previously stated by the learned Chief Justice in Matthews v. Chicory Marketing Board (1938) 60 C.L.R. 263 and Parton v. Milk Board (Victoria) (1949) 80 C.L.R. 229. For these reasons and those given in the Victorian case the demurror ought to be overruled.
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9. Taylor and Menzies JJ. in their judgments held that there was no material difference from the Victorian case by reason that licences in Queensland were granted indefinitely (but subject to forfeiture) rather than annually.
10. The reasons for the judgments in the Victorian case are summarised in the following paragraphs.
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11. Dixon C.J. held that an examination of the licensing system in the liquor trade showed that there was a tax "upon" goods of a kind which tended to be recovered by the person paying it in the price he charged for the goods which bore the imposition. This was an excise duty. The legislation must be considered as a whole and showed that the tax fell upon the goods: no difference was caused because there was a quasi-monopoly value in the grant of a liquor licence. The fee of six per centum on the purchases of the previous year had to be paid on the annual renewal of the licence and it was immaterial who paid the fee. A detailed examination of the different forms of licence showed that the distribution of liquor was treated as a continuous operation and taxed accordingly. Although the provision enabling part of the burden of the tax to be placed on a landlord suggested that the Legislature intended that the tax would not be incorporated in the price of liquor sold to the customer the tax remained one calculated directly on the price of goods and essentially associated with

p.15,11.9-16

p.15,11.17-26

p.15,11.27-48

pp.18-19

their quantity and value. It was immaterial that the legislation imposing the tax also provided for the licensing of premises for the consumption of liquor. Section 90 dealt with the demarcation of authority between Commonwealth and State to tax commodities. The six per centum fee was a tax upon liquor and was consequently an excise upon liquor.

12. McTiernan J. held that the fees had the indicia of taxation and should not be regarded as consideration for the rights gained by the licensees. A tax was a duty of excise when payable on or in respect of goods and intended or expected to be passed on to the consumer or user. He felt bound to follow the majority decision in Parton v. Milk Board (Victoria) that excise duties were not limited to the point of production. The fees in question were payable on or directly in respect of liquor purchased and were an excise. 10

13. Fullagar J. held that a review of the decisions as to the meaning of "duties of excise" was necessary. The original definition was by Griffith C.J. in Peterswald v. Bartley (1904) 1 C.L.R. 497 at p.509. The fees were a tax. However the distinction between direct and indirect taxes was a misleading test and should not be used. It had been held applicable to Canadian cases but that was because of the specific reference to the Canadian Constitution. The next test was that the tax had to be "upon goods" to be an excise. This meant that the tax was charged by reason of and by reference to the relationship between the taxpayer and the goods. The necessary relation must be found in the production or manufacture of goods (Peterswald v. Bartley). The reference in Section 93 of the Constitution to "duties of excise paid on goods produced or manufactured in a State" was intended to cover all duties of excise and the collocation of "duties of customs" with "duties of excise" in Sections 55, 86, 87, 90 and 93 of the Constitution showed that the duties were analogous. He adopted McTiernan J's. interpretation in Parton v. Milk Board at pp.264-5. The nature of the duties of excise in force in the Australian Colonies before the enactment of the Constitution Act supported his view. Although it was not necessary to his decision, he held that it was not necessarily an element of a duty of excise that it should be measured by quantity or value of goods. The 20 30 40 50

basis of his decision in favour of the defendant was not inconsistent with the Court's decision in previous cases although it did not agree with Dixon C.J's. judgments in Matthew's case and Parton's case. In this case no tax fell upon a producer or manufacturer or affected production or manufacture but the tax fell upon the licensee in respect of past purchases and was accordingly not a duty of excise.

10 14. Kitto J. held that a tax was only a duty of excise if the criterion of liability was the taking of a step in the process of bringing goods into existence or into a consumable state or passing them down the line to the consumer. An excise duty would in general be an indirect tax and would be passed on in the sense used in the cases on the Canadian Constitution. A tax exacted for the mere right to engage in a trade was not a duty of excise. Detailed consideration of the legislation showed that although without the licence sales would not be made, there was
20 no connection between any part of the licence fee and any particular sale. The fee was not a tax on each purchase of liquor. The person making each purchase of liquor did not thereby become liable for any part of the licence fee. The fee was concerned with the person who obtained or renewed the licence rather than with the person who made the purchases and although the purchases had a bearing upon quantum they were not taxed. A.G. for British Columbia v. Kingcome Navigation Company (1934) A.C.45 supported
30 the view that the fees were paid for the advantages of having a licence and were not imposed in respect of commercial dealings. This conclusion was further supported by R. v. Lancashire (1857) 7 E. & B. 839, 119 E.R. 1458 and Jones v. Whittaker (1870) L.R. 5 Q.B. 541.

40 15. Taylor J. held that the licence fee was not paid in respect of the purchase of the liquor or the period in which the liquor was bought but for the licence for the succeeding period. Parton's case enlarged the definition of excise given in Peterswald v. Bartley and applied in later decisions of the High Court of Australia and decided that a tax imposed in respect of some dealing with an article by way of sale or distribution was a tax on production or manufacture and an excise provided it was expected that the tax would be passed on to the purchaser or consumer. However, the fees in this case were dissimilar in many respects to imposts previously
50 held to be duties of excise. They were not a tax on the production or manufacture of liquor or on liquor

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sold. They were payments for the rights granted by the licence. They could not be directly passed on to the consumer, but were only one item in the expense of a licensed victualler's business. The fee was not a purchase tax upon purchases made, for it was the application for renewal of the licence, not the purchase of liquor, that created the liability. This conclusion was borne out by an examination of the detailed working of the legislation which was primarily for the regulation of a trade which the public interest demanded should be strictly supervised. This entailed the creation of a form of monopoly value (see Henriksen v. Grafton Hotel Ltd. (1942) 2 K.B. 184 at p.189). It was agreed that a fixed fee or a fee varying with the assessed annual value of the premises would not be a duty of excise, and there was no significant difference between a fee calculated by reference to that value and one calculated directly by reference to past purchases.

