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(3)

In the Privy Council.

ON APPEAL FROM THE HIGH COURT  
OF AUSTRALIA

UNo. 7 of 1950. OF LONDON  
W.C.L.  
JUL 1953  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN

NELUNGALOO PTY. LIMITED ... (Plaintiff) APPELLANT

AND

10 THE COMMONWEALTH OF AUSTRALIA, THE ATTORNEY-  
GENERAL FOR THE COMMONWEALTH OF AUSTRALIA,  
WILLIAM JAMES SCULLY and THE AUSTRALIAN  
20 WHEAT BOARD ... (Defendants) RESPONDENTS.

CASE OF THE APPELLANT

NELUNGALOO PTY. LIMITED.

1.—This is an Appeal by Special Leave from an Order of the High Court of Australia in its appellate jurisdiction made on the 31st day of May, 1948, dismissing an Appeal by the Appellant in an action brought by it against the Respondents to recover certain monies in respect of the expropriation of wheat by the Respondent Commonwealth by virtue of the National Security (Wheat Acquisition) Regulations and the Order of the Minister of State for Commerce made thereunder. Orders, p. 178  
Orders, p. 177

2.—The said Order of the High Court of Australia was made upon appeal from an Order made on the 2nd day of July, 1947, by His Honour Mr. Justice Williams, a Justice of the High Court of Australia sitting in its original jurisdiction, dismissing with costs the said action and entering Judgment therein for the Respondents. Orders, p. 177,  
p. 122

3.—The questions raised by this appeal are (inter alia) :—

- (a) the question of the proper basis for awarding compensation for personal property compulsorily acquired and in particular :—
  - (i) whether the amount of compensation should be diminished by reason of the existence and operation of the general scheme under which the acquisition has taken place ;

- (ii) whether in awarding such compensation legislation which might have been, but which, in the event was not passed, and executive steps which might have been, but which in the event, were not taken, should be taken into consideration as an element in ascertaining the value of the property acquired ; and in particular, whether it is legitimate to assess compensation on the basis that if there had not been an acquisition, then by some other exercise of Government authority to effect the same object, the value of the commodity would have been depressed or diminished ; 10
- (iii) whether in awarding such compensation prices fixed under price fixing regulations which may be used as an instrument of governmental policy and which do not limit the price fixation to the determination of a fair price as between seller and buyer ought to be taken into consideration, and if so, to what extent ;

Other questions which may in certain events arise are :—

- (I) whether delivery of property to a government authority by a person in accordance with the terms of regulations or orders believed to be valid is a voluntary delivery so as to preclude such person from succeeding in an action of tort upon such regulations and orders proving to be invalid, although purporting to have been made under a valid statute making failure to observe them a criminal offence ; 20
- (II) whether the constitutional requirement of “ just terms ” under s. 51 (xxx) of the Australian Constitution is satisfied by a law which authorises the general acquisition of a commodity on terms that the expropriated owners shall accept as compensation such sum by way of dividend out of the proceeds of the realisation of the commodity as the Minister may determine upon the recommendation of the authority managing the acquired commodity where that authority in its management of the commodity is subject to ministerial control and is not bound to act in the interests of the expropriated owners and in particular is not bound to obtain a just price for the commodity whether sold by it or placed by it at the disposal of the Government. 30

4.—On the 21st day of September, 1939, Wheat Acquisition Regulations were made under the National Security Act, 1939. Such regulations incorporated the Australian Wheat Board.

5.—As at relevant dates such National Security (Wheat Acquisition) Regulations provided as follows :— 40

- “ 14. For securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth, for the efficient

prosecution of the war, and for maintaining supplies and services essential to the life of the community, the Minister" (being the Minister of State for Commerce) "may, from time to time, by order published in the Gazette make provision for the acquisition by the Commonwealth of any wheat described in the order, and that wheat shall, by force of and in accordance with the provisions of the order become the absolute property of the Commonwealth freed from all mortgages, charges, liens, pledges, interests and trusts affecting that wheat and the rights and interests of every person in that wheat (including any rights or interests arising in respect of any moneys advanced in respect of that wheat) are hereby converted into claims for compensation."

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" 15. All persons having wheat acquired by the Commonwealth in their possession control or disposal on the date of the publication of an order describing that wheat shall, within fourteen days of that publication, furnish to the Board a return in accordance with Form A in the schedule to these Regulations."

