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UNIVERSITY OF LONDON  
W.C.1.  
12 NOV 1956  
INSTITUTE OF ADVANCED  
No. 55 of LEGAL STUDIES

In the Privy Council.

15252

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN—

10 THE COMMONWEALTH OF AUSTRALIA, THE RIGHT  
HONOURABLE JOSEPH BENEDICT CHIFLEY, The Treasurer  
of the said Commonwealth, THE COMMONWEALTH  
BANK OF AUSTRALIA and HUGH TRAILL ARMITAGE,  
the Governor of the Commonwealth Bank of Australia  
(Defendants)

*Appellants in each appeal*

— AND —

20 BANK OF NEW SOUTH WALES and GEORGE ROLAND  
LOVE (a shareholder and director of the said Bank suing  
on behalf of himself and all other holders of shares on any  
register in Australia of the said Bank) and NORMAN  
BURGOYNE PERKINS (a shareholder of the said Bank  
suing on behalf of himself and all other holders of shares on  
any register outside Australia of the said Bank), THE  
30 COMMERCIAL BANKING COMPANY OF SYDNEY  
LIMITED and EDWARD RITCHIE KNOX (a shareholder  
and director of the said Bank suing on behalf of himself and  
all other holders of shares on any register in Australia of  
the said Bank) and BASIL COLIN SHUBRA HORDERN  
(a shareholder of the said Bank suing on behalf of himself  
and all other holders of shares on any register outside  
Australia of the said Bank), THE NATIONAL BANK OF  
AUSTRALASIA LIMITED and HARRY DOUGLAS  
40 GIDDY (a shareholder and director of the said Bank suing  
on behalf of himself and all other holders of shares on any  
register in Australia of the said Bank) and VERA DE  
LAURET RANKIN (a shareholder of the said Bank suing  
on behalf of herself and all other holders of shares on any  
register outside Australia of the said Bank), THE  
QUEENSLAND NATIONAL BANK LIMITED (in volun-  
tary liquidation) and FRED PACE the Liquidator thereof,  
THE COMMERCIAL BANK OF AUSTRALIA LIMITED  
and JOHN LANGLEY WEBB (a shareholder and director  
of the said Bank suing on behalf of himself and all other  
holders of shares on any register in Australia of the said  
Bank) and LESLIE HORACE AYLIFF WHITE (a share-  
holder of the said Bank suing on behalf of himself and all  
other holders of shares on any register outside Australia of  
the said Bank), THE BANK OF ADELAIDE and SIR

HOWARD WATSON LLOYD (a shareholder and director of the said Bank suing on behalf of himself and all other holders of shares of the said Bank), THE BALLARAT BANKING COMPANY LIMITED and the HONOURABLE JAMES FREDERICK KITSON (a shareholder and director of the said Bank suing on behalf of himself and all other holders of shares of the said Bank), THE BRISBANE PERMANENT BUILDING AND BANKING COMPANY LIMITED and WALTER EDWIN SAVAGE (a shareholder and director of the said Bank suing on behalf of himself and all other holders of shares of the said Bank) (Plaintiffs) 10  
*Respondents in the first appeal*

AND BETWEEN

SAME

— AND —

THE BANK OF AUSTRALASIA, THE UNION BANK OF AUSTRALIA LIMITED and THE ENGLISH SCOTTISH & AUSTRALIAN BANK LIMITED (Plaintiffs)  
*Respondents in the second appeal*

AND BETWEEN

20

SAME

— AND —

THE STATE OF VICTORIA and the ATTORNEY GENERAL of the STATE OF VICTORIA (Plaintiffs)  
*Respondents in the third appeal*

AND BETWEEN

SAME

— AND —

THE STATE OF SOUTH AUSTRALIA and the ATTORNEY-GENERAL OF THE SAID STATE (Plaintiffs) 30  
*Respondents in the fourth appeal*

AND BETWEEN

SAME

— AND —

THE STATE OF WESTERN AUSTRALIA and the ATTORNEY-GENERAL OF THE SAID STATE (Plaintiffs)  
*Respondents in the fifth appeal.*

(CONSOLIDATED APPEALS).

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## CASE FOR THE RESPONDENTS.

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### A. INTRODUCTORY.

RECORD.  
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1. These are appeals brought by special leave granted by His Majesty by Order in Council dated 26th November 1948 against certain Orders of the High Court of Australia dated 11th August 1948 in so far as such Orders declare that section 46 of the Banking Act 1947 is invalid and grant an injunction on the basis of that declaration.

10 2. By the said Order in Council the appeals in the several actions in which the said Orders of the High Court of Australia were made, in all of which said actions the Appellants were Defendants, were ordered to be consolidated. This Case is accordingly submitted in the said consolidated appeals on behalf of each of the Respondents, who were severally Plaintiffs in the said respective actions.

20 3. By the said Order in Council it was reserved to the Respondents to raise as a preliminary point the plea that these appeals do not lie without a certificate of the High Court of Australia, and it was further ordered that if such preliminary point should be decided against the Respondents they should be at liberty to raise all such constitutional points as they should think fit.

4. By the said Orders of the High Court of Australia many other provisions of the Banking Act 1947, as well as section 46 thereof, were declared to be invalid. The Appellants do not challenge the declarations of invalidity of any of these provisions other than section 46. Accordingly the question for determination in these consolidated appeals, if notwithstanding the absence of a certificate of the High Court of Australia they lie at all, is whether section 46 of the Banking Act 1947 is valid, standing in an Act containing the following relevant operative provisions only:—

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#### “PART I.—PRELIMINARY.

“1. This Act may be cited as the *Banking Act 1947*.

Short title.

“2. This Act shall come into operation on the day on which  
“it receives the Royal Assent.

Commence-  
ment.

“3. The several objects of this Act include—

Objects.

“(a) the expansion of the banking business of the  
“Commonwealth Bank as a publicly-owned bank conducted  
“in the interests of the people of Australia and not for private  
“profit;

“(b) the taking over by the Commonwealth Bank of the banking business in Australia of private banks and the acquisition on just terms of property used in that business;  
“(c) the prohibition of the carrying on of banking business in Australia by private banks.

Parts.

“4. This Act is divided into Parts, as follows:—  
“Part I.—Preliminary.  
“Part II.—Legislative Intent.  
“Part III.—Application of Act.  
“Part IV.—Expansion of Banking Business of Commonwealth Bank. 10  
“Part VII.—Prohibition of the carrying on of Banking Business by Private Banks.  
“Part IX.—General.

Definitions.

“5. In this Act, unless the contrary intention appears—  
“‘Australia’ includes the Territories under the authority of the Commonwealth; 20  
“‘private bank’ means a body corporate the name of which is set out in the First Schedule;  
“‘Schedule’ means a Schedule to this Act;  
“‘The Commonwealth Bank’ means the Commonwealth Bank of Australia;

## “PART II.—LEGISLATIVE INTENT.

Legislative intent.

“6. It is hereby declared to be the intention of the Parliament— 30  
“(a) that if any provision of this Act is inconsistent with the Constitution, that provision and all the other provisions of this Act shall nevertheless operate to the full extent to which they can operate consistently with the Constitution;  
“(b) that the provisions of the last preceding paragraph shall be in addition to, and not in substitution for, the provisions of section fifteen A of the *Acts Interpretation Act 1901-1941*; and 40  
“(c) that this section and section fifteen A of the *Acts Interpretation Act 1901-1941* shall have effect notwithstanding that their operation may result in this Act having

“an effect different, or apparently different, in substance  
 “from the effect of the provisions contained in this Act in  
 “the form in which this Act was enacted by the Parliament.

“PART III.—APPLICATION OF ACT.

“7. Nothing in this Act shall apply to State banking.

Act not to  
 apply to State  
 banking.

“8. The application of this Act shall extend to the  
 “Territories under the authority of the Commonwealth.

Extension to  
 Territories.

“PART IV.—EXPANSION OF BANKING BUSINESS OF  
 “COMMONWEALTH BANK.

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“*Division 1.—Preliminary.*

“11. It shall be the duty of the Commonwealth Bank—

Commonwealth  
 Bank to observe  
 customary  
 practices and  
 usages of  
 bankers.

“(a) to provide, in accordance with the conditions  
 “appropriate in the normal and proper conduct of banking  
 “business, adequate banking facilities for any State or  
 “person requiring them;

“(b) to conduct its business without discrimination  
 “except on such grounds as are appropriate in the normal  
 “and proper conduct of banking business; and

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“(c) to observe, except as otherwise required by law,  
 “the practices and usages customary among bankers, and,  
 “in particular, not to divulge any information relating to,  
 “or to the affairs of, a customer of the Commonwealth  
 “Bank except in circumstances in which it is, in accord-  
 “ance with law or the practices and usages customary  
 “among bankers, necessary or proper for the Commonwealth  
 “Bank to divulge that information.

“*Division 2.—Acquisition of Shares in Private Banks.*

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“12. (1.) The Commonwealth Bank may, subject to the  
 “approval of the Treasurer, purchase all or any of the shares  
 “in a private bank the name of which is set out in Part I. or  
 “Part II. of the First Schedule at a price not less than the market  
 “value in Australia of those shares on the fifteenth day of  
 “August, One thousand nine hundred and forty-seven.

Commonwealth  
 Bank may  
 purchase shares  
 in private  
 banks.

“(2) For the purposes of the last preceding sub-  
 “section, the market value in Australia on the fifteenth day of  
 “August, One thousand nine hundred and forty-seven, of a class  
 “of shares specified in the second column of the Second Schedule

“in a private bank the name of which is specified in the first  
“column of that Schedule shall be the value specified in the third  
“column of that Schedule in respect of that class of shares.

“14. (As to shares voluntarily acquired)

“*Division 4.—Taking over of Businesses of Private Banks.*

“22. . . . .

Negotiations  
for purchase  
of business of a  
private bank.

(5.) The Commonwealth Bank may, subject to  
“the approval of the Treasurer, make an agreement with a  
“private bank for the taking over by the Commonwealth  
“Bank of the business in Australia of that private bank. 10

(6.) An agreement under this section may be  
“made with a private bank whether or not a notice under  
“sub-section (1.) of this section has been given to that  
“private bank but, if such a notice has been given to a  
“private bank, an agreement with that private bank shall  
“not be made after the date specified in the notice (or, if the  
“notice has been amended under sub-section (3.) of this  
“section, after the date specified in that notice as so  
“amended).

“(7.) An agreement under this section may 20  
“include provisions for the taking over by the Common-  
“wealth Bank of any of the business, assets and liabilities  
“outside Australia of the private bank with which the  
“agreement is made.

“(8.) Where an agreement has been made under  
“this section for the taking over by the Commonwealth  
“Bank of the business in Australia of a private bank—

“(a) all the assets of that private bank which  
“are Australian assets subsisting upon the date upon  
“which that business is so taken over (in this section 30  
“and in the next succeeding section referred to as ‘ the  
“date of transfer’) shall, by force of this Act, be vested  
“in the Commonwealth Bank upon the date of transfer;

“(b) all the liabilities of that private bank which  
“are Australian liabilities subsisting upon the date of  
“transfer shall, by force of this Act, become liabilities of  
“the Commonwealth Bank upon the date of transfer and  
“the private bank shall be discharged from its obliga-  
“tions in respect of those liabilities;

“(c) all the assets of that private bank which 40  
“relate to banking transactions and become Australian  
“assets after the date of transfer shall, by force of this

“Act, be vested in the Commonwealth Bank upon the  
 “date upon which they so become Australian assets;  
 “and

“(d) all the liabilities of that private bank which  
 “relate to banking transactions and become Australian  
 “liabilities after the date of transfer shall, by force of  
 “this Act, become liabilities of the Commonwealth  
 “Bank upon the date upon which they so become  
 “Australian liabilities and the private bank shall be  
 “discharged from its obligations in respect of those  
 “liabilities.

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“(9.) The Commonwealth Bank shall cause  
 “notice of the making of an agreement under this section to  
 “be published in the *Gazette* and the notice shall specify the  
 “date upon which the business in Australia of the private  
 “bank with which the agreement has been made is to be  
 “taken over by the Commonwealth Bank.

“23. (1.) Notwithstanding anything contained in any  
 “other Act, but subject to this section, where an agreement  
 “has been made under the last preceding section, there shall  
 “not be taken into account for the purpose of any Act  
 “imposing a tax upon incomes or profits—

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Provisions  
 with respect  
 to taxation.

“(a) the amount paid to the private bank in  
 “pursuance of the agreement;

“(b) the amount of any dividend paid by the  
 “private bank wholly and exclusively out of so much  
 “of the amount so paid, reduced in accordance with the  
 “next succeeding sub-section, as exceeds the paid-up  
 “capital of the private bank at the date of transfer; and

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“(c) the amount of any distribution which is  
 “made to the members of the private bank by a  
 “liquidator in the course of winding up the private bank  
 “and represents so much of the amount so paid, reduced  
 “in accordance with the next succeeding sub-section,  
 “as exceeds the sum of—

“(i) the paid-up capital of the private bank  
 “at the date of transfer; and

“(ii) any dividends to which the last pre-  
 “ceding paragraph applies.

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“(2.) The amount by which the amount paid to  
 “the private bank shall be reduced for the purposes of  
 “paragraphs (b) and (c) of the last preceding sub-section  
 “shall be the sum of—

“(a) any interest payable in pursuance of the agreement which is included in the amount paid to the private bank; and

“(b) the profits derived by the private bank after the end of the year of income which ended on the thirtieth day of June, One thousand nine hundred and forty-seven, or of the accounting period adopted by the private bank in lieu of that year for the purposes of the *Income Tax Assessment Act 1936-1947*, and before the date of transfer, after deducting from the amount of those profits—

“(i) the income taxes paid or payable in respect of those profits; and

“(ii) any dividend paid out of those profits before the date of transfer.

“(3.) Nothing in sub-section (1.) of this section shall affect the application of the law relating to income tax or war-time (company) tax in relation to—

“(a) income or profits derived by the private bank before the date of transfer;

“(b) interest payable in pursuance of the agreement on the whole or part of the amount paid to the private bank; or

“(c) any other income or profits derived by the private bank after the date of transfer, not being income or profits arising directly from the taking over of the business of the private bank.

“(4.) For the purposes of this section, ‘dividend’ and ‘paid’ have the same meanings as those expressions have in the *Income Tax Assessment Act 1936-1947*.

“PART VII.—PROHIBITION OF THE CARRYING ON OF BANKING BUSINESS BY PRIVATE BANKS.

“46. (1.) Notwithstanding anything contained in any other law, or in any charter or other instrument, a private bank shall not, after the commencement of this Act, carry on banking business in Australia except as required by this section.

“(2.) Each private bank shall, subject to this section, carry on banking business in Australia and shall not, except on grounds which are appropriate in the normal and proper conduct of banking business, cease to provide any facility or service provided by it in the course of its banking business on the fifteenth day of August One thousand nine hundred and forty-seven.

Prohibition of banking business by private banks.



“(3.) The last preceding sub-section shall not apply  
 “to a private bank if its business in Australia has been taken  
 “over by another private bank or after that business has  
 “been taken over by the Commonwealth Bank.

“(4.) The Treasurer may, by notice published in  
 “the *Gazette* and given in writing to a private bank,  
 “require that private bank to cease, upon a date specified  
 “in the notice, carrying on banking business in Australia.

10 “(5.) The date specified in a notice under the last  
 “preceding sub-section shall be not more than two months  
 “after the date upon which the notice is published in the  
 “*Gazette*.