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16. Menzies J. held that Sections 92 and 93 of the Constitution indicated that excise duty was payable on goods produced or manufactured within the Commonwealth. A tax upon a dealing with goods which was not upon production or manufacture was not a duty of excise. There was no indication in the Constitution that the Commonwealth should have the exclusive right to impose all forms of taxation upon goods. A close review of the Australian cases turning on the meaning of "duties of excise" showed that although an excise duty was a tax on the production or manufacture of goods, a tax upon the sale or purchase of goods manufactured in Australia at any point before sale for consumption is to be regarded as a tax on production or manufacture, and that a tax may be an excise notwithstanding that quantity or value of the goods is not the basis of the duty. The licence fees in question, although they might be indirect taxes, were not taxes on sales or purchases but upon persons seeking licences. The fees could not be described as a tax on the production or manufacture of liquor. They were not duties of excise. This followed from the statements in Parton's case by Latham C.J. at p.248 and Dixon J. at p.263. The fees for temporary licences were of a different character and should be considered as duties of excise.

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17. Windeyer J. considered that the licence fees were duties of excise. A tax measured by the

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amount of a commodity bought or sold is prima facie a duty of excise. The Court had always considered the comparison with indirect taxation and the licence fees had all the qualities of an indirect tax. The real nature of the tax depended upon its operation and effect upon the commodity in question as an article of commerce. It was not decisive that the amount to be paid depended on earlier purchases. The way in which a publican's business was conducted showed that he could normally expect to carry it on from year to year, as in England (Sharp v. Wakefield (1891) A.C. 173). The circumstances of the trade were complex but from a business point of view the surcharge represented by the fee would be reflected in the price paid by the consumer. The case when a licence was not renewed was exceptional and should not determine the general rule. An excise duty was not limited to taxes on producers of commodities. The fact that the licence fee was paid for the right to carry on the trade was no ground for saying that it was not a duty of excise: it could be both, and the statement in Browns Transport Pty. Ltd. v. Kropp (1959) 100 C.L.R. 117; (1959) A.L.R. 1 was not to the contrary. The history of the legislation showed that the licence fee was not originally a duty of excise, but had become so by the changes made in 1916. There was nothing in the Licensing Act of Victoria or the historical background of English licensing law which prevented a fee for a liquor licence being a duty of excise.

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LEAVE TO APPEAL TO JUDICIAL COMMITTEE:
(PARAGRAPHS 18 - 19)

18. On 19th July 1960 the Judicial Committee intimated that they would advise Her Majesty to grant the Appellant's Petition for special leave to appeal, and that the question which arose under Section 74 of the Constitution was one which the Judicial Committee did not determine, but left it open to the Respondents to raise upon the final hearing of the appeal. p.21

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19. No application has been made by the Appellant to the High Court of Australia for a certificate under Section 74 of the Constitution.

RESPONDENT'S CONTENTIONS: (PARAGRAPHS 20-30)

20. The Respondents respectfully submit that this is a case to which Section 74 of the Constitution of the Commonwealth of Australia applies because it raises a question as to the limits inter se of the constitutional powers of the Commonwealth and those of a State and for

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that reason the Appellant is not entitled to appeal. Any question as to the application of Section 90 of the Constitution raises an inter se point. Whether a law imposes a duty of excise or not invokes the question whether the law may be imposed by a State or by the Commonwealth which is a question as to the distribution of powers between the two Legislatures. If the law is held to impose a duty of excise, it is within the limits of Commonwealth power and not within the limits of State power. If it does not impose a duty of excise, it is within the limits of State power continued by Section 107 of the Constitution and is outside the limits of the exclusive power granted to the Commonwealth by Section 52 of the Constitution, which is a category of power in itself. The question whether a law imposes an excise is thus a question as to the limits of the constitutional power of the State and a question as to the limits of the exclusive power of the Commonwealth. The terms of Section 74 are not limited to powers of any particular kind, but are wide enough to apply to all questions as to the limits of any powers of the Commonwealth and of the States.

21. It is respectfully submitted that the object of Section 74 was to leave to the decision of the High Court of Australia all questions the product of federalism, but to preserve a right of appeal to Her Majesty in Council in cases where the question as to the limits of constitutional power was not a federal question. The section should be broadly interpreted so as to leave to the High Court the final control over federal questions (Nelungaloo Pty. Ltd. v. The Commonwealth (1952) 85 C.L.R. 545 at 570; O'Sullivan v. Noarlunga Meat Limited (No.2) (1956) 94 C.L.R. 367 at 375). Dixon C.J. in the present case defined the nature of the question arising under Section 90 as "wholly concerned with the demarcation of authority between Commonwealth and State to tax commodities" ((1960) A.L.R. 129 at 136) and any question as to a demarcation or distribution of authority between Commonwealth and States is an "inter se" question within Section 74 (cf. Ex Parte Nelson (No.2) (1929) 42 C.L.R. 258 at 275)

22. When a power is declared to be exclusively vested in the Commonwealth a question can arise as to the limits inter se of the powers of the Commonwealth and those of any State, and the dicta

to the contrary in Nelungaloo Pty. Ltd. v. Commonwealth of Australia (1951) A.C. 34 at 48 and Attorney-General for Australia v. The Queen and The Boilermakers' Society of Australia (1957) A.C. 288 at 324 should not be followed. Dixon C.J. in Nelungaloo Pty. Ltd. v. The Commonwealth supra at 573-4 suggested that a question as to the boundary of one exclusive power, namely that with respect to bounties, was a conspicuous example of an inter se question; the Commonwealth's power in relation to bounties like that in relation to excise is rendered exclusive by Section 90, and it is submitted that no valid reason exists for holding that an inter se question can arise as to the power with respect to bounties whereas none can arise as to the Power with respect to excise. In Ex Parte Nelson (No.2) supra, Dixon C.J. held that questions arising under Section 92 of the Constitution are not inter se questions and the correctness of this view is established by the decisions of the Judicial Committee in James v. Cowan (1932) A.C. 542 at 560; and Commonwealth of Australia v. Bank of New South Wales (1950) A.C. 235 at 292. However, the questions arising under Section 92 are questions as to the scope or effect of a constitutional prohibition on powers and it does not follow from what Dixon C.J. said in Ex Parte Nelson (No.2) supra that when a power is declared to be exclusively vested in the Commonwealth, no question can arise as to the limits inter se of that power of the Commonwealth and the power of a State. Section 92 is not "designed to accomplish that distribution of powers among the respective governments of the Federal system which gives rise to the questions described by Sec.74" (Ex Parte Nelson (No. 2) supra at 275) whereas Section 90 is so designed. Section 74 applies to questions as to the limits inter se of the constitutional powers of any two or more States as well as to questions as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States. In the case of two or more States, there can be no question of the paramountcy of the powers of one State over those of another because the powers of each State are plenary and absolute within its territorial limits (Powell v. Appollo Candle Company Limited (1885) 10 App. Cas. 282 at 290). If Section 74 applies in relation to questions as to the limits of the Constitutional powers of two States, although there is no common boundary between those powers, it should not be held that in relation to questions as to the limits of a power of the Commonwealth and that of a State the section only applies where there is a common boundary between the powers. Any question whether an Act of a State Legislature encroaches beyond a limit imposed upon it