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" 16. (1) Any person having wheat acquired by the Commonwealth in his possession, control or disposal may deliver or consign that wheat to a licensed receiver or, on receipt of a notice in writing from the Board (or from the Chairman of a Committee authorised in that behalf by the Board) requiring him to deliver or consign that wheat to a licensed receiver specified in the notice, shall deliver or consign (as the case may be) the wheat to that licensed receiver within the time specified in the notice ;

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" (2) Notwithstanding anything contained in sub-regulation (1) of this Regulation, no person shall, on or after the date of the commencement of this sub-regulation, deliver any wheat acquired by the Commonwealth which was harvested prior to the first day of September 1939, and which is stored on a farm on the date of the commencement of this sub-regulation, to a licensed receiver or to any other person whomsoever except in accordance with instructions from the Board or with the approval of the Board and in either case in accordance with such terms and conditions as the Board may impose ;

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" (3) Any person who, on the date of the commencement of this sub-regulation, has in his possession control or disposal any wheat acquired by the Commonwealth which is stored on a farm and which was harvested prior to the 1st day of September 1939 shall, within fourteen days from the commencement of this sub-regulation, forward to the Board a return in accordance with Form AA in the Schedule to these Regulations."

" 17. Except as provided in Regulation 16 of these Regulations, or with the consent of the Board, no person shall—

- “ (a) part with the possession of any wheat acquired by the Commonwealth which is held in his possession ;
- “ (b) take into his possession any wheat which has been acquired by the Commonwealth other than wheat which he purchases from the Commonwealth ; or
- “ (c) purport to sell or offer for sale, or purport to buy or offer to buy (otherwise than from the Commonwealth) any wheat which is the property of the Commonwealth.”
- “ 19. (1) Upon delivery or consignment of any wheat in accordance with Regulation 16 of these Regulations (or in the case of wheat 10 acquired by the Commonwealth to which sub-regulation (2) of Regulation 16 of these Regulations applies, after the date of the commencement of that sub-regulation) every person having any right or interest in that wheat may forward to the Board a claim for compensation in accordance with Form B in the Schedule to these Regulations and shall be entitled to be paid such amount of compensation as the Minister, on the recommendation of the Board, determines ;
- “ (2) It shall not be necessary for the Minister to make a determination in pursuance of sub-regulation (1) of this regulation 20 until, in his opinion, a sufficient quantity of any wheat acquired by the Commonwealth has been disposed of to enable the Board to make a just recommendation, but the Minister may, in his absolute discretion, make any payment on account of any claim notwithstanding that no determination in respect of that claim has been made ;
- “ (2A) The basis of the compensation to be recommended by the Board shall be the rate or rates per bushel arrived at by reference to the surplus proceeds from the disposal of wheat, but from the compensation determined by the Minister, the Board 30 may make deductions on account of any or all of the following :—
- “ (a) the price or value of corn sacks (including freight thereon) supplied to the wheatgrower or which, in the opinion of the Board, form a proper charge against the proceeds of the wheat ;
- “ (b) railway freight from the country siding to the terminal port, and
- “ (c) dockages or deductions as fixed by the Board on account of the quality or condition of the wheat or corn sacks.”
- “ 25. The Commonwealth may purchase any wheat and may use or 40 sell or otherwise dispose of any wheat acquired or purchased by it as it deems necessary for securing the public safety and the

defence of the Commonwealth and the Territories of the Commonwealth, for the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community.”

- “ 26. On behalf of the Commonwealth and subject to any directions of the Minister, the Board may :—
- “ (a) purchase any wheat, wheat products or corn sacks ;
  - “ (b) sell or dispose of any wheat, wheat products or corn sacks acquired or purchased by the Commonwealth ;
  - 10 “ (c) grist or arrange for the gristing of any wheat into flour and sell or otherwise dispose of that flour ;
  - “ (d) manage and control all matters connected with the handling, storage, protection, treatment, transfer or shipment of any wheat acquired by the Commonwealth or of any wheat or flour sold or disposed of by the Commonwealth or by the Board on behalf of the Commonwealth ;
  - “ (da) carry, in any ship chartered by it for the carriage of wheat or flour, any other commodity at such rates of freight as the Board, subject to any directions of the Minister, determines ;
  - and
  - 20 “ (e) do all matters which it is required by these Regulations to do or which are necessary or convenient for giving effect to these Regulations.”