“(6.) The Treasurer may, from time to time, by  
 “notice published in the *Gazette* and given in writing to  
 “the private bank concerned, amend a notice under sub-  
 “section (4.) of this section (including such a notice as  
 “previously amended under this sub-section) by substi-  
 “tuting a later date for the date specified in that notice (or  
 “in that notice as so amended).

20 “(7.) That later date may be a date either before or  
 “after the expiration of the period of two months referred  
 “to in sub-section (5.) of this section.

“(8.) Upon and after the date specified in a notice  
 “under sub-section (4.) of this section (or, if that notice has  
 “been amended under sub-section (6.) of this section, upon  
 “and after the date specified in that notice as so  
 “amended), the private bank to which that notice was given  
 “shall not carry on banking business in Australia.  
 “Penalty: Ten thousand pounds for each day on which the  
 “contravention occurs.

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“PART IX.—GENERAL.

“58. Nothing in this Act shall require a State or person,  
 “being a customer of a private bank the business of which in  
 “Australia has been taken over by the Commonwealth  
 “Bank under this Act, to continue as a customer of the  
 “Commonwealth Bank.”

Rights of  
 customers of  
 private banks.

5. In the High Court of Australia the present Respondents  
 challenged the validity of section 46 of the Banking Act 1947 upon  
 40 the grounds:—

(i) that the provisions of the section do not constitute a  
 law for the peace, order and good government of the Common-  
 wealth with respect to any of the matters with respect to which

the Commonwealth Parliament has, by virtue of section 51 of the Commonwealth of Australia Constitution Act, (hereinafter referred to as "the Constitution"), or otherwise, power to make laws;

(ii) that they contravene section 92 of the Constitution;

(iii) that they are inconsistent with the maintenance of the constitutional integrity of the States;

(iv) that they are inconsistent with section 105A of the Constitution and the Financial Agreement made thereunder;

(v) that they are inseparable from other provisions of the Banking Act 1947 which were themselves submitted to be invalid, and which have been so declared in those parts of the said Orders of the High Court of Australia against which no appeal has been brought. 10

6. *As to ground (i)*:— The Appellants did not seek to found the validity of the section upon any legislative powers of the Commonwealth Parliament except those contained in paragraphs (xiii.) and (xx.) of section 51 of the Constitution, which confer power, subject to the Constitution, to make laws with respect to:—

"(xiii.) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money: 20

"(xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."

In their reasons for judgment, Rich and Williams JJ., held that section 46 was not a valid exercise of the power conferred by section 51 (xiii.); but Latham C.J., and McTiernan J., in their dissenting judgments, expressed the view that it was. The view of Starke J., that it might otherwise be within the banking power must be considered subject to his view that section 46 was inseparable from section 24. Dixon J., did not express any final opinion on the point. 30

None of the Justices of the High Court of Australia expressed the view that section 46 of the Banking Act 1947 was a valid exercise of the power conferred by section 51 (xx.). Rich and Williams JJ., held that it was not, and Latham C.J., in his dissenting judgment, and, *semble*, Starke J., were of the like opinion. Dixon and McTiernan JJ., expressed no opinion on the point.

*As to ground (ii)*:— Rich, Starke, Dixon and Williams JJ., held that the section contravened section 92 of the Constitution, while Latham C.J., and McTiernan J., held that it did not. 40

*As to ground (iii)*:— None of the Justices held the section to be inconsistent with the maintenance of the constitutional integrity of the States.

*As to ground (iv)*:— Rich and Williams JJ., held that section 46 was inconsistent with section 105A and the Agreement made

thereunder, but the other members of the Court took the contrary view.

*As to ground (v):*— Starke J., considered the section to be invalid by reason of inseparability from the other provisions of the Banking Act 1947 which were held invalid.

7. The High Court of Australia has not certified that any question in relation to the validity of section 46 is one which ought to be determined by His Majesty in Council. The Respondents submit that under section 74 of the Constitution the appeals do not  
10 lie in the absence of such a certificate.

8. If, contrary to the Respondents' submission, it should be held that the appeals are competent, the Respondents will submit that section 46 is invalid for the same reasons as are mentioned in paragraph 5 hereof, together with the further reason that section 46 in the context in which it now stands in what remains of the Banking Act 1947, is a law for the acquisition of property and is invalid under section 51 (xxxi.) of the Constitution as not providing just terms of acquisition.

#### B. COMPETENCE OF THE APPEALS.

20 9. Section 74 of the Constitution is in the following terms:—  
“No appeal shall be permitted to the Queen in Council  
“from a decision of the High Court upon any question, how-  
“soever 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.

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

40 “Except as provided in this section, this Constitution  
“shall not impair any right which the Queen may be pleased  
“to exercise by virtue of Her Royal prerogative to grant  
“special leave of appeal from the High Court to Her Majesty  
“in Council. The Parliament may make laws limiting the  
“matters in which such leave may be asked, but proposed  
“laws containing any such limitation shall be reserved by  
“the Governor-General for Her Majesty's pleasure.”

10. In the submission of the Respondents, this section precludes His Majesty in Council from hearing, without a certificate of the High Court of Australia, any appeal from that Court in which

the relief sought by the appellant cannot be granted without determining a question 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, (hereinafter called "an *inter se* question").

11. In the Respondents' submission:—

(a) the expression "decision of the High Court" means a judgment, decree, order or sentence of the High Court;

(b) the words "upon any question . . . . . howsoever arising" qualify the words "appeal to the Queen in Council"; 10

(c) the expression "an appeal . . . . upon any question" means an appeal in which the relief sought cannot be granted without determining the question.

12. The reasons for the Respondents' submissions are as follows:—

(a) *The meaning of "a decision of the High Court"*.

(i) Section 74 of the Constitution must be construed in the light of the law as it existed in 1900 with respect to appeals to Her Majesty in Council from courts of British possessions overseas. 20

(ii) Section 71 of the Constitution creates the High Court of Australia; section 73 confers upon it an appellate jurisdiction, and sections 75 and 76 confer upon it, or make provision for conferring upon it, original jurisdiction. Had there been no express provision in the Constitution about appeals to the Privy Council from the High Court, the prerogative power of the Crown to grant special leave to appeal to the Privy Council from any judgment, decree, order or sentence of the High Court, whether in its appellate or in its original jurisdiction, would have existed without limitation. 30

(iii) *The first paragraph* of section 74 modifies this prerogative power by defining a category of appeals from the High Court to the Privy Council which will not lie without a certificate of the High Court.

*The second paragraph* further modifies the prerogative by providing that where such certificate is given in appeals of the category defined in the first paragraph, the appeal upon the question certified shall lie without further leave.

*In the third paragraph*, the first sentence, by its use of the word "impair", indicates that the first two paragraphs have merely modified a prerogative power to grant special leave to appeal which would otherwise have existed; while the second sentence empowers the Commonwealth Parliament to enact further modifications of the prerogative power to grant special 40

leave to appeal to the Privy Council from the High Court, but provides that proposed laws for that purpose are to be reserved for Her Majesty's pleasure.

The section clearly does not create a new jurisdiction; it merely limits the exercise of an existing jurisdiction.

(iv) Since the section deals with appeals which, but for its provisions, the Privy Council might have entertained upon special leave, it follows that the word "decision" in the expression "decision of the High Court" bears its natural meaning, as it does in the preamble and in sections 3, 8 and 24 of the Judicial Committee Act, 1833. It is a generic term for what are described in section 3 of that Act as "the determination, sentence, rule or order"; in section 21 as "the order, sentence or decree"; in section 1 of the Judicial Committee Act, 1844, as "judgments, sentences, decrees or orders"; and in section 73 of the Constitution as "judgments, decrees, orders and sentences". It was only from "decisions" in this sense that appeals lay under the prerogative to the Privy Council from courts in British possessions overseas. The word "appeal" is, indeed, appropriate only to a proceeding in a superior court to reverse or vary a judgment, sentence, order or decree of an inferior court.

The contention of the Appellants, that the expression "decision" in section 74 of the Constitution means an opinion expressed in the reasons for judgment of the High Court upon a question of law arising in the course of the hearing of a case is, in the Respondents' submission, plainly incorrect for two reasons:—

(i) If this meaning were ascribed to the word "decision" the language of the whole section would be quite inappropriate. In 1900, the Privy Council had no jurisdiction to canvass opinions on points of law expressed by courts of British possessions overseas except in so far as such questions arose in the determination of an appeal from the actual judgment, sentence, decree or order of such a court. Thus, on the meaning of the word "decision" suggested by the Appellants, the first sentence of section 74 would be otiose; it would purport to prohibit a non-existing class of appeal, while the second sentence would need to be read as creating a new jurisdiction *sui generis* of a consultative character in a proceeding which could not properly be described as an "appeal" at all.

(ii) Furthermore, this meaning of the word "decision" raises insuperable difficulties where, as the Constitution contemplates in the case of the High Court of Australia (sections 71 and 79), a number of

judges constitute the court which hears the case. Are the separate reasons for judgment of each judge to be examined in order to ascertain whether he has expressed an opinion on an *inter se* question? Must one then count heads in order to determine whether a majority of all the judges or a majority of those who have concurred in the actual order made have expressed an opinion on such a question? Is one to count opinions expressed by judges who dissent from the actual Order made in the proceeding? Is one to count opinions expressed *obiter*? The difficulties which would be involved are well illustrated by the summary of the various reasons for judgment in the present case set out in paragraph 6 above. 10

The Appellants' contention is largely founded upon certain expressions of opinion in *Baxter's* case, 4. C.L.R. 1087, particularly at pages 1116 and 1151. The High Court in that case held that section 74 made the High Court the final arbiter of all questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the States, and that therefore it was not bound by any pronouncement of the Privy Council upon such a question. The construction of the expression "decision of the High Court" in section 74 was not a necessary step in the reasoning which led to this view. Any opinions expressed thereon must be regarded as *obiter dicta*. The Respondents submit that the construction placed upon the expression "decision of the "High Court" by the majority of the Justices in that case is erroneous and should not be accepted. They confined their attention to the case of a judgment or order which could be affirmed or reversed on alternative grounds, and they overlooked a case such as the present, where the judgment or order cannot be reversed without the determination of an *inter se* question; see particularly at pages 1116-7. 20 30

(b) *Whether "upon any question howsoever arising" qualifies "appeal".*

(i) Grammatically, the words in section 74 "upon any question . . . howsoever arising" are capable of qualifying either the words "appeal to Her Majesty in Council" or the words "decision of the High Court".

(ii) If "decision of the High Court" means, as the Respondents contend, the judgment, decree, order or sentence of the High Court:— 40

(i) To construe the words "upon any question howsoever arising" as qualifying "decision of the High Court"

would in practice confine within narrow limits the operation of the first two paragraphs of the section. The Respondents submit that a construction which so reduces the ambit of section 74 should be avoided, if there is any other reasonable construction open.

(II) So to construe the words "upon any question "howsoever arising" gives no significance to the words "howsoever arising".

10 (III) Indeed these words point rather to what may arise in the appeal than to what has already arisen in the proceeding of the High Court. They are inappropriate in relation to a judgment, decree, order or sentence already given or made. They indicate that it is immaterial whether the question is raised by the appellant or the respondent or the Privy Council itself, or at what stage it so arises, if the determination of the question becomes necessary for the resolution of the appeal.

20 (IV) If the words "appeal to the Queen in Council" are treated as qualified both by the words "from a decision "of the High Court" and by the words "upon any question "howsoever arising as to" etc., full effect is given to the grammar and to the language of the section as a whole, including, as above-mentioned, the words "howsoever "arising". The category of appeals with which the first two paragraphs deal is thus defined by reference (a) to the court—viz. the High Court—from whose decision the appeal is brought, and (b) the nature of a question arising in the appeal. The expression in the first paragraph of section 74 "the question is one which ought to be determined by Her  
30 "Majesty in Council", and the expression in the second paragraph of section 74 "an appeal shall lie to her Majesty "in Council on the question", point strongly to the construction for which the Respondents contend.

(c) *Meaning of the expression "an appeal . . . upon any "question".*

40 (i) In the Respondents' submission, the natural meaning of the expression "an appeal . . . upon any question" is an appeal in which the relief sought from the Privy Council cannot be granted without deciding the *inter se* question. That this is the correct meaning appears from the provisions in relation to the certificate of the High Court which are cited in (b) (ii) (iv) above. It is the determination of an *inter se* question in the absence of a certificate of the High Court which the section seeks to preclude.

(ii) Section 74 is one of a group of sections being Chapter III of the Constitution, which are in part directed to providing, as is essential in a constitution for a federation, a judicial authority for the interpretation of the Constitution, including the resolution of questions as to the respective constitutional spheres of the Federation and of the constituent States. Chapter III constitutes the High Court the judicial organ of the Federation. Consistently with the creation of the Commonwealth as a self-governing Dominion, it embodies a scheme whereby the delimitation of the constitutional powers of the Commonwealth and of the States *inter se* may be made the exclusive province of this federal court. Section 76 (i.) empowers the Commonwealth Parliament to confer original jurisdiction on the High Court in any matter arising under the Constitution or involving its interpretation. Section 77 (ii.) empowers the Commonwealth Parliament to define the extent to which the jurisdiction of the High Court shall be exclusive of the jurisdiction of the Courts of the States. By the combined operation of these provisions the Commonwealth Parliament is empowered to make laws ensuring that cases in which questions arise as to the limits *inter se* of the constitutional powers of the Commonwealth and the States shall be brought before the High Court. To complete the scheme it was necessary to provide in the Constitution itself that in cases which had come before the High Court, the Privy Council should not in any appeal determine any question as to such delimitation except upon the invitation of the High Court.

(iii) The construction which the Respondents place upon section 74 does achieve this result and makes the scheme effective.

(iv) On the other hand the Appellants' construction reduces section 74 to a narrow procedural provision, governing the rights of particular litigants only, operating arbitrarily and not giving effect to any intelligible constitutional principle.

(v) In exercise of the powers conferred by section 76 (i) and 77 (ii) of the Constitution the Commonwealth Parliament in 1907 amended the Judiciary Act 1903 by inserting therein sections 38A and 40A as they now appear. These sections secured the transfer from the Supreme Courts of the States to the High Court of all cases involving "*inter se* questions". By this means the Privy Council was precluded from determining any *inter se* question on appeal from the State Courts.

(vi) From that time section 74 applied to all appeals involving *inter se* questions which might reach the Privy Council.



(vii) The clear purpose of sections 38A and 40A of the Judiciary Act was to make the High Court the exclusive tribunal for the determination of *inter se* questions, except in so far as under section 74 a certificate might be granted, and thus to prevent a recurrence of conflicts between the High Court and the Privy Council such as arose in *Webb v. Outtrim*, (1907) A.C. 81, and *Baxter's* case, 4 C.L.R. 1087. See *Pirrie v. McFarlane*, 36 C.L.R. 170 per Starke J., at pp. 224 and 225. The construction of section 74 contended for by the Respondents is the only one which will effectuate this purpose.

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(viii) If section 74 is to depend for its operation (as the Appellants contend) upon the circumstance that an "*inter se*" question has been in fact "decided" by the High Court and decided adversely to the intending Appellant, the possibility of such conflicts is not removed and the delimitation of the respective constitutional spheres is not the exclusive function of the High Court.