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by the Constitution so as to intrude upon legislative territory reserved to the Commonwealth is an inter se question (Ex Parte King; re Sydney University (1943) 44 S.R. N.S.W. 19 at 26-27). The decision that a licence fee is an excise has the result that the "frontier" of Commonwealth power reaches into the State so that inter se questions arise (Jones v. The Commonwealth Court of Conciliation and Arbitration (1917) A.C. 528). The dictum of Evatt J. in Hopper v. The Egg and Egg Pulp Marketing Board (Victoria) (1939) 61 C.L.R. 665 at 681 is not inconsistent with the judgment of Dixon C.J. in Ex Parte Nelson (No. 2) supra and is correct.

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23. In the event that the objection to the jurisdiction of the Judicial Committee is not upheld, the Respondents respectfully submit that the appeal should be dismissed. The Respondents respectfully adopt the reasoning of the majority of the High Court who allowed the demurrer. The reasons for which the Respondents contend that Section 18(1) of The Liquor Acts 1912 to 1958 does not impose a duty of excise within the meaning of Section 90 of the Constitution may be summarised as follows:-

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- (a) The licence fee payable under the section is not a tax upon or in respect of or in relation to goods;
- (b) The licence fee is not a tax upon the production or manufacture of goods produced or manufactured in Australia;
- (c) The licence fee if a tax on goods, is not an indirect tax;
- (d) The licence fee if a tax on goods, is not imposed in relation to the quantity or value of the goods;
- (e) The true character of the licence fee is that of a fee payable for a valuable right conferred on the licensee by the State.

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24. All the decisions of the High Court from Peterswald v. Bartley (1904) 1 C.L.R. 497 to Browns Transport Pty. Ltd. v. Kropp (1958) 100 C.L.R. 117 accept that to be an excise a tax must be upon or in respect of or in relation to goods. The Respondents submit that a tax on or

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in respect of or in relation to goods means a tax imposed on a person by reason of and in respect of the manufacture or production by him of goods or a dealing by him with goods. Possibly a tax in respect of the ownership or use of goods may also be a tax on goods (cf. Browns Transport Pty. Ltd. v. Kropp (1958) 100 C.L.R. 117 at 129; Matthews v. Chicory Marketing Board (Victoria) (1938) 60 C.L.R. 263 at 303-4; Parton v. Milk Board (Victoria) (1949) 80 C.L.R. 229 at 252-3). It is submitted that there will not be a tax on or in respect of or in relation to goods unless the person who produces, manufacturers or deals in the goods is himself taxed in respect of such production, manufacture or dealing; a tax on one person measured by the value of another person's goods is not a tax on or in respect of or in relation to goods.

25. The licence fee payable under Section 18 (1), which is based on the gross amount paid or payable for or in respect of all liquor purchased or obtained for the licensed premises during the preceding twelve months, is not imposed on or in respect of or in relation to any dealing in goods. It is not imposed on the sale of the liquor because the exaction is imposed whether or not the liquor is sold. A person who pays a licence fee may sell nothing at all (as for example if his premises are destroyed by fire, or if he becomes bankrupt or dies, immediately after obtaining his licence). If the licensee sells liquor the price obtained on its sale has no bearing on the amount of his fee. The fee is not a tax on the purchase of the liquor. The tax may be payable although no liquor has been purchased (Section 18(5) (ii)). The fact that purchases are made does not inevitably result in the payment of a licence fee; for example if purchases are made by a licensee who ceases to carry on business and does not obtain a renewal of his licence, no exaction will be payable based on the purchases in the last year in which the licensee traded. The person who pays the tax may not be the person who bought the liquor in respect of whose value the tax is quantified.

26. It is respectfully submitted that to be an excise, it is not enough that the tax is on goods; the tax must be imposed upon goods produced or manufactured in Australia and in respect of the production or manufacture. It was laid down in Peterswald v. Bartley supra at 508 that the fundamental conception of an excise is that it is a tax on articles produced or manufactured in a country and the same view was taken in subsequent decisions of the High Court (cf. The

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Commonwealth and Commonwealth Oil Refineries Limited v. South Australia (1926) 38 C.L.R. 408 per Knox C.J. at 419-20 (with whom Powers J. at 436 agreed); per Isaacs J. at 426, 430-1; per Higgins J. at 435; per Starke J. at 438-9 - cf. per Rich J. at 437; Attorney-General for New South Wales v. Homebush Flour Mills Limited (1937) 56 C.L.R. 390; per Latham C.J. at 400-1; per Starke J. at 408; cf. per Rich J. at 403; Matthews v. Chicory Marketing Board (Victoria) supra per Latham C.J. at 277 (with whom McTiernan J. agreed at 304); per Starke J. at 286 - cf. per Dixon J. at 298-300). However, in Parton v. Milk Board (Victoria) supra, the majority departed from this view. Rich and Williams JJ. at 251-2 held that a duty of excise "must be imposed so as to be a method of taxing the production or manufacture of goods", but went on to hold that "the production or manufacture of an article will be taxed whenever a tax is imposed in respect of some dealing with the article by way of sale or distribution at any stage of its existence, provided that it is expected or intended that the taxpayer will not bear the ultimate incidence of the tax himself, but will indemnify himself by passing it on to the purchaser or consumer". Dixon J. at 259-260 held that it was not an essential feature of the conception of an excise that the tax must be levied on the producer or manufacturer, and that "a tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon its manufacture or production". The minority, Latham C.J. at 245-7 and McTiernan J. at 265-7, held that to be an excise a tax must be levied upon the production or manufacture of goods and that a tax imposed in respect of the sale of goods after the producer or manufacturer has disposed of them is not a tax upon production or manufacture. It is submitted, with respect, that the judgment of the minority in Parton v. Milk Board (Victoria) supra is correct. It is submitted that the essential conception of an excise is a tax on the production or manufacture of goods within the country. Section 93 of the Constitution supports this view. It is further supported by the association in the Constitution of "duties of customs" with "duties of excise" (in Sections 55, 86, 87 and 90 as well as in Section 93); indeed the power of the Commonwealth to impose duties of excise only became exclusive on the imposition of uniform duties of customs. The licence fee payable under

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Section 18(1) is not imposed upon the production or manufacture of liquor.