*The meaning of inter se question.*

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13. If the construction of section 74, for which the Respondents contend, is accepted, the consequence in the present case is that the consolidated appeals cannot be heard by the Privy Council unless the High Court grants a certificate under section 74 of the Constitution, since each of the appeals is an appeal upon an *inter se* question:

30

(a) The consolidated appeals are against "the Orders of "the High Court dated the 11th day of August, 1948, in so far "as such Orders declare that section 46 of the Banking Act, "1947 is invalid and grant an Injunction on the basis of that "declaration". The Appellants thus assert the validity of section 46, and to succeed in the appeals they must obtain from the Privy Council a determination, not only that section 46 does not infringe section 92 of the Constitution, but also that it is authorised by section 51 thereof, and does not for any other reason exceed the powers of the Commonwealth Parliament.

40

(b) Whether section 46 of the Banking Act 1947 is authorised by section 51 of the Constitution is an *inter se* question: *Jones v. Commonwealth Court of Conciliation and Arbitration*, (1917) A.C. 528; *Australian National Airways Limited v. Commonwealth*, (No. 2), 71 C.L.R. 115. The reason for this is as follows. In the process of defining the Commonwealth legislative power under section 51 of the Constitution, a line is ascertained which defines, on the one hand, the exclusive legislative power of the States and, on the other, the legislative power of the Commonwealth, which, although not exclusive of that of the States, is made supreme by section 109

of the Constitution. To adopt the language of Dixon J., in *Ex parte Nelson* (No. 2), 42 C.L.R. 258 at pp. 270, 271: "The expression 'limits *inter se*' refers to some mutual relation between the powers belonging to the respective Governments of the Federal system. The required relation has been found in the effect which the process of defining the specific and paramount powers of the Commonwealth Parliament must have upon the ascertaining or determination of the amount of plenary power retained by the legislatures of the States. *Jones v. Commonwealth Court of Conciliation and Arbitration*, 10 (1917) A.C. 528. For in the process of defining the Commonwealth legislative power a line is ascertained. Upon one side of it is the undefined residue of absolute and uncontrolled power remaining to the States. Upon the other is the legislative power vested in the Commonwealth, made supreme by section 109. Upon that side of the line State legislative power, if any there be, is subordinate. It is a boundary at which the supreme power of the State begins, and that of the Commonwealth ends, a limit *inter se* of these plenary powers."

*Alternative construction of section 74 of the Constitution.*

20

14. If, contrary to the Respondents' primary submission, a construction of section 74 should be accepted which, whilst giving the word "decision" the meaning of actual judgment, decree, order or sentence, treats the words "upon any question, howsoever arising" as qualifying the expression "decision of the High Court", the Respondents then submit that the declaration of the High Court that section 46 of the Banking Act 1947 is invalid is itself a decision upon an *inter se* question. The grounds of this submission of the Respondents, which is alternative to their primary submission in paragraphs 11-13 above, are as follows:—

30

(i) The parts of the Orders against which these consolidated appeals are brought are declarations that section 46 of the Banking Act 1947 is invalid and injunctions restraining the Treasurer of the Commonwealth from putting section 46 (4.) into operation. The declarations are not limited to declarations that the section is invalid as infringing section 92 of the Constitution, but are made in suits in which, as appears by the indorsements on the Writs of Summons, the Commonwealth Parliament's power to enact section 46, as well as that section's repugnancy to section 92 of the Constitution, was raised as an issue. It is submitted that these are declaratory Orders upon an *inter se* question.

40

(ii) Further, a declaratory Order that section 46 of the Banking Act 1947 is invalid, on whatever reasoning it may be based, necessarily decides in the negative and in favour of the

contention of the Respondent States the question whether the Commonwealth Parliament has power to prevent the States from exercising their executive powers to deposit their public monies with private banks and to manage their public finance by resort to such banks. It is submitted that the question so decided is an *inter se* question, since it delimits the boundary between Commonwealth legislative and State executive power with respect to this matter. *A.G. for N.S.W. v. Collector of Customs for N.S.W.*, (1909) A.C. 345.

10 *Further alternative construction of section 74 of the Constitution.*

15. Further, if, contrary to the Respondents' primary submission, a construction of section 74 should be adopted which gives to the word "decision" the meaning of the *ratio decidendi* upon which the actual judgment or order was based, and treats the words "upon any question, howsoever arising" as qualifying the expression "decision of the High Court", the Respondents then submit that the declaration of the High Court that section 46 is invalid has for its *ratio decidendi*, at least in part, the decision in this sense of  
 20 an *inter se* question. The grounds of this submission of the Respondents, which is a further alternative to the submission in paragraphs 11-13 above, are as follows:—

An analysis of the reasons for judgment of the members of the High Court shows:—

(i) That Latham C.J. and McTiernan J. dissented from the declaration of *the Court* that section 46 is invalid. Their individual judgments on the validity of this section form no part of the decision (in any sense) of the Court, and must therefore be disregarded altogether in ascertaining what was the  
 30 decision of the High Court. The fact that both dissenting Judges thought that section 46 of the Act was authorised by section 51 of the Constitution cannot, as the Appellants argued upon the application for special leave to appeal, be taken into consideration in determining what was the "decision of *the High Court*", or what were the reasons upon which the Order actually made by the Court was based.

(ii) That Rich and Williams JJ. held that section 46 of the Act was not authorised by section 51 of the Constitution, and was contrary to section 105A and to section 92 of the Constitution.

40 (iii) That Starke J. held that section 46 of the Act was invalid because it was not severable from section 24 of the Act, which he, in common with all the other members of the Court except McTiernan J., held was invalid because it was not authorised by section 51 of the Constitution. He therefore held that section 46 was beyond the power of the Commonwealth.

He also held that section 46 was contrary to section 92 of the Constitution.

(iv) That Dixon J. did not express any concluded opinion upon the question whether section 46 of the Act was authorised by section 51 of the Constitution, but held that section 46 was contrary to section 92 of the Constitution.

This analysis shows that, of the four Justices who participated in the declaration of the High Court that section 46 was invalid, three held that the section was invalid because of a lack of Commonwealth power under section 51 of the Constitution, and two of them held further that the section was contrary to section 105A of the Constitution. All three also held, with Dixon J., that the section was contrary to section 92 of the Constitution. The declaration of the Court that section 46 is invalid is therefore based at least as much upon the determination that the section is beyond power as upon the determination that it offends section 92. Thus upon the Appellants' construction of section 74 there is a decision of the Court upon an *inter se* question adverse to the Appellants. 10

*Summary.*

16. The Respondents accordingly submit that, since no certificate has been granted by the High Court under section 74 of the Constitution, that section precludes His Majesty in Council from hearing and determining these consolidated appeals, for the following among other reasons:— 20

(1) because the relief sought by the Appellants in these consolidated appeals cannot be granted by His Majesty in Council without determining an *inter se* question;

(2) because the declarations and injunctions against which these consolidated appeals are brought are themselves decisions of the High Court on an *inter se* question; 30

(3) because the determination of an *inter se* question was included in the *rationes decidendi* of the majority of the Judges of the High Court who were parties to the Order of that Court.

C. SUMMARY OF EVIDENCE.

17. All the Respondent Banks, which are companies incorporated as is set out in the Record of Proceedings, are and have been for many years carrying on general banking business in Australia. Banks carrying on general banking business after the manner of the Respondent Banks are referred to in the Macmillan Report as "commercial banks". Each such bank holds an authority in writing to carry on banking business in Australia, granted to it unconditionally by the Governor-General of the Commonwealth of Australia under and by virtue of Part II of the Banking Act 1945. 40

18. A large measure of control over the private banks is exercised by the Commonwealth Bank pursuant to the provisions of the Banking Act 1945.

Vol. II.  
pp. 218-222

19. The magnitude of the business of the Respondent Banks is stated in the Record of Proceedings, from which it appears that in November 1947 there were throughout Australia the Head Offices and about 2,200 branches and 800 agencies of these banks. There were also branches and agencies in the Australian Capital Territory, the Northern Territory, New Zealand and England. The total number of the Respondent Banks' customer accounts in Australia was about 1,388,000 and the number of customers somewhat less than this figure. Many of the branches in Australia are situated at or close to State borders, and many of the customers of each branch so situated are resident in or carry on business in a State other than that in which the branch where their accounts are kept is situated. A great number of customers have accounts at more than one branch and many of them at branches in more than one State. Even the smallest branch has to transact some interstate banking business for its customers.

Vol. I.  
pp. 28-33  
pp. 92-98

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pp. 33; 96-98

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pp. 32, 97

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pp. 46, 111

20. Each of the Respondent Banks (other than The Ballarat Banking Company Limited and The Brisbane Permanent Building and Banking Company Limited) operates as an Australia-wide organization, and the whole of its cash and credit resources in Australia is available to be utilized in its business wherever required in the Commonwealth, without regard to State boundaries. It is an essential feature of the business of each of the Respondent Banks that banking transactions constantly take place between its branches in different States and between its branches and branches in other States of other banks.

Vol. I.  
pp. 45-46,  
111-112

21. The staffs of the Respondent Banks include a number of senior officers whose duties are not confined to any one State but extend to the whole of Australia. All members of the respective staffs are subject to transfer to any place in which the bank carries on business.

Vol. I.  
p. 98

22. All the Banks carry on extensive interstate operations including the following principal classes of transactions:—

- (a) the collection and negotiation of interstate bills of exchange, cheques and promissory notes;
- (b) the transfer of funds interstate;
- (c) the establishment of interstate credits;
- (d) the issue and negotiation of travellers' cheques.

40

These transactions are explained in detail in the Record of Proceedings. The volume of the interstate transactions of the Respondent Banks is indicated in the Record of Proceedings, from which it appears that the total annual turnover of interstate transactions exceeds £750,000,000 and amounts to something between 10% and 15% of all transactions.

Vol. I.  
pp. 47-52; 100-109

Vol. II.  
pp. 300-301;  
328-333  
Vol. I. p. 100  
Vol. II. p. 298

Vol. I.  
pp. 54-56

23. The interstate transactions of the Respondent Banks are frequently an integral part of complex transactions which include both interstate and intrastate banking operations which are inextricable one from the other.

Vol. I.  
pp. 53-54, 112

24. The interstate banking facilities which are provided by the Respondent Banks could not possibly be provided without the trained staffs, equipment and assets which they are enabled to maintain on an Australia-wide basis by reason of the balance of their entire businesses both intrastate and interstate.

Vol. I.  
pp. 56-58,  
108-110

25. Interstate trade and commerce in Australia involves as a matter of practical necessity interstate banking transactions, and this interstate banking is in the main transacted by the private trading banks. In some cases the banks by their banking operations acquire an interest in goods the subject of interstate trade. 10

Vol. I.  
pp. 33-38  
117-120  
128-133  
141-146

26. Not only does the conduct of modern business require for its operation the utilization of banking facilities, but such facilities are essential in order to enable the States to carry on and perform their necessary governmental functions. Such facilities are provided by the private banks, (particularly for the States of New South Wales and Victoria which do not bank with the Commonwealth Bank), in the fashion set out in the Record of Proceedings. Although there are small incorporated State banks doing general banking business in the States of South Australia and Western Australia, these banks depend upon facilities provided by the private banks, and could not in any case undertake the banking business of those States. Similarly the States Savings Banks of Victoria and South Australia depend upon facilities provided by the private banks or by the Commonwealth Bank carrying on business in competition with the private banks. The State Savings Banks and the Commonwealth Savings Bank which is associated with the Commonwealth Bank are competing with one another for business. If the private banks were to be prohibited from carrying on business, the State Banks would be dependent upon the Commonwealth Bank to provide such facilities as they require. Further, the practical result would be that the States would have to transact their financial business with the Commonwealth Bank upon such terms as that Bank (or the Treasurer of the Commonwealth) saw fit to offer or impose. 20

*ibid.*  
pp. 164-167  
184-187

*ibid.*  
pp. 38-45  
120-121  
148-153  
167-171

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pp. 146-7  
163, 172  
183-184  
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#### D. SECTION 46 BEYOND THE POWER OF THE COMMONWEALTH PARLIAMENT.

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*Section 46 inseparable from sections of the Act declared to be beyond power.*

27. Although many sections of the Banking Act 1947 have been held, and for the purposes of this appeal are conceded to be,

invalid, the meaning of section 46 must be ascertained by construing it in the context of the entire Act.

The Act as passed embodies a single legislative scheme for the nationalisation of banking in Australia: see paragraph 4 of the petition for special leave to appeal in these actions.

28. While section 3 of the Act speaks of the "several" objects of the Act, it is clear that the objects set out in sub-sections (a), (b) and (c) are not mutually exclusive, but state the several steps considered necessary in the one scheme of nationalisation.

10 Thus, section 3 (a) states the object of providing the publicly owned Commonwealth Bank as the "national" bank.

Section 3 (b) states the object of taking over the businesses of the named private banks: (see the definition of "private bank" in section 5).

Section 3 (c) states the object of preventing the same banks from carrying on banking business.

29. The use of the word "several" in the introductory words of section 3 does not require section 3 (c) to be regarded as stating an object completely independent of and unrelated to the scheme of  
20 nationalisation.

In any event an "objects clause", such as section 3, cannot control construction, though in case of ambiguity it may assist construction.

30. Section 46 is a single section forming Part VII of the Act. Subsections (1.), (2.) and (3.) are plainly part of, and dependent for their operation upon, the acquisition provisions. There is nothing in the Act or in the section itself to indicate that sub-sections (4.)-(8.) embody some independent and unrelated legislative scheme.

31. Subsections (4.)-(8.), read as independent of the whole of  
30 the remainder of the Act, would authorise the Treasurer, without taking over the businesses of any of the private banks, for any reason and at any time, to close any or all of the private banks without compensation, and without any provision for the absorption of bank officers and staff, or in relation to customers' accounts or the completion of current transactions. Paragraph 120 of this Case illustrates the effect which such an operation of the subsections would produce in relation to State Governments as customers of the private banks.

32. So to read these subsections is to impute to the legislature  
40 not only two discordant schemes of legislation in the one section, but also an intention to authorise "extraordinary confusion and "disturbance" and to "reduce to chaos the trade and commerce of "Australia"—see paragraphs 39 and 41 (*infra*). No construction which produces such results should be adopted unless the language of the section is incapable of bearing any other meaning.

33. The Respondents submit that the authority conferred upon the Treasurer by section 46 (4.) is only exercisable for the purposes of the Act as a whole—see paragraphs 27-30 of this Case. Therefore a notice under that subsection can only be given as an ancillary to the acquisition of a private bank.

34. Section 46 takes its place in the scheme of nationalisation—

(a) by requiring the named private banks to carry on, and preventing them from making changes in, their business until they are taken over by the Commonwealth Bank under the Act;

(b) by preventing the named banks from carrying on banking business thereafter. 10

35. This construction harmonises subsection (4.) with subsections (1.), (2.) and (3.). Subsection (1.) deals, not with the prohibition of carrying on banking business generally, but with the prohibition of carrying it on otherwise than in the manner required by section 46. Thus, subsections (1.) and (2.) provide that, notwithstanding anything contained in any other law or in its instrument of incorporation, each of the named private banks is to carry on its banking business in Australia, and therein to provide any facility or service which it provided on the 15th August 1947—the day preceding the date on which the Prime Minister and Treasurer publicly announced the Government's intention to introduce legislation to nationalise banking. Upon the taking over of a private bank by the Commonwealth Bank, the private bank is by subsection (3.) released from this obligation. 20

36. Upon this construction of subsections (1.)-(3.), it is necessary to make provision to prevent the acquired bank from recommencing banking business. This function, in the Respondents' submission, subsections (4.)-(8.) perform.

37. The Respondents submit that section 46 as a whole is inseverable from the acquisition provisions of the Act which have been declared invalid or which have been rendered inoperative by injunction, and in respect of which there is no appeal. 30

38. If as a matter of construction the general words of section 46 (4.) should be qualified in the way submitted in paragraph 33 of this Case there is nothing in section 6 of the Act which requires or justifies an enlargement of the meaning thus ascertained when other portions of the Act are found to be invalid.

39. The Respondents respectfully adopt the analysis of section 6 made by Dixon J. . 40

His Honour said of section 46:—

“To isolate section 46 (4.) (8.) and give them an  
 “operation quite independent of the compulsory acquisition  
 “provisions would, indeed, give the enactment a different effect  
 “in substance from that which, it may be supposed, was con-  
 “templated. For it would enable the Treasurer to close any or  
 “all of the private banks, but not to take over the businesses.



“Extraordinary confusion and disturbance, if not worse, would  
 “no doubt be caused by the use by itself of such a power to close  
 “up even one large bank, to say nothing of the result if it were  
 “applied at the same time to all.

“It may be assumed that it was outside the contemplation  
 “of anybody that the private banks should be closed, not only  
 “without compensation, but without any arrangement in  
 “respect of the bank officers and staff and without any provision  
 “for continuance of the customers’ accounts and without any  
 “other transitional arrangements.”

10

40. But these considerations did not lead His Honour, as in the Respondents’ submission they should have, to construe the subsections in such a way as to harmonise them with the scheme of which His Honour thought they formed part. Only because His Honour thought that section 46 (4.) was unqualified on its true construction did he find occasion for the application of section 6 so as to prevent its being treated as inseverable.

41. Starke J., on the other hand, having held that section 46 (4.) - (8.) was linked with the provisions for acquisition, held that section 6 did not compel him to regard these subsections as severable.

20

His Honour said:

“The presumption of severability raised by section  
 “6 of the Act is overcome, to my mind, by considerations and consequences that make evident their inseparability.  
 “They are in their nature ancillary to the acquisition of the  
 “shares and the businesses of the banks dealt with in earlier  
 “sections of the Act. And putting into operation the provisions  
 “of Part VII of the Act would reduce to chaos the trade and  
 “commerce of Australia, unless the businesses of the banks were  
 “compulsorily acquired or the banks under pressure agreed to  
 “make them over to the Commonwealth.

30

“A court is not required to attribute such an intention to  
 “Parliament if another construction is open”

*Section 46 beyond the power conferred by Section 51 (xxxi.).*

42. Under Section 51 of the Constitution the Commonwealth Parliament has power to make laws, subject to the Constitution, for the peace, order and good government of the Commonwealth with respect to:—

“(xxxi.). The acquisition of property on just terms from  
 “any State or person for any purpose in respect of which the  
 “Parliament has power to make laws:”

40

43. If, contrary to the Respondents’ submissions, section 46 (4.) to (8.) confers upon the Treasurer a power to give a notice or notices at any time to any or all the private banks independently of

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 p. 162, ll. 9 to  
 24

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 p. 124, ll. 24 to  
 33

a compulsory acquisition of any bank, the Respondents submit that Section 46 is invalid because—

(a) in conjunction with section 22 (5.)-(9.) it is a law for the acquisition of the property of the private banks, and does not provide just terms therefor. Indeed it arms the intended purchaser with a power so menacing that no fair bargain could be expected to result; and

(b) by itself it is a law for the acquisition in whole or in part of the businesses of the private banks, and provides no compensation therefor.

10

*Section 46 beyond the power conferred by Section (xiii).*

44. The Parliament of the Commonwealth is a legislature of enumerated powers. Though each power is in its nature plenary, its extent must be ascertained by construction of the language in which it is granted. That language in defining a subject matter indicates the nature of the laws it authorises as to that subject matter.

45. In order that a law may be held valid as an exercise of legislative power upon a specific subject matter, it is not enough that it has some relation to that subject matter. The true nature and character of the law—its pith and substance—must show that it is a law upon the specified subject matter.

*Gallagher v. Lynn*, (1937) A.C. 863.

*Prafulla Kumar Mukherjee v. Bank of Commerce*, (1947)  
L.R. 74 Ind. App. 23.

46. The true nature and character of Section 46 will be determined by first construing it in the context of the *entire Act* as it was passed, and then, having so construed it, by determining its operation in what now remains of the *Act*. The Respondents' submissions upon the construction of section 46 are set out in paragraphs 27 to 41 of this Case.

47. Under section 51 of the Constitution the Commonwealth Parliament has power to make laws, subject to the Constitution, for the peace, order and good government of the Commonwealth with respect to:—

“(xiii.) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money.”

48. Section 5 defines “private bank” as one of the fourteen banks whose names appear in the First Schedule. Section 46 (4.)-(8.) is therefore a law authorising the Treasurer for any reason and at any time to issue a notice to one of a limited number of named corporations, having the effect upon its expiry of preventing that corporation from carrying on banking business in Australia.

40

49. *Prima facie* such a law is in pith and substance a law with respect to the named corporations, and this is particularly so when it appears that the discretion of the Treasurer is not limited by any consideration relating to the conduct of banking.

50. If the operation of an enactment is dependent upon and related to considerations which have no relevance to the subject matter of a head of legislative power, the law is not a law with respect to that subject matter, merely because in its operation it will affect persons engaged in activities which fall within the legislative field.

10 *Union Colliery Co. v. Bryden*, (1899) A.C.580.

And when, as here, the circumstances under which and the considerations upon which the law operates do not appear in the law itself, it is impossible to predicate of the law that it is a law upon the specified subject matter—viz. banking.

51. The submission contained in the preceding three paragraphs is independent of the submission as to the construction of the word “banking” in section 51 (xiii.) of the Constitution set out in paragraphs 52 to 63 of this Case.

20 52. If, contrary to the submissions contained in paragraphs 27-41, section 46 (1) should be construed as containing a direct prohibition of banking and section 46 (4.)-(8.) as conferring an absolute and uncontrolled discretion on the Treasurer, the Respondents further submit that upon its proper construction section 51 (xiii.) of the Constitution does not authorise the enactment of section 46 of the Banking Act 1947.

53. Section 51 (xiii.) must be construed as a single provision, each part of it being construed with reference to the whole, and so that the word “banking” shall bear the same meaning wherever it appears in the paragraph.

30 54. The separate power to make laws with respect to the incorporation of banks shows that the power with respect to “banking” authorises laws with respect to the conduct of banking business, not laws with respect to banks.

*Tennant v. Union Bank of Canada*, (1894) A.C.31.

*Cf.* the provisions of paragraph 38 of the 7th Schedule to the Government of India Act, 1935, which confers power on the Federal Legislature in respect of:—

“Banking, that is to say, the conduct of banking business  
“by Corporations . . . . .”

40 55. “Banking” in Section 51 (xiii.) refers to a continuing existing activity to be governed, not to something which may be completely suppressed.

56. This appears most clearly upon an examination of the phrase “State banking extending beyond the limits of the State “concerned”, and a consideration of what legislation is authorised by

that portion of section 51 (xiii.). It is submitted that the Commonwealth Parliament could not pass a law prohibiting State banking from extending beyond the borders of the State concerned. The purpose of this portion of section 51 (xiii.) was to enable the Commonwealth Parliament, by the use of its paramount power of legislation, (see section 109), to protect and control the transactions of a State bank extending beyond the borders of its own State. If this were not so, the power of each State to establish a bank of its own, (whose business the Constitution assumes may extend beyond the limits of the State), might be rendered nugatory by an Act of the Commonwealth Parliament preventing a State bank from affording its customers within the State facilities for the conduct of business with persons in other States or overseas. The business of a State bank must subsist in order to extend. It is therefore submitted that the phrase "State banking extending beyond the limits of the State "concerned" refers to the banking operations of a State bank which, or a portion of which, take place outside the borders of the State concerned. These and these only may be subjected to Commonwealth legislation; and it follows that such legislation can do no more than regulate, and cannot suppress, such banking operations. 10

The phrase "banking other than State banking" in the same way refers to banking operations conducted by a bank other than those conducted by a State bank. 20

57. There is no power to suppress State banking, or to suppress so much of State banking as extends beyond the limits of the State concerned. And, since the two subjects are similarly described and form parts of the same power, it is submitted that there is also no power to suppress or prohibit the carrying on by a private bank of banking operations.

58. Within a power so defined, laws may be passed concerning the stability of the banker, the regulation of banking practice, and the protection of the customer. For all such laws would be in pith and substance laws regulative of the business of banking. 30

Since the relevant word is "banking" and not "banks", the power must relate to the operation or function, not simply to the person or body carrying it on.

59. Section 46 (1.) of the Banking Act 1947 prohibits any private bank from carrying on banking business in Australia "except as "required by this section". Section 46 (2.) requires every private bank to carry on banking business in Australia "subject to this section" Section 46 (4.)-(8.) empowers the Treasurer by a notice to require a private bank to cease upon a date specified carrying on banking business in Australia, after which date the carrying on of banking business by such bank will involve it in heavy penalties. 40

60. Nowhere in section 46, or in any other section of the Act not invalidated by the decision of the High Court, is there any trace of

a purpose to regulate the conduct of banking. It is submitted that neither the direct prohibition in section 46 (1.), nor the prohibition authorised by section 46 (4.), can be justified under a power to make laws with respect to banking.

61. Unless section 51 (xiii.) is wide enough to authorise a complete prohibition of all banking other than State banking which does not extend beyond the limits of the State concerned, no construction can be placed on the power which will support a bare prohibition unrelated to the regulation of the activity.

10 62. In the High Court of Australia it was argued for the Appellants that, whether or not section 51 (xiii.) of the Constitution gives power to make a law for the suppression of banking, section 46 of the Banking Act 1947 merely authorises the Treasurer to confine banking to the Commonwealth and State Banks. It was said "It selects those who may do the banking and is therefore  
"within the principle of *Huddart Parker v. The Commonwealth*,  
"44 C.L.R.492". But *Huddart Parker's* case was a decision as to the extent of Commonwealth legislative power with respect to trade and commerce with other countries and among the States. It therefore  
20 affords no guide as to the kind of laws which may be passed under a more narrowly defined subject-matter such as is found in section 51 (xiii.). More detailed reference to the decision in *Huddart Parker's* case will be found in paragraph 94 of this Case in connection with the Respondents' submission that section 46 of the Banking Act infringes section 92 of the Constitution.

63. The Respondents do not deny that in the course of regulating some form of activity such as "trade and commerce among the "States", or "banking other than State banking", the Commonwealth Parliament might (apart from any question arising under  
30 section 92 of the Constitution) legislate by means of a licensing system or otherwise in such a way as to choose between persons desirous of engaging in that form of activity. But in every case the legislation in question must be a law with respect to (i.e. on the subject of) the specific subject matter defined in section 51. Section 46 of the Banking Act 1947 is not a law with respect to the manner in which banking business (other than State banking) may be carried on. It authorises a bare prohibition of certain named banks from carrying on their business, with the express object of expanding the business of the Commonwealth Bank and of giving effect to  
40 a political philosophy concerning private profit and public ownership. It is not therefore a "selection" of the persons to be permitted to engage in banking as a means or method of controlling and regulating the business of banking. It authorises a suppression, for avowedly

non-banking reasons, of all banking business conducted by banks other than the Commonwealth Bank and the State banks.

*Section 46 beyond the power conferred by Section 51 (xx.) of the Constitution.*

64. Under section 51 (xx.) of the Constitution, the Commonwealth Parliament has power, subject to the Constitution, to make laws for the peace, order and good government of the Commonwealth with respect to:—

“(xx.) Foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth.” 10

65. Although the banks to which section 46 applies are all corporations, the High Court held, and in the submission of the Respondents correctly held, that the section was not authorised by section 51 (xx.).

66. This is submitted to be so for the following reasons:—

(a) The legislative power thereby conferred does not go beyond the making of laws for regulating the conditions under which corporations of the kinds specified shall be recognised as legal entities throughout Australia and as entitled to carry on business in Australia. 20

This view is in accord with *Huddart Parker & Co. Pty Ltd. v. Moorehead*, (1908), 8 C.L.R. 330; see particularly the judgments of O'Connor and Higgins JJ.

To read section 51 (xx.) as conferring a power to legislate generally with respect to corporations of the kind specified and their trade, (a construction for which the Appellants contended unsuccessfully in the High Court), would:—

(i) destroy the balance of the Constitution by depriving the limiting words in section 51 (i.), (xiii.), (xiv.) and (xxxv.) of much, if not all, of their significance, and by giving the Commonwealth a general rather than a further particular legislative power. Such a construction would submit State banking carried on by corporations to the complete control of the Commonwealth Parliament, and 30

(ii) produce the inconvenient result, referred to in detail by Higgins J., in *Huddart Parker & Co. Pty Ltd. v. Moorehead* (*supra*), that the activities of certain corporations could and would be governed by quite different laws from those governing the same activities of individuals or other corporations. 40

(b) In any event banking and the incorporation of banks are matters dealt with specifically by section 51 (xiii.) which should be regarded as providing for the whole relevant legislative power of the Commonwealth Parliament; and accordingly

per Rich and Williams JJ. Vol. III p. 76, l. 48 to p. 77, l. 41 per Starke J. *ibid.*, p. 110, ll. 10-33

per Latham C.J. Vol. III. p. 41, ll. 6-40; per Rich and Williams JJ., *ibid.*, p. 77, ll. 22-41; per Starke J. *ibid.*, p. 110, ll. 27-30

section 51 (xx.) should be regarded as not applying to corporations as far as they are engaged in banking.

10 (c) Further, section 46 cannot be supported by section 51 (xx.), whatever be the construction placed upon it, for the section is not in pith and substance a law with respect to financial corporations; it does not select private banks as those whose business is to be prohibited because they are corporations, or in reference to anything arising from their corporate nature. The abolition of banking for private profit, said by section 3 (a) to be an object of the Act, is unconnected with the corporate nature of the Respondents.

#### E. SECTION 92 OF THE CONSTITUTION.

67. The first paragraph of section 92 of the Constitution provides as follows:—

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

20 The Respondents submit that section 46 is inconsistent with this section of the Constitution.

#### GENERAL (Part I).

68. Section 92 is an overriding constitutional provision guaranteeing the freedom of trade, commerce and intercourse among the States. Sections 51 and 52 are subject to section 92, which also binds the States. Section 92 effectively withdraws from both the Commonwealth and the States power to make any law inconsistent with the freedom guaranteed.

30 69. The Constitution thus deliberately creates a gap in the legislative field in Australia, but by section 128 it enables the Australian people to reduce or close the gap if they see fit so to do. In *James v. The Commonwealth*, (1936) A.C. 578, the existence of such a legislative gap was referred to in argument: (see pp. 595 and 601), but its inconvenience was held to flow from the terms of the Constitution: (see pp. 629 and 633).

70. There is neither necessity nor warrant for reducing this gap by placing any gloss on the express words of the Constitution. The only permissible course is to construe the section in accordance with the ordinary principles of construction applicable to a section of an

Imperial Statute enacted in 1900 as a Constitution for a self-governing Dominion. See *James v. The Commonwealth*, (1936) A.C. 578 at pp. 613-614.

71. The concept of trade, commerce and intercourse in section 92 is a wide and practical one and embraces much more than trade in goods. Commercial dealings in relation to intangibles such as choses in action, and both commercial and non-commercial travel and communication, are included in the concept.