10 27. It is further respectfully submitted that a tax will not be an excise unless it is imposed upon goods in relation to quantity or value (Peterswald v. Bartley supra at 509), and that the view of the minority in Matthews v. Chicory Marketing Board (Victoria) supra should be preferred to that of the majority. The tax in the present case does not meet this requirement.

20 28. It is respectfully submitted that to be an excise the tax must be an indirect tax in the sense that it forms an element naturally incorporated in the price of the commodity, or, put in another way, so that the ultimate incidence of the tax is not intended to fall on the person who pays it, but it is intended or expected that the tax will be passed on and borne by the consumer (Peterswald v. Bartley, supra at 509, 511, The Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia supra at 420, 435, 437, 438; Matthews v. Chicory Marketing Board (Victoria) supra at 277, 285-6, 300-302; Parton v. Milk Board (Victoria) supra at 252-3, 259; Attorney-General for British Columbia v. Kingcome Navigation Company Limited (1934) A.C.45; Atlantic Smoke Shops Limited v. Conlon (1945) A.C.550). The licence fee payable under Section 18(1) is not an indirect tax. Although a licensed victualler may in a general way increase his prices to take account of the impost, the amount
30 by which he recoups himself from the consumer cannot bear any direct relation to the amount of tax paid. The licence fee does not enter at once into the price of the liquor. No specific amount can be added to the price of the liquor in respect of the licence fee. Section 18A of The Liquor Acts shows that the Legislature did not intend the tax to be passed on to the consumer. The price fixing provisions of The Liquor Acts (Sections 134A and 134H) can be used to prevent the tax from being passed on.

40 29. The true character of the licence fee is that it is the price paid by the licensee for a valuable privilege. The fee is a payment made for the condition of carrying on the business of a licensed victualler. In form, and in truth, it is paid to enable the licensee to take part in the business of dealing in liquor, which is the subject of extensive legislative control, and the fee was not intended to be a form of taxation upon the production, manufacture, purchase or sale of the liquor. Licence fees were until the passing of The

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Liquor Acts Amendment Act of 1935 exacted by reference to the annual value of the licensed premises, and neither in that nor in the present form, did they constitute duties of excise. Licence fees of this kind have never previously been considered to be duties of excise (see Parton v. Milk Board (Victoria) supra per Latham C.J. at 248 and Dixon J. at 263 and The Commonwealth and Commonwealth Oil Refineries Limited v. South Australia supra per Isaacs J. at 426).

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30. The Respondents respectfully submit that this appeal should be dismissed with costs and the judgment of the High Court of Australia affirmed for the following amongst other

R E A S O N S

1. Because the Appellant is precluded from appealing by Section 74 of the Constitution of the Commonwealth of Australia;

2. Because the appeal raises a question as to the limits inter se of the constitutional powers of the Commonwealth and the State;

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3. Because the licence fee imposed on the Appellant was not a duty of excise within Section 90 of the Constitution;

4. Because the licence fee was not a tax upon or in respect of or in relation to goods;

5. Because the licence fee was not a tax upon the production or manufacture of goods produced or manufactured in Australia;

6. Because the licence fee was not a duty imposed upon goods in relation to their quantity or value;

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7. Because the licence fee was not an indirect tax;

8. Because the true character of the licence fee was that of a fee payable for a valuable right conferred on the licensee by the State;

9. And for the reasons appearing in the reasons for judgment of Fullagar, Kitto, Taylor and Menzies JJ. in the High Court of Australia.

H.T. GIBBS

M.B. HOARE

M. HEALD.

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A P P E N D I X

"The Liquor Acts, 1912 to 1958"

4. In this Act, unless the context otherwise indicates, the following terms have the meanings respectively assigned to them, that is to say, -

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10 "Brewer" - Any maker, for purposes of sale, of beer, ale, porter, or stout, or any other fermented liquor brewed wholly or in part from malt: the term "registered brewer" means a brewer whose brewery is registered under any law in force in Queensland relating to the registration of brewers or breweries or a person licensed to make beer pursuant to The Beer Excise Act 1901-1928 of the Commonwealth of Australia (or any Act of the Commonwealth in amendment of or substitution for such act);

.....

"Commission" or "Licensing Commission" - The Licensing Commission appointed and constituted under this Act;

.....

20 "License" - A licence (including, in appropriate cases, every renewal thereof) of any description or kind, whether granted under this Act, or any Act repealed by this Act, in force at any material time: Every endorsement upon or attaching to any license shall be regarded as forming part of that license;

"Licensed premises" - The premises in respect of which a license is granted;

30 "Licensed victualler" - The lawful holder at any material time of a licensed victualler's license; where necessary the term includes the person lawfully permitted to carry on the business of the licensed victualler;

40 "Licensee" or "holder" - In relation to a license, the lawful holder at any material time of that license, and, in relation to licensed premises, the person who in relation to the license in respect of those premises is the licensee; where necessary the term includes the person lawfully permitted to carry on the business of the holder;

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5. Unless expressly herein otherwise declared, nothing in this Act shall apply to any person who -

- (a) Sells any spirituous or distilled perfume bona fide as perfumery; or
- (b) Being the holder of a permit in writing (which permit the Commission is hereby authorised to grant) sells in quantities of not less than two gallons at any one time on the premises specified in such permit cider, perry, or other liquor made by him from apples, pears, or other fruit grown in Australia, and not to be drunk on the premises; or 10
- (c) Sells liquor in a refreshment-room at the Houses of Parliament by the permission or under the control of Parliament; or
- (d) Sells liquor in any military canteen lawfully established; or
- (e) Being an apothecary, chemist, or druggist, administers or sells any spirits as medicine or for medicinal or chemical purposes; or 20
- (f) (Repealed by Section 4(i) of the amending Act of 1954)
- (g) Being a registered brewer, sells beer from a registered brewery in quantities of not less than two gallons and delivered in quantities of not less than two gallons at one time; or
- (h) Being a licensed auctioneer, sells, by auction - 30

Liquor in quantities of not less than two gallons at one time on behalf of some person who is himself authorised by or under this Act to sell the same liquor; or

By order of a trustee in bankruptcy of a bankrupt's estate or of a person holding property in trust under any composition or scheme of arrangement under Division 5 of Part IV., or composition, scheme of arrangement, or assignment under Part XI., or deed of arrangement under Part XII. 40

respectively of the Bankruptcy Act 1924-1950 of the Commonwealth (including any enactment of the Commonwealth in amendment of or in substitution for any of those provisions), liquor the property of the estate of that bankrupt or being property held in trust as aforesaid by the person ordering the sale by auction thereof; or

10 By order of the executor, administrator, or trustee of the estate of a deceased person, liquor the property of the estate of that deceased person; or

By order of the Public Curator of Queensland liquor the property of an estate in course of administration by the said Curator; or

(i) Is a grower and maker of wine.

Moreover, unless expressly herein otherwise declared, nothing in this Act shall apply -

20 (i) To the sale, during any actual flight of an aircraft, of liquor to any passenger in such aircraft where the sale is made by or on behalf of the owner of such aircraft and the liquor is sold for the purpose of being drunk or consumed on such flight; or

(ii) To the carrying about in an aircraft of liquor for sale in accordance with the provisions of subparagraph (i) of this paragraph; or

30 (iii) To cases where, at the meetings of any association, society, or club bona fide formed for and engaged in legitimately holding or carrying out literary or musical entertainments, or friendly society, charitable, or lodge purposes, or outdoor games and exercises, or agricultural or pastoral shows, the refreshments supplied to members and their guests at the expense of the association, society, or club, include liquor; or

40 (iv) To the sale of liquor in a canteen at any industrial undertaking or works where the sale of that liquor in that canteen is made by or on behalf of a person permitted in writing by the Commission to sell that liquor at that canteen and otherwise in compliance in every respect with the provisions, conditions, and restrictions of that permit or to the drinking or consumption in that canteen of that liquor.

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The Commission may from time to time grant permits for the purposes of subparagraph (b) of the first paragraph, and of subparagraph (iv) of the second paragraph, respectively of this section, and, in every case may grant the permit to such person and for such period of time as it thinks fit, and every such permit shall be granted subject to such provisions, conditions, and restrictions as may be prescribed and, in so far as not prescribed, as the Commission may specify therein, and the Commission may at any time and without assigning any reason, revoke any such permit: 10

Provided that, but without prejudice to the validity of, and enforcement of this Act upon, that revocation, notice in writing of the intention to revoke such a permit shall wherever possible be served on the permittee.

Before granting a permit for the purposes of subparagraph (iv) of the second paragraph of this section, the Commission shall take into consideration 20 the location of the industrial undertaking or works concerned relative to any licensed victualler's premises.

6. (1) For the purposes of this Act there shall be appointed and constituted a Commission to be called "The Licensing Commission" (hereinafter referred to as the "Commission").

(2) The Commission shall consist of three members each of whom shall be appointed by the Governor in Council by commission in His Majesty's name. 30

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16. (1) Licenses may be granted under this Act of the several descriptions following, namely:-

- (a) A licensed victuallers' license:
- (b) A wine-sellers' license;
- (c) A packet license;
- (d) A spirit merchants' license;
- (e) A club license of any of the several kinds prescribed;
- (f) A booth license;

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- (g) A Bottlers' license;
- (h) A billiard license or a bagatelle license;
- (i) A railway refreshment room license.

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10 17. From and after the passing of "The Liquor Acts Amendment Act of 1935" the number of each of the licensed victuallers' and wine-sellers' licenses existing at the passing of "The Liquor Acts Amendment Act of 1935," shall be deemed to be the greatest number of each of such licenses, respectively, which may be in force at any time within the State:

Provided that nothing in this Act contained shall prevent or be deemed to prevent the removal under this Act of a cancelled or surrendered license to another locality in the same district or in any other district:

Provided further, that nothing in this Act shall prevent or be deemed to prevent a forfeited license being transferred to some other person in respect of the same premises or removed to another locality in the same district or in any other district.

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20 18A. (1) Notwithstanding any agreement to the contrary whether made before or after the passing of "The Liquor Acts Amendment Act of 1945" -

30 (i) Any licensed victualler or wine-seller who is not the owner of the licensed premises and who, in respect of the year commencing on the first day of July, one thousand nine hundred and fifty-five, or any year thereafter, pays the annual fee for such license fixed on a percentage basis, may without suffering any penalty imposed by any such agreement deduct from any rent payable by him for the premises for any year in respect of which such fee is paid a sum equal to one-fourth of the amount of such fee or may recover the said sum by action as for a debt in any court of competent jurisdiction from the owner of the premises;

40 (ii) Where such sum is so deducted from any rent payable to or is recovered from an owner of the licensed premises and such owner is

himself a tenant of another person who is an owner of the premises within the meaning of this section such tenant may in like manner deduct from any rent payable by him to or may recover from the last mentioned owner a sum equal to the amount so deducted or recovered and so on until the owner to whom the rent is payable is not himself a tenant of another person;

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(iii) In this section the term "rent" includes any rent reduced or commuted under any such agreement.

(2) For the purposes of this section the term "Owner" where used with respect to licensed premises includes a cestui qui trust and means the person for the time being entitled to receive either on his own account or as mortgagee or other incumbrancer in possession the rent of such premises, or if he is absent from Queensland the attorney or agent of such person capable of giving a valid receipt for such rent:

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Provided that as respect licensed premises situated upon land held for an estate of leasehold from the Crown the term "owner" shall not include the Crown.

19. (1) The accommodation and/or essential services required for a licensed victualler's or wine-seller's premises within a city or town or township or country area shall be as prescribed:

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Provided that until such matters as aforesaid are prescribed, the accommodation and sanitary conveniences required for a licensed victualler's or wine-seller's premises shall, and notwithstanding the repeal of sections twenty-three, twenty-four, and twenty-five of "The Liquor Acts, 1912 to 1932", be as provided in the said sections and/or any regulations made thereunder.

The power to prescribe accommodation shall include power to prescribe different accommodation in relation to licensed victualler's premises or wine-seller's premises respectively according to locality, class or description as prescribed, or otherwise as prescribed.

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Notwithstanding anything contained in this

Act, the Commission upon being satisfied that additional accommodation, or additional essential services, or both, are required in connection with any such licensed premises, may order the owner, or the licensee, or both of them, to provide, within a time to be specified in that order, that additional accommodation, or those additional essential services, or both that additional accommodation and those additional essential services.