72. The Appellants contend that trade and commerce in section 92 is limited to trade in goods, and that the section secures freedom for nothing more than the interstate carriage of goods and persons. That view would stultify section 51 (i.) in which trade and commerce must bear the same meaning as in section 92. 10

73. The Appellants' contention misconceives the judgment in *James v. The Commonwealth*, (1936) A.C. 578, as deciding that the immunity given by the section extends to some, but not to all, of the activities comprised in the trade and commerce to which section 51 (i.) refers.

74. In *W. & A. McArthur Ltd. v. Queensland*, 28 C.L.R. 530, at p. 549, it was said:— 20

“The notion of a person or thing, tangible or intangible, “moving in some way from one State to another is no doubt a “necessary part of the concept of ‘trade, commerce and inter- “course among the States’. But all the commercial dealings and “all the accessory methods in fact adopted by Australians to “initiate, continue and effectuate the movement of persons and “things from State to State are also parts of the concept, because “they are essential for accomplishing the acknowledged end”.

The judgment of the Privy Council in *James v. The Commonwealth* (1936) A.C. 578, expressed no dissent from this view; indeed it proceeds upon the footing that it is correct (see p. 619 *et seq.*), as is recognised also in the dissenting judgment of the Chief Justice in the present case. The view with which their Lordships did disagree was that section 92 secures immunity from all law for all activities falling within trade, commerce and intercourse as so described; and they held that the immunity conferred by the section is an immunity for all activities falling within the concept, but only from some laws. Whether a particular law is within this class was held to be a question of fact: (see the submissions in paragraphs 80-81 below). 30

The Appellants' contention also treats the words “whether by “means of internal carriage or ocean navigation” as words of restriction confining the operation of section 92 to such things and persons as are being carried by land or sea. This view is unsupportable and has long since been rejected; (see *W. & A. McArthur Ltd. v.* 40



*Queensland*, 28 C.L.R. at p. 550, and the judgment of Dixon J. in the present case).

75. The Appellants' contention is contrary to the settled view of the High Court of Australia, as appears from the following references:—

*Duncan v. Queensland*, 22 C.L.R. 556, per Barton J., at p. 593.

*W. & A. McArthur Ltd. v. Queensland*, 28 C.L.R. 530, per Knox C.J., Isaacs and Starke JJ., at pp. 546-550.

*James v. Cowan*, 43 C.L.R. 386, per Isaacs J., at p. 418.

10 *Peanut Board v. Rockhampton Harbour Board*, 48 C.L.R. 266, per McTiernan J., at p. 313.

*R. v. Connare*, 61 C.L.R. 596, per Latham C.J., at p. 603; Rich J., at p. 613; Starke J., at p. 616; Dixon J., at p. 617-8; Evatt J., at p. 622.

*R. v. Martin*, 62 C.L.R. 457, per Dixon J., at p. 461.

*Australian National Airways Ltd. v. The Commonwealth*, 71 C.L.R. 29, per Starke J., at p. 76.

20 The contention is also inconsistent with the references in *James v. The Commonwealth*, (1936) A.C. 578, to communications and post and telegraph services (at pp. 625-6), to bills of exchange (at p. 629), to personal passage (at pp. 630-1), and to trade consisting of acts including documents (at p. 630).

The contention of the Appellants is also inconsistent with the settled doctrine of the Supreme Court of the United States as to what is commerce, as appears from the following references:—

*Freeman v. Hewit*, 329 U.S. 249, at pp. 258-9.

*Polish National Alliance v. National Labour Relations Board*, 322 U.S. 643.

*U.S. v. South Eastern Underwriters Association*, 322 U.S. 533.

30 *Associated Press v. National Labour Relations Board*, 301 U.S. 103.  
*Fisher's Blend Station Inc. v. Washington Tax Commission*, 297 U.S. 650.

*International Text Book Co. v. Pigg*, 217 U.S. 91.

*Western Union Telegraph Co. v. Texas*, 105 U.S. 460, at p. 464.

*Pensacola Telegraph Co. v. Western Union Telegraph Co.* 96 U.S. 1.

76. When activities falling within the concept of trade, commerce and intercourse are conducted across State lines they form part of trade, commerce and intercourse among the States.

40 77. The freedom guaranteed is freedom for the people of Australia to carry on trade, commerce and intercourse across State lines: (*James v. The Commonwealth*, (1936), A.C. at p. 630). The section treats interstate trade, commerce and intercourse, not as an abstraction or a mere economic phenomenon, but as an activity carried on by individuals. The presence of the word "intercourse" in particular indicates this clearly.

78. The contrary contention of the Appellants, namely that section 92 is concerned only with the volume or flow of interstate trade, commerce and intercourse, is contrary to the settled view of the High Court of Australia throughout. Thus, in each of the following references, the emphasis is upon the protection which the section affords the individual:—

*Fox v. Robbins*, 8 C.L.R. 115, per O'Connor J., at p. 126; per Higgins J., at p. 131.

*R. v. Smithers*, 16 C.L.R. 99, per Isaacs J., at p. 113.

*W. & A. McArthur Ltd. v. Queensland*, 28 C.L.R. 530, per Knox C.J., Isaacs and Starke JJ., at pp. 543 and 551. 10

*James v. South Australia*, 40 C.L.R. 1, per Isaacs and Powers JJ., at p. 32; per Gavan, Duffy, Rich and Starke JJ., at p. 39.

*James v. Cowan*, 43 C.L.R. 386; per Starke J., at pp. 391-2; per Isaacs J., at p. 418.

*Peanut Board v. Rockhampton Harbour Board*, 48 C.L.R. 266, per Rich J., at p. 277; per Starke J., at pp. 282-3, 285; per Dixon J., at p. 287; per McTiernan J., at p. 313.

*O. Gilpin Ltd. v. Commissioner for Road Transport*, 52 C.L.R. 189, per Dixon J., at p. 211. 20

*Riverina Transport Co. v. Victoria*, 57 C.L.R. 327, per Evatt J., at p. 367.

*Australian National Airways Ltd. v. Commonwealth*, 71 C.L.R. 29, per Latham C.J., at p. 60; per Starke J., at pp. 78-79; per Dixon J., at p. 91; per Williams J., at p. 107.

*James v. The Commonwealth*, 62 C.L.R. 339, per Dixon J., at pp. 361-2.

Such a contention is also inconsistent with statements of the Privy Council in *James v. The Commonwealth*, (1936) A.C. 578, at pp. 614, 629, 630, 631, and of Latham C.J., in the present case. 30

79. The freedom which section 92 guarantees is freedom to engage in interstate trade, commerce and intercourse in a community regulated by law; but within the limitations inherent in that conception the freedom is absolute. The conception of freedom of trade, commerce and intercourse in such a community presupposes some restrictions on the individual, such, for example, as may be involved in a Sale of Goods Act, or a Public Health Act dealing with the purity of foods and drugs, or a Bankruptcy Act containing restrictions on the right of a bankrupt to trade, or a law containing provisions as to the incapacity of certain classes of persons to enter into contracts. 40  
The presence in the Constitution of such provisions as section 51 (i.), (v.), (vii.) to (xviii.), and (xx.), along with, but subject to, section 92, suggests the nature of the freedom guaranteed, in that they presuppose that laws may regulate trade, commerce and intercourse and yet leave them free.

Vol. III.  
p. 60, ll. 20-25;  
also  
per Rich and  
Williams JJ.,  
*ibid.*,  
p. 95, l. 27 to  
p. 96, l. 12;  
Starke J.,  
*ibid.*,  
p. 111,  
ll. 18 to 22;  
Dixon J.,  
*ibid.*,  
p. 168,  
ll. 21 to 46.

80. Laws which burden, restrict, impair, hinder or prevent activities conducted across State lines in the course of trade, commerce or intercourse by individuals infringe the freedom guaranteed.

81. Whether or not a law does so is a question of fact (*James v. The Commonwealth*, (1936) A.C. 578 at p. 631), which—

- (a) can only be determined in respect of some known law, upon a consideration of the circumstances in which it is made, the activities which it affects, and the extent to which it affects them;
- 10 (b) is fundamentally a question of degree;
- (c) cannot be determined by any one test of universal application.

*GENERAL (Part II).*

82. It is submitted, however, that the following propositions are correct and may be applied when considering the question of fact:—

- (a) The actual operation of the law itself is the material consideration.
- 20 (b) The point as at which to assess the operation of the law is at the frontier. But the freedom guaranteed is not limited to freedom from laws which apply directly at the point of the crossing of State lines.

Laws applying at points and to matters other than such crossing may infringe the section, depending in each case upon what effects such laws have upon that passage. *James v. The Commonwealth*, (1936) A.C. 578, at pp. 630-1.

This may be illustrated by the following laws or executive acts declared by the High Court of Australia to infringe section 92, in cases which were approved by the Privy Council in *James v. The Commonwealth*, (1936) A.C. 578:—

- 30 (i) A legislative declaration by a State that stock and meat in the State were to be held for the purposes of and kept for disposal by the Crown in aid of supplies for the armed forces:  
*Foggitt Jones & Co. v. N.S.W.*, 21 C.L.R. 357.
- (ii) A State Statute and an Order thereunder, the combined effect of which was to fix a proportion or quota of a product and to forbid the marketing in Australia of any greater quantity:  
40 *James v. South Australia*, 40 C.L.R. 1.  
*James v. Cowan*, 43 C.L.R. 386.  
*James v. Cowan*, (1932) A.C. 542.
- (iii) The seizure under the same Statute of parcels of the product in the hands of a producer so as to prevent him selling them in defiance of the quota fixed:  
*James v. Cowan*, (1932) A.C. 542.

(iv) A State scheme for the compulsory marketing of a product by acquiring the product and preventing producers from engaging in all trade therein, domestic, interstate and foreign:

*Peanut Board v. Rockhampton Harbour Board*, 48 C.L.R. 266.

(v) The imposition by a State on an importer of petrol of an obligation to buy locally a proportion of power alcohol: [petrol, which is not produced in Australia, being imported into the State sometimes directly from abroad and sometimes immediately from another State.] 10

*Vacuum Oil Co. v. Queensland*, 51 C.L.R. 108.

(vi) A State law providing for payment of a higher fee for a licence to sell all fermented and spirituous liquors than that required for a licence to sell locally-produced wine only:

*Fox v. Robbins*, 8 C.L.R. 115.

(c) Laws which merely preclude individuals in one State from intercourse, commercial or other, with other States, must offend section 92. 20

Laws which merely prohibit individuals from conducting activities across State lines in the course of trade, commerce and intercourse necessarily infringe the section. Likewise, laws which merely prohibit such intercourse or such activities except at governmental discretion or through Government agencies infringe the section:

*R. v. Smithers Ex parte Benson*, 16 C.L.R. 99, per Isaacs and Higgins JJ., at pp. 116-7 and 117-8.

*R. v. Connare, Ex parte Wawn*, 61 C.L.R. 596 at pp. 604-5. 30

*Milk Board v. Metropolitan Cream Pty. Ltd.*, 62 C.L.R. 116.

*Gratwick v. Johnson*, 70 C.L.R. 1.

*Australian National Airways Ltd. v. The Commonwealth*, 71 C.L.R. 29.

(d) Laws which merely prescribe the manner in which the activities of persons may be conducted in the course of trade, commerce and intercourse *prima facie* do not infringe the section; but in particular cases, by reason of the extent and nature of the interference with the activity, they may do so.

(e) The fact that a law operates generally and does not discriminate against interstate trade, commerce and intercourse is not conclusive of validity. If the restriction of, or power to restrict, interstate trade is included in the operation of the law, the fact that other trade is equally affected does not diminish the restriction. The expression "absolutely free" cannot mean merely "as free as non-interstate trade". 40

The contention that a general law applying equally to interstate and other trade and commerce cannot infringe section 92 is inconsistent with the decision of the Privy Council in *James v. The Commonwealth*, (1936) A.C. 578 at p. 628, and with the settled view of the High Court of Australia.

per Dixon J.,  
Vol. III,  
p. 166, l. 47 to  
p. 167, l. 16

10 (f) The freedom guaranteed is not freedom merely from laws on the subject of trade, commerce or intercourse. Just as section 92 effectively withdraws power from the States to make any law, upon any topic, which infringes the guaranteed freedom, so all the powers conferred on the Commonwealth Parliament by section 51 are subject to section 92.

*Application of these considerations to section 46.*

83. For the purpose of determining whether section 46 of the Banking Act 1947 infringes section 92 of the Constitution, section 46 should be considered in the context of those provisions of the Act which have not been declared invalid by the High Court. Of such provisions, regard need be had only to sections 3, 5, 6, 7 and 11.

20 84. Section 46 (4.) authorises the Treasurer to give notices in the prescribed terms to all the Respondent Banks, and section 46 (8.) operates upon the expiry of the notices to prohibit them all from carrying on the business of banking anywhere or in any manner in Australia.

85. Thus section 46 may effect the complete prohibition of the carrying on of all general banking business in Australia by the only bodies now doing so, other than Government banks.

30 86. The prohibitions effected by section 46 extend to interstate and all other banking business alike. Neither section 46 nor the notices which it authorises can be limited, by virtue of section 6 or otherwise, to non-interstate banking. The operation of section 46 in relation to interstate banking is not diminished by the inclusion of all other banking with interstate banking in the same prohibitions. The prohibition of the carrying on of interstate banking business is thus within the operation of the section itself.

87. The operation of the section is to prevent—

(i) all persons and bodies other than Government banks from engaging in the business of interstate banking in Australia, and

40 (ii) all persons and bodies in Australia from remitting funds interstate in the course of trade, commerce or intercourse by means of any banking transactions except such as Government banks may be prepared to carry out. Although section 46 is directed in terms to the Respondent Banks, it imposes a corresponding prohibition upon their customers, by virtue of section 5 of the Commonwealth Crimes Act, 1914-1941, which

provides that: "Any person who aids, abets, counsels or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against any law of the Commonwealth . . . shall be deemed to have committed that offence and shall be punishable accordingly".

88. The section is designed to, and in operation will, produce a monopoly for Government banks in the conduct of banking business in Australia. One of the objects of creating such a monopoly is to subject the conduct of the activities monopolised to the immediate control of the Executive Governments. Thus the necessary operation and effect of the Act is to subject the remission of funds interstate to the direct control of the Executive Governments of Australia. The remission of funds is an essential and indispensable step in the conduct of interstate trade. 10

89. Hence, upon the creation of the monopoly aimed at, the Governments of Australia will be placed in the position of being able to determine, without the necessity of any further legislation, the extent to which, and the conditions upon which, the facilities provided by interstate banking may be had, by persons for whose interstate trade, commerce or intercourse they are necessary. 20

"The Constitution is not to be mocked by substituting executive for legislative interference with freedom."

*James v. Cowan*, (1932) A.C. 542 at p. 558.

90. The "objects" of the prohibition are shown by the terms of the Act itself, and in particular by sections 3, 11 and 46 (2.), to be the expansion of the banking business of the Commonwealth Bank and the prohibition of the carrying on of banking business in Australia by private banks, and they do not include the regulation of the manner in which banking business shall be conducted. In particular, sections 11 and 46 (2.) show that section 46 is not founded upon any discontent with, or desire to alter, the manner in which the Respondent Banks conduct banking business. And section 46 does not limit or qualify the discretion of the Treasurer by reference to the manner in which banking business is to be conducted. Thus the section cannot properly be described as a law prescribing the manner in which activities shall be conducted. 30

91. The Act does not in any relevant sense provide for selection of the persons by whom banking transactions, including interstate banking transactions, may be carried out. It simply provides for the prohibition of all but Government banks from engaging in them. 40

In the High Court, the Appellants contended that section 46 of the Banking Act merely enables the Treasurer of the Commonwealth to decide who shall take part in banking. They contended that such a provision was *in pari materia* with the provision of the Transport Workers Act 1928-1929, the subject of decision in

*Huddart Parker Ltd. v. The Commonwealth*, 44 C.L.R. 492, which the Appellants claimed to have decided that the Commonwealth might, under section 51 (i.) of the Constitution, select the persons who should engage in interstate trade.