10 For the purposes of this Act and without limiting the effect of the preceding paragraphs or the meaning of the terms "accommodation" and "essential services" the Commission may by order require the provision of sitting rooms, sleeping rooms, facilities for the consumption of liquor at tables in lounges, in gardens, under awnings, or in the open air, the provision of a bottle department, the provision of bath facilities, the installation of a water storage system in cases
20 where a water supply service is not in the opinion of the Commission available, and the provision of ventilation, cooling, heating, lighting, cooking equipment, and other necessities and of closets, privies, and other sanitary necessities.

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22. (1) No license under this Act shall be held by any of the following persons, that is to say -

- (i) A person holding office or employment under the Government of this State or any other State of the Commonwealth, or of the Commonwealth;
- (ii) A police officer or a bailiff or the spouse of a police officer or a bailiff;
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- (iii) A licensed auctioneer, a licensed commission agent, or a partner or spouse of a licensed auctioneer or of a licensed commission agent;
- (iv) A brewer or distiller or the spouse of a brewer or distiller;
- (v) A person actually undergoing a sentence for any criminal offence in respect of which imprisonment for any period exceeding one month has been imposed without the option of a fine;
- 40 (vi) Any person under the age of twenty-one years, and no license other than a bottler's license shall

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be held by a licensed spirit merchant or the spouse of a licensed spirit merchant;

Provided that the aforesaid disqualification shall not apply to a brewer or distiller or commission agent, or spouse of a commission agent, in the case of a spirit merchant's license.

(2) No licensed victualler's license or wine-seller's license or spirit merchant's license shall be held in respect of any premises of which any police officer, bailiff, licensed auctioneer, licensed commission agent, partner of a licensed auctioneer or licensed commission agent, or the spouse of any of the aforesaid persons, is owner or wherein he or she is directly or indirectly interested: 10

Provided that an auctioneer or his partner, or a licensed commission agent or his partner, or the spouse of any of them, shall not by reason only of owning the freehold of land upon which any premises are erected be deemed to be directly or indirectly interested in such premises within the meaning of this subsection. 20

No licensed victualler shall be competent to become a licensed auctioneer or a licensed commission agent.

(3) No license shall be held by any person or in respect of any premises declared by or in pursuance of this Act to be a disqualified person or disqualified premises during the continuance of such disqualification. 30

Any license held by any person disqualified or attached to premises so disqualified may be forfeited unless an application for transfer of the same is made within a reasonable time and granted by the Commission.

(4) Except that a billiard license or bagatelle license may be held in conjunction with any other license, and except that a licensed victualler or wine-seller or spirit merchant may hold a license to bottle liquor, no person shall hold more than one license at one and the same time. 40

(5) The mere fact that a licensee is a married woman shall not operate as a bar to such licensee continuing to hold the license under this Act.

(6) Notwithstanding anything contained in this Act, the Commission may, by notice in writing, call upon a licensee to satisfy it that no one of the following persons has any beneficial interest whatsoever in the license in question or in the premises thereby licensed, that is to say any person who is unfit to hold a license under this Act, or who is disqualified by or under this Act from holding such a license or to whom the Commission has refused such a license.

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If, when called upon as aforesaid, a licensee fails, within the time specified in the notice so calling upon him and such extension, if any, of that time as may be granted by the Commission, to satisfy the Commission that no person as aforesaid holds any beneficial interest whatsoever in the license or, as the case may be, licensed premises in question, the Commission may forfeit the license and for that purpose the provisions of section 47B of this Act, with all necessary adaptations, shall extend accordingly.

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Forfeiture as aforesaid may, in the case of a license held by the licensee in the capacity of owner of the premises thereby licensed, be imposed both in respect of the licensee and those premises.

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29. (1) When any licensee desires to transfer his license to any other person the intending transferor and transferee shall deliver to the Commission an application in the prescribed form for such transfer.

(2) The Commission may upon being satisfied that the proposed transferee is a fit and proper person to hold a license transfer such license to such person by an endorsement upon the license in the prescribed form.

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30. The Commission may by order authorise any person not otherwise disqualified under this Act whom it thinks entitled to the benefit of any licensed victualler's license or wine-seller's license or his qualified nominee, for such period as specified in the order, to carry on the business in the licensed premises in the same manner as if such license had been formally transferred to such person, in any of the following cases, that is to say -

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(a) Where the licensee deserts the licensed premises,

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or refuses or neglects to transfer the license upon being justly required so to do; or

- (b) If during the currency of the license the licensee ceases to occupy the licensed premises, or his tenancy of such premises is determined by effluxion of time, or by notice to quit, or by any other means whatsoever other than the bankruptcy of the licensee, and he refuses or neglects to transfer the license upon being justly required so to do. 10

Where the owner or a qualified nominee of the owner is the applicant for an order under this section the Commission may, notwithstanding the non-production of the license, upon being satisfied that the owner is entitled to possession of the licensed premises, grant to that owner or, subject to the owner so requesting, to that qualified nominee a special certificate of transfer of that license in such form as the Commission thinks applicable. 20

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33. (1) Upon the death or bankruptcy of a licensee under this Act the Commission may on the application within a reasonable time of the executor named in the will of such deceased person, or the legal personal representative, widow, or nearest of kin of such deceased person, or the Public Curator, or the trustee of the estate of such bankrupt person, authorise such executor, or legal personal representative, or Public Curator, or trustee, as the case may be, either by himself or by an agent to be approved by the Commission, to carry on the business of such deceased or bankrupt person under such license for such period as the Commission may fix, with power to renew such authority if necessity arises. 30

To preserve the continuity of the business of a deceased or bankrupt licensee the Commission may permit a person to carry on such business until the grant of authority under the preceding provisions of this subsection. 40

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35. The premises of a licensed spirit merchant or licensed club or holder of a billiard or

bagatelle license may be changed where authority so to do is given by the Commission.

An application for change of premises may be made to the Commission in the prescribed form.

If the Commission grants the application the authority for such change of premises shall be given by endorsement on the license in the prescribed form.

10 36. (1) In the exercise of the functions hereinbefore conferred upon the Commission by this Act, the Commission may -

- (a) Of its own motion cancel any licensed victualler's or wine-seller's license; or
- (b) Upon the application of the licensee, or where the licensee is not also the owner of the premises upon the joint application of the owner and of the lessee or sub-lessee holding the license, and of the mortgagee (if any) accept the surrender of any licensed victualler's or wine-seller's license.