The Respondents do not concede that the case did so decide, or that in that sense the decision had the approval of the Privy Council in *James v. The Commonwealth*, as claimed by the Appellants. But in any event, the Respondents submit that a law which excludes all persons other than Government agencies from an activity is not *in pari materia* with a law which, whilst effecting a selection, upon some disclosed basis, of the persons who shall carry on the activity, does not deny to all persons the opportunity of engaging in it.

92. It may be conceded that laws which contain a licensing scheme with an ancillary prohibition of unlicensed persons, may, on examination in the light of the circumstances to which they apply, prove to be no more than a regulation of the manner in which the activities of persons may be carried on, and therefore not obnoxious to section 92. In the case of such laws, it may be said that the Commonwealth selects the actors in connection with some activity within its competence. But the Respondents submit that a law which requires that a licence be obtained to carry on activities which include interstate activities, and provides that the licence may be arbitrarily granted, refused or withdrawn, does deny the freedom guaranteed by section 92.

93. This is well illustrated by a consideration of Regulation 79 of the Air Navigation Regulations, the subject of the unanimous decision of the High Court in *Australian National Airways v. The Commonwealth*, 71 C.L.R. 29. This regulation prohibited the use of aircraft in an interstate air transport service except under the authority of and in accordance with a licence issued by the Commonwealth aviation authority (at first a Board, and later the Director-General of Civil Aviation). In its unamended form sub-regulation (3) provided that:

“The Board shall, if satisfied as to the safety of the proposed service, issue a licence subject to such conditions in addition to compliance with these Regulations, as the Board considers necessary to ensure the safety of the aircraft and of the persons to be carried by the aircraft”.

40 In this form it was conceded that the regulation did not infringe section 92, since it regulated interstate trade and commerce by a licensing system which entitled anyone who complied with conditions relevant to the subject matter to obtain a licence. But, in 1940, regulation 79 (3) quoted above was repealed and replaced by the following provision:—

“The Director General may issue a licence upon such conditions, in addition to compliance with these Regulations as the Director General considers necessary or he may refuse to issue the licence.”

It was held by the whole Court that in its relation to interstate air transport this provision contravened section 92, because it prevented persons from taking part in interstate trade and commerce, excepting only those to whom a Commonwealth official in the exercise of an uncontrolled discretion might choose to issue a licence. The licensing scheme had thus ceased to be a mere regulation of interstate trade—*Australian National Airways v. The Commonwealth*, 71 C.L.R. 29, per Latham C.J., at pp. 67-68; per Starke J., at pp. 79-80; per Dixon J., at p. 95; per Williams J., at pp. 110-111. 10

94. There is no inconsistency between this judgment and the judgment in *Huddart Parker Ltd. v. The Commonwealth*, 44 C.L.R. 492. In *Huddart Parker's* case, the question was whether it was within the competence of the Commonwealth Parliament under section 51 (i.) of the Constitution to authorise a statutory regulation which required that, in the employment, engagement or picking up of waterside workers for overseas and interstate ships at certain ports, priority should be given to those workers available for employment who were members of a specified Trade Union. By a majority the High Court upheld the validity of the regulation as a law with respect to trade and commerce with foreign countries and among the States. Whether or not such a law infringed section 92 was not considered, since at that time it was assumed that section 92 did not bind the Commonwealth. But in any case *Huddart Parker's* case affords no support for the proposition that a licensing system is valid when licences may be arbitrarily granted or withdrawn. Latham C.J., in *Melbourne Corporation v. The Commonwealth*, 74 C.L.R. 31 at p. 49, said of the decision in *Huddart Parker's* case: 20

“Under the Transport Workers Act every person had a right to obtain a renewal of a licence, and the reasoning upon which this decision was based shows, in my opinion, that every person had a right to obtain a licence, he could be deprived of his licence only upon specified grounds which were relevant to the work of transport workers, and there was an appeal to a court against deprivation of licence. Section 48 of the Banking Act 1945”—which was the subject of decision in the *Melbourne Corporation* case—“leaves the granting or refusal of consent entirely to the discretion of the Treasurer.” 30

The Respondents respectfully adopt this analysis of *Huddart Parker's* case.



*Effect of section 46 on interstate trade, commerce and intercourse.*

95. (a) If a banker is engaged in interstate trade, commerce and intercourse, section 46 provides for a direct and unqualified prohibition of his participation in interstate trade, commerce and intercourse, and, (if this be material), not as part of any legislative scheme for the regulation of it, but solely as a means of creating a governmental monopoly.

10 (b) Whether or not a banker be regarded as engaged in interstate trade, commerce and intercourse, section 46 subjects other persons who are unquestionably engaged in interstate trade, commerce or intercourse to the direct control of Executive Governments in the performance of what is an essential step in their interstate trade, commerce or intercourse, namely, the interstate remission of funds.

96. Whether the carrying on of a banker's business in Australia is itself a form of trade, commerce and intercourse and is carried on among the States is a practical question depending upon the established facts and known commercial methods.

20 The question is to be answered in the light of Australian conditions. For that reason the conclusion of the majority of the High Court of Australia on this question should not be disturbed.

97. That conclusion is in accordance with the common understanding of the nature of interstate trade and commerce, both in Australia and in the United States of America.

*Commonwealth Oil Refineries v. South Australia*, 38 C.L.R. 408 at p. 429.

*R. v. Gates Ex parte Maling*, 41 C.L.R. 519 at pp. 530-1.

*Australian National Airways v. The Commonwealth*, 71 C.L.R. 29.

30 See the American cases referred to in paragraph 75, and also—

*Swift & Co. v. U.S.*, 196 U.S. 375, at p. 398.

*Public Utilities Commissioner v. Landon*, 249 U.S. 236, at p. 245.

*Engel v. O'Malley*, 219 U.S. 128.

98. Further, the expression used in section 92 includes the word "*intercourse*". The inclusion of this word expands the area of freedom beyond that covered by the words trade and commerce.

99. The evidence shows that the business of banking as conducted in Australia by the Respondent Banks includes—

- 40 (i) the negotiation and collection of interstate bills of exchange, cheques and promissory notes,  
 (ii) the transfer of funds interstate,  
 (iii) the establishment of interstate credits,  
 (iv) the issue and negotiation of travellers' cheques.

The evidence also shows that interstate banking transactions by traders in goods form an indispensable part of their interstate trade.

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 pp. 56-58,  
 108-110

100. It is therefore submitted that a banker in carrying out interstate banking transactions as part of his business is to that extent engaged in interstate trade, commerce and intercourse.

101. In any case, a banker, when engaged in remitting funds for a customer, in the course of the customer's trade, commerce or intercourse, and when negotiating interstate bills, is necessarily himself engaged in interstate trade and commerce.

102. At least, when carried on over State lines banking is intercourse among the States, whether it be regarded as a business, or as individual transactions either of the banker or of the customer. 10

(a) The banker, in remitting funds interstate, necessarily engages in intercourse among the States, whether or not his remission of the funds is itself part of trade or commerce, and whether or not his customer is remitting the funds in the course of trade or commerce. That intercourse is of the essence of the banker's business, and it is that intercourse which section 46 prohibits.

(b) The customer's remission of funds interstate is itself an act of intercourse among States, and, as indicated in paragraph 88, is itself subjected to the arbitrary control of the Executive Governments. 20

103. In *Australian National Airways Ltd. v. The Commonwealth*, 71 C.L.R. 29, the plaintiffs were in business to provide, amongst other things, interstate transport services to carry goods and persons, not merely in the course of their customers' trade, but for a great diversity of purposes, commercial and non-commercial. The High Court had to consider the Australian National Airlines Act 1945. That Act provided, *inter alia*, (i) that air licences should cease to be operative so long as adequate services were provided by the Australian National Airlines Commission, (ii) that an air licence should not be issued to any person other than the Commission, unless the licensing authority was satisfied that, having regard to the airline services operated by the Commission, the issue of a licence was necessary to meet the needs of the public with respect to inter-state airline services or territorial airline services, and (iii) that a person should not enter into a contract for the transport of any person or goods in the course of any prescribed inter-state airline service or territorial airline service operated by any person other than a person holding an airline licence in respect of that service, not being a licence which was inoperative as above mentioned. 30 40

The Court, (Latham C.J., and Rich, Starke, Dixon and Williams JJ.), unanimously held that in its relation to airline services between States the Act was a law with respect to trade and commerce between States, but that in purporting to confer on the

Commission a monopoly in respect of service between States it contravened section 92.

Their Honours considered the Act from the point of view of those who were carrying on the business of conveying persons and goods from State to State, whether or not the persons and goods so conveyed were themselves travelling or consigned in the course of any trade or commerce.

Thus, Latham C.J., (at p. 57), said: "In my opinion the providers of these services, irrespective of the relation to trade and commerce of the persons whom or the goods which they carry, are themselves engaged in interstate trade and commerce."

Rich J., (at p. 71), said: "I have no doubt that, as here found", (i.e. in section 51 (i.)), "the phrase 'trade and commerce' is wide enough to include not only the sale and disposition of goods but the transport of goods and persons, and not only the transport of goods and persons incidentally to the disposition of goods, but such transport as an end in itself."

Starke J., (at p. 76), said: "Trade and commerce among the States is not an isolated journey across a State boundary line . . . , but the flow of business among the States. It includes the movement of goods and persons from one State to another, transportation by land, sea or air, and it also includes something more such as sales of goods tangible or intangible by persons in one State to persons in another."

Dixon J., (at p. 83), expressed the opinion "that, if not all interstate transportation, at all events all carriage for reward of goods or persons between States is within the legislative power", (i.e. the powers as to interstate trade and commerce), "whatever may be the reason or purpose for which the goods or persons are in transit."

Williams J., (at p. 107), said: "There can be no doubt, in my opinion, that to engage in the business of transporting passengers and goods by air for reward from one State to another is to engage in interstate commerce."

The whole Court held that the creation of a monopoly by the exclusion of private persons from competition with the Australian National Airlines Commission in interstate air transportation was repugnant to section 92.

104. It is submitted that this decision was correct, and that it illustrates and supports the propositions contained in paragraphs 71 to 82 inclusive above. It is also submitted, for the reasons indicated in paragraph 82 (e) above, that the decision cannot be distinguished from the present case on the ground that only interstate operations were the subject of the legislation there considered.

OPINIONS OF THE JUSTICES OF THE HIGH COURT IN THESE ACTIONS.

(a) *The dissenting Opinion of the Chief Justice.*

Vol. III.  
p. 92, l. 22.

*ibid.*  
p. 63, ll. 18-19  
*ibid.* p. 66, l. 37  
*ibid.*  
p. 66, ll. 40-41

105. In the High Court, Latham C.J., (with whom McTiernan J., concurred on this point), reached the conclusion that section 46 does not infringe section 92 of the Constitution by (a) denying that the carrying on of banking business is itself a form of trade, commerce and intercourse, and (b) treating banking as a mere instrument of trade and commerce, and (c) regarding section 46 as a form of mere regulation of banking, not directed against any interstate element therein. 10

*ibid.*  
p. 60, ll. 40-43

106. If His Honour had considered the carrying on of a banker's business to include a form of interstate trade, commerce or intercourse, it is submitted to be clear from his judgment in the present case, and from his judgments in *Milk Board v. Metropolitan Cream Pty. Ltd.*, 62 C.L.R. 116, and *Gratwick v. Johnson*, 70 C.L.R. 1, (to which he adhered in the present case) and in *Australian National Airways Ltd. v. The Commonwealth*, 71 C.L.R. 29 at p. 61, that he would have concurred with the majority of the Court in holding section 46 to be invalid. 20

Vol. III.  
p. 63, l. 18

*ibid.*  
p. 62, ll. 21  
*et seq.*  
*ibid.*  
p. 62, l. 48  
p. 63, l. 3

107. His Honour expresses the conclusion that banking is not trade or commerce at all; but examination of His Honour's reasoning upon this aspect of the case shows that his real conclusion was that banking is not a form of interstate trade or commerce within the scope of section 92. Whilst His Honour does say that a banker does not sell anything, but merely provides a service of a financial character not exclusively used by traders but available for all forms of human activity (in which respect it would be indistinguishable from the business of an airline operator thought by His Honour to be a form of trade and commerce in the *Australian National Airways* case), his ultimate conclusion necessarily depends upon his view that all that section 92 protects is the physical passage across the border of persons and of things being carried by land or sea, and that in the business of a bank there is no passage across the border of anything. 30

*ibid.*  
p. 62, l. 45

108. His Honour does not appear to have considered whether or not interstate banking is interstate intercourse, or whether or not the prohibition of it is consistent with the freedom of intercourse among the States.

Vol. III.  
p. 64, l. 8

109. His Honour's reasons for holding section 46 to be valid on the footing that banking is a mere instrument of trade and commerce appear to proceed upon an assumption that section 46 operates merely as a regulatory provision. His Honour seems to have thought that this was conceded by the Respondents. He attributes to them a proposition which he appears to regard as (i) conceding that 40

section 46 is merely regulatory of banking, and (ii) denying that any part of an interstate transaction can be subjected to legislative control: see his reference to *McArthur's* case.

110. The proposition he states was never submitted by the Respondents. They always conceded that interstate transactions may validly be subjected to regulatory control, but they always denied that section 46 was in the nature of a regulatory control of banking.

111. His Honour's reasoning may be summarised thus:

10 (a) Section 92 does not preclude some legislative control of a business, even though that business is directly related to and is even part of interstate trade and commerce, and even though the application of the law effecting the control may render the carrying on of business by a particular individual impossible;

(b) Control of a business may offend the section if it is "directed against" any interstate element in the business;

(c) Section 46 is not "directed against" any interstate element in banking;

20 (d) Therefore section 46, being a mere legislative control of the business of banking, does not offend section 92.

112. It is submitted that proposition (a), although correct if "control" is used, as His Honour appears to use it, in the sense of "regulation", has no application to a law such as is found in section 46, which provides for an absolute prohibition and not for any form of regulation. His Honour's reference to the application of the law rendering the carrying on of business by an individual impossible merely acknowledges, as the Respondents concede, that the consequences of the operation of a law are irrelevant. Thus a law which required a banker to maintain a specified cash reserve as a condition of his retaining a licence to carry on business would not be invalid merely because some individual banker might find himself unable to maintain such a reserve and consequently unable to retain a licence. But such a law bears no resemblance to section 46, which authorises the Treasurer to prevent the Respondents from being bankers at all.

30

113. The meaning of the expression in His Honour's judgment "directed against any interstate element in" a business is uncertain.

40 (a) If it means that some motive for its enactment inimical to interstate trade must be discovered before a law can be held to offend section 92, it introduces an unwarranted qualification into that section.

(b) If it means that the purpose or object of a law must be examined in order to discover whether it infringes section 92, it means no more than is asserted by the Respondents, namely that the actual operation of the law is the material consideration. The purpose or object of a law is what it does.