20 Any such application for the surrender of a license shall be made in the prescribed manner.

30 (2) The power of the Commission to cancel or accept the surrender of a license shall not be limited or prejudiced howsoever by the provisions of this Act relating to the removal of cancelled, surrendered or forfeited licenses, it being hereby declared that the matter of whether or not the Commission will or may either upon the cancellation or acceptance of the surrender of a license, or at any time, remove the same to any other premises shall not be taken into consideration by the Commission in determining whether or not it will cancel or accept the surrender of the license.

40 37. (1) The Commission shall not cancel any license unless the licensee, and if the licensee is not also the owner of the licensed premises the owner, and if the licensee is a sub-lessee the lessee, and the mortgagees (if any) of such licensed premises have been served with a notice in the prescribed manner to show cause why such license should not be cancelled. Such notice shall fix a day upon which the parties concerned may show cause, being not less than fourteen days after the serving of such notice.

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Any such notice as aforesaid may be served personally upon the person to whom it is directed or in such other manner as may be prescribed.

Nothing in this section contained shall require or be deemed to require the service of notice as aforesaid on any person who has joined in an application for the surrender of a license.

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38. The Commission may -

- (a) Consider whether the premises the subject-matter of such license comply in full with all or any of the prescribed requirements relating to licensed premises; and 10
- (b) Consider the convenience of the public and the requirements of the locality in which the licensed premises are situated; and

subject to the above considerations have regard to -

- (i) The nature and standard of the accommodation and essential services afforded by such licensed premises; and 20
- (ii) The distance between such licensed premises and the licensed premises nearest thereto, and

Subject also to the above considerations and having regard to the above matters consider all such other circumstances as it shall in its absolute discretion deem relevant, including the nature and standard of the accommodation and essential services afforded by the licensed premises in comparison with the average nature and standard of the accommodation and essential services afforded by other licensed premises in the same locality and which comply in full with all of the prescribed requirements. 30

Any such consideration as aforesaid may be given by the Commission without the giving by the Commission to the holder of the license or any other person of any notice of its intention to consider all or any of such matters.

39. Where the Commission determines to cancel 40

or to accept the surrender of any license the Commission shall fix a date on and from which that license shall be and be deemed to be cancelled or, as the case requires surrendered, which date may be either the date of the determination or any later date.

40. On and from the date of cancellation or surrender of a license in manner aforesaid the following consequences shall ensue, namely:

- 10 (a) The holder of such license shall no longer be or be deemed to be the holder of a license within the meaning of this Act; and
- (b) The premises the subject-matter of such license shall no longer be or be deemed to be licensed premises within the meaning of this Act:

20 Provided that, to the extent necessary to give operation and effect to the provisions of this Act relating to the removal of cancelled, surrendered or forfeited licenses, any and every such license shall, notwithstanding the cancellation, surrender or forfeiture thereof, be presumed to be a subsisting such license and (until duly vested in some person pursuant to the removal thereof under, subject to, and in accordance with the provisions of this Act) to be the absolute property of the Commission.

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30 42. No person shall be or be deemed to be entitled to or shall have or be deemed to have any right or claim to compensation in respect of any license which has been cancelled, forfeited, or surrendered under this Act other than in respect of a licensed victualler's or wine-seller's license which has been cancelled by the Commission or the surrender of which has been accepted by the Commission under and in accordance with section thirty-six of this Act.

40 43. (1) As soon as practicable after the determination to cancel or accept the surrender of any licensed victualler's or wine-seller's license the Commission shall make a valuation on a fair and equitable basis of the amount of compensation payable to the owner of the licensed premises by reason of the value thereof being diminished owing to the cancellation or surrender of such license, and to the licensee by reason of his lease or agreement being annulled, and for the loss of his license and business.

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47A. (1) Subject to Section 47B of this Act, the Commission may -

- (a) Forfeit any licensed victualler's license or wine-seller's license upon any one or more of grounds (i) to (vii), both inclusive, in subsection two of this section;
- (b) Forfeit any spirit merchant's license upon any one or more of the grounds (vi) and (vii) specified in subsection two of this section. 10
- (c) Forfeit any billiard license or bagetelle license upon any one or more of grounds (i), (ii), (iii), (iv) and (viii) specified in subsection two of this section.

(2) Subject to subsection one of this section, the grounds for forfeiture of a licensed victualler's license, a wine-seller's license, a spirit merchant's license, or a billiard license or a bagetelle license shall be - 20

- (i) That the licensee is a person of drunken or dissolute habits or immoral character, or is otherwise unfit to hold a license;
- (ii) That the licensed premises have been the resort of prostitutes or persons under the surveillance of the police;
- (iii) That the licensed premises have been conducted in an improper manner, and drunkenness permitted therein;
- (iv) That the licensed premises have been used for purposes of betting or gambling, or of any games prohibited by law, or that the licensee or any person has been convicted for any offence committed on the licensed premises with respect to betting, gambling, or any other game prohibited by law; 30
- (v) That the licensee does not keep in stock and/or supply in reasonable quantities, all classes, kinds, and descriptions of liquor which are usually consumed or demanded by the general public in the locality in which the licensed premises are situated 40

and supplies of which are reasonably obtainable by the licensee in Queensland, excepting that if a registered brewer is entitled to an estate of freehold in possession or to an estate of leasehold from the Crown of the land upon which the licensed premises are situated or is the mortgagee in possession of such land it shall be a sufficient answer to this ground for the licensee to show that he is bound by agreement with such brewer not to stock and/or supply any class, kind, or description of liquor brewed or made by a person other than such brewer and similar to a class, kind or description of liquor brewed or made by such brewer and that, subject to such agreement, he does in fact stock and supply, in reasonable quantities, all classes, kinds, and descriptions of liquor usually consumed or demanded by the general public in the locality in which the licensed premises are situated;

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(vi) That the holder of the spirit merchant's license has not, in the opinion of the Commission, maintained his premises in which liquor is stored in a secure and proper manner or that his licensed premises are out of repair;

(vii) That a licensee has been convicted under section one hundred and sixty-one of this Act for making a false return as required by this Act to be made by him in respect of liquor purchased or otherwise obtained or sold or otherwise disposed of;

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(viii) That the holder of a billiard license or bagatelle license has not, in the opinion of the Commission, maintained the premises in respect of which he holds that license in a secure and proper manner or that those premises have fallen into disrepair.