Vol. III.  
p. 64, l. 12  
*ibid.*  
footnote to  
p. 60.

Vol. III  
p. 65, ll. 32-33

*McCawley v. R.*, 26 C.L.R. 9, and (1920) A.C. 691.  
*James v. Cowan*, 43 C.L.R. 386 at p. 408, per Isaacs J.  
*Duncan v. Queensland*, 22 C.L.R. 556, at pp. 623-4, per Isaacs J.  
*W. & A. McArthur Ltd. v. Queensland*, 28 C.L.R. 530 at p. 570  
 per Rich J.

Thus its operation will determine whether or not it offends section 92. In this sense, section 46 is directed against interstate banking, which it operates to prohibit.

(c) If it means, as it appears to mean in His Honour's judgment, that a general law with no differential reference to interstate transactions cannot offend section 92, the Respondents submit that the view it indicates is clearly erroneous. See the submissions in paragraphs 82 (e) and 86 above, and *James v. The Commonwealth*, (1936) A.C. 578 at p. 628, and *Peanut Board v. Rockhampton Harbour Board*, 48 C.L.R. 266. 10

114. It is further submitted that it is impossible to regard section 46, in the context of sections 3, 5, 6, 7, 11 and 22, as providing for legislative control, in the sense of regulation, of the business of banking: see paragraph 90 of this Case.

115. The proposition actually submitted by the Respondents, which His Honour misapprehended, was, (as appears in 76 C.L.R. at p. 22, and from the footnote agreed by the Appellants, contained in the Record of Proceedings):— 20

“On the decided cases as they stand, at least this proposition  
 “is correct that section 92 is infringed whenever an individual  
 “or corporation is engaged in interstate trade, commerce or  
 “intercourse, and, either by a direct prohibition, or by acquisi-  
 “tion with the object, purpose or motive of effecting such a  
 “prohibition, the carrying on of such a business by him or it is  
 “forbidden.” 30

It is submitted that this proposition is in accordance with the judgment of the Privy Council in *James v. The Commonwealth*, (1936) A.C. 578, and with every authority cited by His Honour.

116. His Honour did not discuss the effect of section 46 in relation to customers engaging in banking transactions in the course of their interstate trade, commerce or intercourse.

(b) *Opinion of Rich and Williams JJ.*

117. Rich and Williams JJ. held—

(1) that the freedom guaranteed by section 92 is freedom in respect of the activities of individuals; 40

(2) that a banker who carries on business in more than one State is engaged in trade, commerce and intercourse among the States;

(3) that legislation, Commonwealth or State, infringes section 92 where it operates directly, and not merely incidentally, to burden, hinder or prevent persons or corporations engaging wholly or partially in trade or commerce across State boundaries;

(4) that discrimination is not the test, and legislation may infringe the section although it operates in restraint both of intrastate and interstate trade;

(5) that the question is in each case one of fact;

10

(6) that section 46 (4.)-(8.) of the Banking Act 1947 is legislation which in fact operates directly to prevent the private banks at present engaged in interstate banking from continuing to carry on either intrastate or interstate trade, and to prevent the private banks not at present engaged in interstate banking from ever engaging therein;

(7) that this legislation cannot be severed in its operation so as to operate solely with respect to intrastate and overseas trade;

20

(8) that the section accordingly infringes section 92 and is void.

The Respondents submit that Their Honours' judgment correctly applies section 92, and in particular they desire to adopt Their Honours' discussion of the authorities they cite in support of the view that banking is within the concept of trade, commerce and intercourse, and Their Honours' observations upon the cases of *James v. The Commonwealth*, (1936) A.C. 578, *James v. Cowan*, (1932) A.C. 542, and *Australian National Airways Ltd. v. The Commonwealth*, 71 C.L.R. 29.

(c) *Opinion of Starke J.*

30

118. Starke J. held—

(1) that the expression "trade, commerce and intercourse" in section 92 describes the activities of individuals;

(2) that the words "whether by means of internal carriage or ocean navigation" are not descriptive or limiting, but are inserted rather to prevent limitation; and the expression "trade, "commerce and intercourse" includes the sale of intangibles as well as of tangibles;

40

(3) that it is not every transaction or act of bankers that belongs to interstate trade. but in Australia bankers do a considerable business across State lines, and it would be unrealistic and illogical to deny the character of interstate commerce to business so conducted;

(4) that the effect of the decision in *James v. The Commonwealth*, (1936) A.C. 578, is to deny that section 92

Vol. III.  
p. 100, ll. 42-47

*ibid.*  
p. 100, ll. 48-50

*ibid.*  
p. 101, l. 3  
*ibid.*  
p. 101, ll. 11-13

*ibid.*  
p. 101, ll. 13  
*et seq.*

*ibid.*

Vol. III.  
p. 111, ll. 20  
*et seq.*

*ibid.*, ll. 32  
*et seq.*

*ibid.*  
p. 113, ll. 43-46

*ibid.*  
p. 114, ll. 15-20

prescribes freedom from all governmental control extending over the whole of any transaction which is treated as having the characteristic of interstate commerce, and to substitute "freedom as at the frontier" as the true criterion;

Vol. III.  
p. 124, ll. 35  
et seq.

(5) that the operation of section 46 of the Banking Act 1947 is to prohibit all domestic, interstate and foreign banking business on the part of the private banks, and therefore to exclude those banks from the business of interstate banking in Australia, and so to interfere with the freedom of such business as at the frontier;

*ibid.*  
p. 124, ll.  
143-144

(6) that it is not possible to divide the business of banking into compartments; it is one whole and nation wide;

*ibid.*  
p. 125, ll. 4-10

(7) that section 46 is therefore inconsistent with the provisions of section 92 of the Constitution, and with the reasons of their Lordships in *James v. Cowan*, (1932) A.C. 542, and *James v. The Commonwealth*, (1936) A.C. 578, and of the High Court in *Peanut Board v. Rockhampton Harbour Board*, 48 C.L.R. 266, and *Australian National Airways Ltd. v. The Commonwealth*, 71 C.L.R. 29.

The Respondents submit that His Honour's application of section 92 was correct, and in particular that His Honour was right in regarding *James v. The Commonwealth*, not as holding that the freedom guaranteed by section 92 is limited to part only of a transaction having the characteristic of interstate trade and commerce, but as holding that the freedom is freedom as at the frontier and not freedom from all Governmental control.

(d) *Opinion of Dixon J.*

119. Dixon J. held:—

Vol. III.  
p. 165, l. 30

(1) that the contention of the Appellants, that the protection which section 92 provides extends to the transfer from one State to another of nothing but commodities and persons, places an unwarranted limitation upon a constitutional provision that was intended to guarantee freedom from restriction to a broad category of interchange, converse and dealings between States in the affairs of life;

*ibid.*  
p. 165, ll. 26-29.

(2) that the words "trade, commerce and intercourse" include all forms and varieties of interstate transactions, whether by way of commercial dealings or of personal converse or passage;

*ibid.*  
p. 164, l. 50  
to p. 165, l. 6

(3) that section 51 (xiii.) was placed in the Constitution because it was desired that the subject of banking as a whole should fall under Federal legislative authority, and not because it was considered that so much of banking as involves transactions with other countries or among the States could not fall under section 51 (i.);



(4) that the words “whether by means of internal carriage  
“or ocean navigation” are words of extension, not of restriction;

(5) that what the judgment of the Privy Council in *James v. The Commonwealth*, (1936) A.C. 578, has corrected is:—

(a) the error of applying the conception of freedom where there was no real burden upon and no real obstruction to passing from one State to another or dealing across State lines, and

10 (b) the failure to recognise that regulation of trade, commerce and intercourse is compatible with freedom of interstate passage or converse;

(6) that from the decision in *James v. The Commonwealth* (*supra*) several consequences follow:—

(a) the transfer of the whole trade in a commodity from the ordinary channels used by individuals to a Government Board is an interference with freedom of interstate trade;

20 (b) a consideration of the question whether this will or will not influence the volume of the traffic across the border in the commodity is beside the point;

(c) the view is incorrect that a measure may be good because its purpose or object is to increase the volume or value of a trade, including trade with other States, considered apart from the freedom of people to engage in the trade;

(d) there is no room for the view that section 92 leaves it always open to the legislatures to determine by whom operations of interstate trade may lawfully be conducted;

30 (7) that section 92 does not preclude the regulation of trade and commerce, at all events until regulation is pressed to the point of impairing true freedom of interstate commerce; nor does it preclude the regulation of some other subject simply because interstate trade and commerce may be affected consequentially or indirectly; but no such questions arise in relation to section 46 (4.)-(8.) of the Banking Act 1947, which authorises a direct and absolute prohibition;

(8) that the view that section 92 is limited to freedom from laws discriminating against interstate commerce has long been universally rejected and is erroneous;

40 (9) that the effect of section 92 in relation to expropriation turns on another and different set of considerations, with which one is not concerned in dealing with section 46 (4.)-(8.);

(10) that section 92 treats interstate traffic and intercourse, not as a mere economic phenomenon, but as an activity, and as such sets it free for people to engage in;

Vol. III.  
p. 165, ll. 7-12

*ibid.*  
p. 166, ll. 40-46

*ibid.*  
p. 169, ll. 1-14

Vol. III.  
p. 169, ll. 15-39

Vol. III.  
p. 166, l. 47 to  
p. 167, l. 44

*ibid.*  
p. 169, ll. 37-40

*ibid.*  
p. 168, ll. 37-39

Vol. III.  
p. 165, ll. 30-32

(11) that the subject-matter of the prohibition authorised by section 46 (3.)-(8.) of the Banking Act 1947 is comprised within section 92 of the Constitution so far as the business consists of interstate transactions;

*ibid.* ll. 33-35

(12) that the operation of section 46 (8.) or section 46 (1.), when the power given by section 46 (4.) is exercised in relation to all private banks, is to suppress all banking except that carried on by the Commonwealth Bank or by State banks;

*ibid.* ll. 36-40

(13) that the whole business, intrastate, interstate, and foreign, is prohibited; but the prohibition directly imposed upon the conduct of any banking business, except under Government, is direct, and the direct prohibition includes in its operation all interstate banking business; 10

*ibid.*  
p. 168, ll. 19-20

(14) that to close up every bank but a Government bank cannot leave interstate banking free;

*ibid.*  
p. 170, ll. 5-17

(15) that section 6 of the Banking Act 1947 cannot be applied so as to withdraw interstate banking from the operation of section 46 (4.)-(8.);

*ibid.* ll. 22-24

(16) that therefore section 46 (4.)-(8.) are void and that, if and so far as section 46 (1.) would otherwise take effect in consequence of a notice under section 46 (4.), it also is void. 20

The Respondents submit that His Honour's judgment is correct, and in particular they desire to rely upon His Honour's analysis of the effect of the judgment in *James v. The Commonwealth*, (*supra*).

#### F. INCONSISTENCY OF SECTION 46 WITH THE CONSTITUTIONAL INTEGRITY OF THE STATES AND WITH SECTION 105A OF THE CONSTITUTION.

##### *Operation of Section 46.*

120. The prohibition of the carrying on of banking business in Australia by all the private banks, which section 46 purports to 30  
authorise, would affect the States in the following ways:—

(1) All moneys of the States standing to the credit of accounts with the private banks would be, at least temporarily, frozen. The banks would be precluded from honouring cheques drawn on such accounts. They would also be precluded from repaying moneys standing to the credit of such accounts to the States in the ordinary course of business, and perhaps would be precluded from doing so at all, except in a due course of winding up.

(2) The States would be precluded from making, and the 40  
banks would be precluded from accepting, repayment of moneys

borrowed by the States from the banks, e.g., on temporary overdraft, at least in the ordinary course of business. The liability of the States to pay interest would continue in the meantime.

(3) The States would be precluded from collecting the proceeds of cheques in hand drawn on private banks.

10 (4) Persons holding cheques drawn by any of the States on accounts in private banks would find them worthless, and the States would be obliged either to make good the amounts thereof in cash, or to issue new cheques drawn on accounts opened with the Commonwealth Bank (or a State bank, if there were any available).

(5) The States would be precluded from establishing and operating bank accounts with the banks most convenient for their purposes, and would have to resort to the Commonwealth Bank for their banking transactions. There are not branches of the Commonwealth Bank in all places in Australia where the States may have need of banking facilities.

(6) The States would be precluded from obtaining temporary overdraft accommodation from private banks.

20 121. The Ministers and officers of the States would be guilty of an offence if they were to be knowingly concerned in, or parties to, any transaction involving the carrying on of banking business by a private bank prohibited from doing so under section 46: (see Commonwealth Crimes Act, 1914-1941, section 5).

30 122. The effects mentioned in sub-paragraphs (1), (2) and (3) of paragraph 120 above would paralyse the States in relation to essential functions of government. The whole administration of the government of the States would be affected: payment of the public service, of Judges, Magistrates and Members of Parliament, the convening of Parliament, and in fact, every function involving the expenditure of moneys.

40 123. The effects mentioned in sub-paragraphs (4) and (5) of paragraph 120 above would subject the finances of the States to the control of the Federal Executive, except insofar as the States might be able to utilise State banks. The evidence, however, establishes that if the conduct of banking business by private banks were prohibited, the States would in practice have no alternative but to resort to the Commonwealth Bank. The Commonwealth Bank is a corporate agency of the Commonwealth. It is subject to the control of the Commonwealth Treasurer: see Commonwealth Bank Act 1945, section 9.

124. Section 11 of the Banking Act 1947 affords no real protection to the States; its provisions are unenforceable and illusory.

125. It is submitted that the power of the Commonwealth Parliament to make laws, subject to the Constitution, with respect to

Vol. I,  
pp. 147, 163,  
172, 183, 187;

per Rich and  
Williams JJ.,  
Vol. III,  
pp. 88-90;  
per Starke J.,  
*ibid.* p. 123;  
per Dixon J.,  
*ibid.*  
pp. 147-155.

banking cannot be exercised so as to prevent the States from performing the constitutional functions which are necessary for their continued existence as bodies politic within a federation, co-ordinate with the Commonwealth and independent of it.

126. The effect mentioned in sub-paragraph (6) of paragraph 120 above likewise interferes with an essential power of the States which even the Financial Agreement, which was concerned to preclude borrowing by individual States as far as practicable, expressly reserved to them.

127. Moreover, the last-mentioned effect is inconsistent with 10 the Financial Agreement made under section 105A of the Constitution, and therefore with that section itself.

*Interference with State Powers.*

128. The Constitution recognises that the States existed as Colonies prior to the establishment of the Commonwealth. Although it does deprive them of some of their former powers, (such, for instance, as the power to legislate upon the matters covered by sections 52 and 90, or to do what is prohibited by sections 92, 114, 115 and 117), it leaves the States as constituent members of a true federation in which Commonwealth and States co-exist, each autonomous 20 and independent of the other within its own sphere, and with political power divided between them.

129. The Constitution, therefore, while establishing the Commonwealth, and defining its powers and functions, confirms the existence of the States and makes provision for the continuance of their Constitutions: see the preamble and sections 3 and 6 of the Commonwealth of Australia Constitution Act, and Part 2 of Chapter I of the Constitution (particularly sections 7, 9, 12, 15 and 21) and Chapter V of the Constitution. As was pointed out by the Privy Council in *James v. The Commonwealth*, (1936) A.C. 30 578 at p. 633, section 107 "imports every State power as fully as if specifically set out."