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48. (1) The Commission may from time to time remove a cancelled, surrendered, or forfeited license to premises in another locality in the same district or in any other district as it considers necessary to meet the convenience of the public and the requirements of any such locality:

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RECORD

51. (1) (a) This section applies with respect to all descriptions and kinds of licenses save packet licenses and railway refreshment room licenses.

(b) An order as hereinafter in this section provided signed by the secretary of the Commission or by an inspector authorised in that behalf by the Commission may be served upon an owner or licensee, or both, where in the opinion of the Commission or of that inspector the licensed premises - 10

- (i) Are by reason of the age or the destruction (complete or partial) of the buildings thereof, or any of them, or their ruinous, damaged or dilapidated condition, or the nature or condition of structural materials, or the structural design or formation thereof unfit for or unsuited or inadequate to their respective purposes under this Act; or 20
- (ii) Require cleansing, painting, repainting or repairing; or
- (iii) Are not in a satisfactory sanitary state or condition; or
- (iv) Do not contain the prescribed accommodation; or
- (v) Are not provided with necessary furniture, furnishings, fittings, fire alarm, fire fighting and fire escape equipment, in good order and condition; or 30
- (vi) Are not as respects the structural condition of the buildings thereof, or any thereof, or as respects furniture, furnishings, and fittings, and services, amenities, and standards of accommodation, or any of those things, suitable and sufficient to meet the needs of the locality in which the licensed premises are situated; or
- (vii) Otherwise do not comply with this Act. 40

(c) The aforementioned order, which may be in general or specific terms, shall require the owner or licensee, or both, to do in relation to

the licensed premises within the time stated in that order, and to the satisfaction of the Commission or inspector, such acts, matters and things, including the lodging with the Commission of detailed plans and specifications, as are in the opinion of the Commission or the inspector necessary and are directed thereby.

10 In the case of an order under this section directed only to a licensee who is not the owner of the licensed premises, a duplicate of the order shall also be served upon the owner of those premises (or, if that owner cannot conveniently be found, shall, if practicable, be affixed, addressed to that owner, upon the front or principal door of those premises).

In the case of a licensed club, if the secretary or nominee thereof cannot conveniently be found, the order as aforesaid may be served by affixing it, if practicable, addressed to that club, upon the front or principal door of the licensed premises thereof.

20 In the case of an order as aforesaid requiring any building to be rebuilt or the accommodation of any licensed premises to be added to within the period stated in that order, that period shall be not less than three months.

(d) The provisions of this subsection shall be in addition to and not in diminution of or substitution for any other provisions of this Act.

30 (2) Subject to section 47B of this Act, if an order under this section in respect of licensed premises is not complied with, the Commission may forfeit the license.

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68. (1) Any licensed victualler who refuses, without lawful excuse, to receive and accommodate any person unless such person is intoxicated or of known disreputable character, shall be liable to a penalty not exceeding five pounds.

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40 108. It shall not be lawful for any person, not being a registered brewer, registered distiller, or licensed victualler or wine-seller or a licensed auctioneer selling under the conditions defined by section five; to sell or otherwise dispose of or to

RECORD

deliver, in quantities of two gallons or exceeding two gallons at one time, any liquor unless he is a licensed spirit merchant and disposes of that liquor at the premises in respect of which his spirit merchant's license is granted.

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129. (1) (a) A person shall not, without the authority of a license, sell any liquor in any premises, vehicle, or vessel or boat, or in any place whatsoever, in any less quantity than two gallons of one and the same description of liquor at any one time.

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(b) This subsection does not apply to the agent or servant of a licensee selling as such agent or servant for the use and benefit of such licensee in or on the premises or, as the case may be, vessel of the licensee and otherwise in accordance in every respect with the license of that licensee.

(2) Any person authorised or permitted by a license to sell any liquor shall not sell any liquor in or on any premises, vehicle, or vessel or boat, or in any place whatsoever save the premises or, as the case may be, vessel in which he is authorised or permitted by his license so to do.

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134A. (1) Where the Commission is of the opinion that the price at which a particular licensed victualler or those licensed victuallers whose licensed premises are situated within any locality, or any two or more of them, or a holder of a booth license is or are selling or supplying liquor or any class, kind or description of liquor in his or their public bars or in containers or bottles for consumption off the licensed premises or, in the case of a holder of a booth license, at his booth is excessive, the Commission may by order fix the maximum price or prices at which the class, kind or description of liquor or the classes, kinds or descriptions respectively of liquor specified in the order may be sold or supplied by the licensed victualler whose licensed premises are specified in the order or by all licensed victuallers whose licensed premises are situated

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within the locality specified in the order, or by the holder of a booth license specified in the order -

- (i) In any public bar; or
- (ii) In containers or bottles for consumption off the licensed premises; or
- (iii) Both in any public bar and in containers or bottles for consumption off the licensed premises; or

10 in the case of a holder of a booth license, at his booth, irrespective of the manner of the sale or supply of the liquor thereat.

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134H. (1) The Governor in Council may from time to time, by Proclamation published in the Gazette, declare that this Part VIIA shall extend and apply with respect to the sale and supply of -

- 20 (a) Liquor of the classes, kinds and descriptions specified in the Proclamation sold or supplied by licensed victuallers for consumption anywhere on the licensed premises or on any part specified in the Proclamation of the licensed premises;
- (b) Liquor of the classes, kinds and descriptions specified in the Proclamation sold or supplied by holders of licenses of the description or descriptions thereof specified in the Proclamation; or
- (c) Beer by brewers,

30 and the provisions of this Part VIIA. shall, with and subject to all necessary adaptations, extend and apply accordingly.

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IN THE PRIVY COUNCIL No. 3 of 1961

O N A P P E A L

FROM THE FULL COURT OF THE HIGH
COURT OF AUSTRALIA

B E T W E E N :

CHARLES MacDONALD WHITEHOUSE
(Plaintiff) ... Appellant

- and -

THE STATE OF QUEENSLAND,
THOMAS ALFRED HILEY and
ALAN WHITESIDE MUNRO
(Defendants) ... Respondent

- and -

THE ATTORNEY GENERAL OF
THE COMMONWEALTH OF
AUSTRALIA ... Intervener

CASE FOR THE RESPONDENTS

FRESHFIELDS,
Garrard House,
31/45 Gresham Street,
LONDON, E.C.2.

Solicitors for the Respondents.