130. The implications to be derived from the Commonwealth Constitution in its setting among the Constitutions of the States are not, as the Appellants contended in the High Court, "to be confined to mere inference from words used in the Commonwealth Constitution to resolve verbal ambiguities therein or where the prima facie meaning of a term would give to a proposition in that Constitution a meaning which would be logically inconsistent with the meaning of other specific propositions in it". To adopt such a principle 40 would make the interpretation and application of a Constitution a more formal and literal exercise than the construction of any other legislation or indeed any legal instrument. In conformity with the

ordinary principles of interpretation stated in *Heydon's* case implications of the most fundamental kind are to be derived from the federal structure resulting from the Constitutions of the States and the Commonwealth, which establish Governments side by side in the one community each independent and sovereign in its own sphere.

*Preamble and Covering Clause 3 of The Commonwealth of Australia Constitution Act.*

10 *A.G. for the Commonwealth v. Colonial Sugar Refining Co. Ltd.* (1914) A.C. 237, at pp. 252-4.

*James v. The Commonwealth*, (1936) A.C. 578, at pp. 610, 611.

*W. R. Moran Pty. Ltd. v. Deputy Commissioner of Taxation for N.S.W.*, (1940) A.C. 838, at p. 855.

*West v. Commissioner of Taxation (N.S.W.)*, 56 C.L.R. 657.

131. There is an implication, resulting from the terms of the Constitution and the federal structure it erects for the government of Australia, that neither the Commonwealth nor a State can exercise its powers so as either (1) to prevent the other from performing the constitutional functions necessary for its continued existence as a  
20 co-ordinate and independent body politic within the federation, or (2) to interfere with or control the other in the performance of such functions so as to deprive it of its co-ordinate and independent position.

132. In particular, from the Constitution as a whole, there necessarily arises an implication that the power given in section 51 to the Commonwealth Parliament to make laws "subject to this Constitution" does not enable the passing of legislation which would operate to destroy or impair the existence of the States or their capacity to function as States, whether in respect of their legislative,  
30 judicial or executive powers. Otherwise it would be possible for Commonwealth legislation under the Constitution to destroy the foundation upon which the Constitution rests, i.e., the co-existence of independent Governments, performing major work of government.

133. The existence of an implication at least as wide as that for which the Respondents contend has always been recognised by the High Court of Australia.

*D'Emden v. Pedder*, 1 C.L.R. 91, as explained in *West v. Commissioner of Taxation (N.S.W.)*, (*supra*), at pp. 688-91.

40 *Deakin v. Webb*, 1 C.L.R. 585, as explained in

*Baxter v. Commissioner of Taxation (N.S.W.)*, 4 C.L.R. 657 at pp. 691-693.

*Baxter v. Commissioner of Taxation (N.S.W.)*, 4 C.L.R. 1087, particularly the judgment of Isaacs J., at pp. 1156-60.

*R. v. Barger*, 6 C.L.R. 41 at p. 72.

*Federated Municipal and State Council Employees Union of Australia v. Melbourne Corporation*, 26 C.L.R. 508, at p. 533.  
*The Amalgamated Society of Engineers v. The Adelaide Steamship Company*, 28 C.L.R. 129 at pp. 143-144, 146, 150 and as explained in *Australian Railways Union v. Victorian Railways Commissioners*, 44 C.L.R. 319 at pp. 390-391; *West v. Commissioner of Taxation (N.S.W.)*, 56 C.L.R. 657, at pp. 681-4 and pp. 696-702, and *Melbourne Corporation v. The Commonwealth*, 74 C.L.R. 31.

*Pirrie v. McFarlane*, 36 C.L.R. 170 at pp. 191, 192 and 221. 10

*Federated S.S. Teachers Association of Australia v. Victoria*, 41 C.L.R. 569.

*West v. Commissioner of Taxation*, 56 C.L.R. 657, particularly the judgments of Dixon and Evatt JJ., at pp. 681-4 and 696-702.

*R. v. Commonwealth Court of Conciliation and Arbitration*, 66 C.L.R. 488 at pp. 507, 515 and 533.

*Pidoto v. Victoria*, 68 C.L.R. 87, at p. 116.

*Essendon Corporation v. Criterion Theatres*, 74 C.L.R. 1, per Dixon J. at pp. 16-27. 20

*Melbourne Corporation v. The Commonwealth*, 74 C.L.R. 31.

The contention of the Appellants, that the decisions of the High Court in *The King v. Sutton*, 5 C.L.R. 789, *Attorney General for N.S.W. v. The Collector of Customs for N.S.W.*, 5 C.L.R. 818, and *Commonwealth v. Queensland*, 29 C.L.R. 1, are inconsistent with such an implication, is not well founded. In the first two of these cases the Court asserted the existence of such an implication, and based its decisions upon the following considerations:

(a) that the Commonwealth Customs power manifestly involves some control of some operations of the State Governments, and could not be effective unless it extended to importations by States; 30

(b) that the importations of goods could not be regarded as an exercise of a function of Government committed to the States by their Constitutions.

With these decisions may be compared the decision of the Supreme Court of the United States in the *University of Illinois v. United States*, (1933), 289 U.S. 48.

The decision in *The Commonwealth v. Queensland*, (*supra*), depended entirely upon section 109 of the Commonwealth Constitution, and no question of legislative interference with the functions of the States was raised. 40

134. The judgments of the Privy Council in the following cases support the implication for which the Respondents contend.

*A.G. for the Commonwealth v. Colonial Sugar Refining Co. Ltd.*, (1914) A.C. 237, at pp. 252-4;

*James v. The Commonwealth*, (1936) A.C. 578 at pp. 610-611.

*W. R. Moran Pty. Ltd. v. The Deputy Commissioner of Taxation for N.S.W.*, (1940) A.C. 838.

If and insofar as there is anything in *Webb v. Outtrim* (1907) A.C. 81, inconsistent with such an implication, it should not now be followed: see *Baxter v. Commissioner of Taxation* (N.S.W.), 4 C.L.R. 1087, at pp. 1122-1133, 1156, 1159 and 1165.

- 10 135. Decisions upon the British North America Act support the existence of such an implication applicable to the Canadian Federal system, although it is less truly federal than the Australian system, particularly in that the Canadian Constitution vests in the Executive of the Dominion of Canada the power to disallow any Act passed by a provincial legislature, and further to instruct the Lieutenant Governor of a Province to withhold assent from Provincial Bills and reserve them for consideration by the Dominion Executive which may refuse assent to such reserved bills, if it thinks fit.

*Great West Saddlery Co. v. King*, (1921) 2 A.C. 91, at p. 100.

*Caron v. King*, (1924) A.C. 999, at pp. 1005-6.

*A.G. for Canada v. A.G. for Ontario*, (1937) A.C. 326, at pp. 352-4.

- 20 136. Judgments of the Supreme Court of the United States of America establish the existence of such an implication from and in the American Federal system:—

*McCulloch v. Maryland*, 4 Wheat. 316.

*South Carolina v. United States*, 199 U.S. 437, at pp. 451-6, 461.

*Metcalf v. Mitchell*, 269 U.S. 514.

*Panhandle Oil Co. v. Mississippi*, 277 U.S. 218.

*Indian Motorcycle Co. v. United States*, 283 U.S. 570.

*James v. Dravo Contracting Co.*, 302 U.S. 134.

*Helvering v. Mountain Producers Corporation*, 303 U.S. 376.

- 30 *Graves v. New York*, 306 U.S. 466.

*United States v. Allegheny County*, 322 U.S. 174.

*New York v. United States*, 326 U.S. 572.

137. The case of *The Melbourne Corporation v. The Commonwealth*, (*supra*), is an instance of the recognition and application of the implication for which the Respondents contend. The case is particularly in point because it decided that such an implication rendered invalid section 48 of the Banking Act 1945, which authorised the prohibition of private banks from carrying on banking business for the States. It established that—

- 40 (a) the management and disposition of its public moneys are essential activities of a State;
- (b) a Commonwealth law denying to a State the right to do any business with any bank but the Commonwealth Bank was beyond power;
- (c) such legislation was beyond power, notwithstanding its character as a law relating to banking within section 51 (xiii.)

of the Constitution, because it was in conflict with the implication to be derived from the Federal nature of the Constitution protecting the essential functions of the States.

138. The decision of the High Court in *Melbourne Corporation v. The Commonwealth*, (*supra*), is submitted to be indistinguishable in principle from the present case. The ground upon which it was sought to be distinguished by Latham C.J., Starke, Dixon and McTiernan JJ., was that the earlier decision depended upon the circumstance that section 48 of the Banking Act 1945 discriminated against the States and operated specially to impede them in their functions, whereas section 46 of the Banking Act 1947 is a section of general application, and, notwithstanding that its consequences to the States may be even more drastic than those of the earlier section, the States are bound to take the banking system as any general law made in the exercise of Federal power may leave it. It is to be observed that Their Honours did not consider section 46 independently of a scheme for nationalisation by orderly transfer of all banking functions to the Commonwealth Bank. 10

139. In answer to the view that the *Melbourne Corporation case* can be distinguished on the ground mentioned, the Respondents submit that— 20

(a) Although section 48 of the Banking Act 1945 was a law which affected the States specially, and so may be said to have discriminated against them, the decision that it was invalid was not, except in the judgment of Dixon J., based upon that consideration. The ground of invalidity was the broader one that the section authorised the Treasurer of the Commonwealth to interfere with or control the States in the exercise of the power to manage and dispose of their public funds, which was a power essential to the existence of Government. 30

(b) Discrimination is not decisive as to whether Commonwealth or State legislation is invalid, as being inconsistent with the implications to be drawn from the Federal nature of the Constitution. This is shown in the judgment of Dixon J., in *Essendon Corporation v. Criterion Theatres Ltd.*, 74 C.L.R. 1. and by the judgment of the Court in *New York v. United States* 326 U.S. 572 at pp. 586-590. The operation of the law is submitted to be the decisive consideration. Moreover, if discrimination were to be adopted as the decisive test, invalidity could always be avoided by making a general instead of a special law. So a special law, such as section 48 of the Banking Act 1945 could, when declared invalid, be followed by a general law such as section 46 of the Banking Act 1947, having the same object and the same effect as regards the States. 40

(c) Although it cannot be questioned that to some extent one government in a federal system must accept, as it finds



10 them, facilities which are, by reason of the constitutional distribution of powers, subject to control by another government in the system, a limit is reached when the control which it is sought to exercise would make the one government dependent upon the other for the exercise of essential governmental functions. Both the rule and the limitation are consequences of the distribution of powers within the system, and without the limitation the constitutional distribution of powers would not serve the purpose for which it was made, namely the maintenance side by side of independent governments each performing major work of government. It follows that even if the States may have to accept a banking system controlled by the Commonwealth, at least they cannot be compelled to accept the Commonwealth as their bank.

*Inconsistency with Section 105A and the Financial Agreement.*

140. Section 105A of the Commonwealth Constitution gives every agreement made thereunder paramountcy over laws of the Commonwealth Parliament: see subsection (5) of that section. Every Act of the Commonwealth Parliament inconsistent with the  
20 terms of such an agreement is invalid.

*New South Wales v. The Commonwealth*, (No. 1), 46 C.L.R. 155.

141. The Financial Agreement 1927, (which, as amended and in consolidated form, is reprinted in the Commonwealth Statutes, 1944, page 169), is an agreement made between the Commonwealth and the States under Section 105A.

142. By the Financial Agreement, the States and the Commonwealth abandoned their rights of independent long-term borrowing, and submitted to the control of the Loan Council the carrying out of their policies requiring such borrowing; but they reserved to  
30 themselves the liberty to carry out such policies as could be carried out by the use of their revenues. In order to meet recurring administrative expenses and to carry out works and services financed from revenue, it was necessary to anticipate revenue, which would not be collected until late in the financial year, and temporary borrowing, including borrowing on overdraft from banks, was inevitable. Consequently, by clause 5 (9) of the Financial Agreement, it was provided that a State should retain its constitutional right to borrow  
40 money for temporary public purposes by way of overdraft, or fixed or other special deposit, on the terms therein set out. Thus by virtue of section 105A the power of the States to borrow for temporary purposes, and to do so by way of overdraft, was elevated into an express paramount constitutional right. Such a right means or includes borrowing from private banks, and is not satisfied by borrowing from the Commonwealth Bank or a State Bank.

The right to borrow money on overdraft for temporary purposes is denied by legislation which places the Treasurer of the Commonwealth in the position of being able to prevent every bank from granting temporary overdraft accommodation to the States.

*Melbourne Corporation v. Commonwealth*, 74 C.L.R. 31, at pp. 63 and 101.

143. To borrow money in this way is a right of the States confirmed by the Financial Agreement and therefore by section 105A of the Constitution, and no Commonwealth law can destroy it.

*Melbourne Corporation v. Commonwealth*, (*supra*).

144. The destruction by one party to a contract of the condition upon which the exercise of a right of the other party depends is itself a breach of the contract and inconsistent with its terms.

*Stirling v. Maitland*, 5 B. & S. 840, at p. 852.

*Southern Foundries Ltd. v. Shirlaw*, (1940) A.C. 701.

*Greenhalgh v. Mallard*, (1943), 2 All E.R. 234.

*S.S. Blairmore Co. Ltd. v. Macredie*, (1898) A.C. at p. 607.

145. If necessary, a term is to be implied in the Financial Agreement that the Commonwealth will not, by any legislative or executive action, prevent the exercise by the States of the right which the Agreement reserves to them.

146. The judgments of Latham C.J., and Williams J., in *Melbourne Corporation v. The Commonwealth*, (*supra*), require the conclusion that section 46 is invalid on this ground. If a law is invalid which restricts State borrowing by requiring the consent of the Treasurer of the Commonwealth, so must be a law which empowers the Treasurer directly to prevent all such borrowing.

147. The ground on which the *Melbourne Corporation case* was distinguished in the present case, namely that the Financial Agreement provides only that the States shall be entitled to obtain overdrafts from such banks as there are from time to time, takes no account of the fact that, if section 46 is valid, the Commonwealth Treasurer can effectually prevent the States from borrowing upon overdraft at all. The obtaining by a State of an overdraft from its own State Bank is not really borrowing; and seeking an overdraft from the Commonwealth Bank amounts to no more than seeking to borrow from the Commonwealth, the other party to the Financial Agreement.

148. It is therefore submitted that section 46 is invalid.

## G. CONCLUSION.

149. The Respondents therefore submit that these Consolidated Appeals should be dismissed for the following, among other, reasons :—

(i) The Appeals are incompetent in the absence of a certificate of the High Court under section 74 of the Constitution.

(ii) Section 46 of the Banking Act 1947 is inseparable from other provisions of that Act, whose invalidity is not challenged by the Appellants.

(iii) Section 46 of the Banking Act 1947 is beyond the legislative power of the Commonwealth Parliament derived from section 51 or any other provision of the Constitution.

10 (iv) Section 46 of the Banking Act 1947 contravenes section 92 of the Constitution.

(v) Section 46 of the Banking Act 1947 is beyond the powers of the Commonwealth Parliament, for the reason that it is inconsistent with the maintenance of the Constitutional integrity of the States.

(vi) Section 46 of the Banking Act 1947 contravenes section 105A of the Constitution and the Financial Agreement made thereunder.

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In the Privy Council.

**ON APPEAL**

FROM THE HIGH COURT OF AUSTRALIA.

**COMMONWEALTH OF AUSTRALIA  
and Others**

— AND —

**BANK OF NEW SOUTH WALES  
and Others.**

AND CONNECTED APPEALS  
(CONSOLIDATED).

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**CASE FOR RESPONDENTS.**

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