6.—On the 16th day of November, 1939, the then Minister of State for Commerce, purporting to act pursuant to the said Regulations by Order published in the Commonwealth Government Gazette declared as follows :—

“ WHEAT ACQUISITION REGULATIONS.

“ ORDER DECLARING CERTAIN WHEAT TO BE ACQUIRED BY  
THE COMMONWEALTH.

30 “ I, GEORGE McLEAY, Minister of State for Commerce, in pursuance of the powers conferred by Regulation 14 of the Wheat Acquisition Regulations, hereby declare that the following wheat is acquired by the Commonwealth, namely :—

- “ (a) all wheat harvested on or before the eighth day of October, One thousand nine hundred and thirty-nine which, on the date of the publication of this Order in the Gazette, is situate in Australia ; and

- “(b) all wheat which is harvested in Australia on or after the date of the publication of this Order in the Gazette,  
except—
- “(c) wheat stored by the grower thereof on his farm for his own use (other than gristing) and which is not for sale ;
- “(d) wheat, to the extent to which it does not exceed one hundred bushels, stored by or on behalf of the grower thereof for the purpose of gristing the wheat into products to be used by the grower ;
- “(e) wheat stored by the grower thereof which has been sold to another grower for use as seed wheat ; and 10
- “(f) in such cases as the Australian Wheat Board approves, wheat which has been sold by the grower thereof to any person for use as seed wheat either by that person or by a purchaser from that person.

Dated this Sixteenth day of November, 1939.

GEORGE MCLEAY,  
Minister of State for Commerce.”

Nock, p. 15,  
ll. 20 and 26  
Nock, p. 21, l. 35  
Perrett, p. 52, l. 4  
Exhibits, p. 371

7.—The Appellant owns and has at all material times owned a property at Nelungaloo, New South Wales of 3,167 acres. A large part of the said property is used for growing wheat. Its crop of f.a.q. (fair average quality) wheat for the cereal year beginning 1st December, 1945, and ending 30th November, 1946, consisted of 14,284 bushels of wheat. 20

Perrett, p. 43, l. 36

8.—Upon the basis that the National Security (Wheat Acquisition) Regulations and the Order of the Minister were valid the said wheat became the property of the Australian Wheat Board on the harvesting of the same.

Nock, p. 22,  
ll. 16 to 38

9.—The Appellant in obedience to the said Order and Regulations believed by it to be valid, delivered the said 14,284 bushels of wheat to the said Board.

Nock, p. 22,  
ll. 40 to 47  
Nock, p. 23,  
ll. 1 and 2  
Nock, p. 24, l. 1  
Exhibits, pp. 182  
to 188  
Latham, C.J.,  
p. 131, ll. 23 to 35  
Perrett, p. 43,  
ll. 26 to 34  
Latham, C.J.,  
p. 131, ll. 36 to 38

10.—Upon delivery of the wheat to the said Board the Appellant caused to be signed a form of declaration which was prescribed in the said Regulations and which in addition to containing particulars of the wheat delivered included a claim for compensation “in accordance with the Wheat Acquisition Regulations.” 30

11.—The said wheat became intermixed with other f.a.q. wheat which had been delivered to the said Board under and by virtue of the said Regulations.

12.—During the 1945/1946 cereal year the said Board controlled the use of all the silos and all handling facilities. Perrett, p. 44,  
ll. 32 to 40

13.—Throughout the said cereal year shipping so far as concerned shipments to the United Kingdom and other parts of the British Empire, was controlled by the Imperial Ministry of War Shipping, but the purchasers from the said Board were offering to buy and in fact bought f.o.b. main Australian ports. Nock, p. 26, l. 42

14.—The 1945/46 wheat crop acquired by the said Board consisted of approximately 123,000,000 bushels, which with certain small exceptions, Nock, p. 21, l. 10  
10 represented the whole of the Australian Wheat crop for that cereal year. Perrett, p. 45,  
ll. 18 to 32

15.—Prior to the coming into operation of the Wheat Acquisition Regulations the price obtained for Australian wheat whether for export or domestic consumption was always that obtaining in the world markets. The price of wheat for domestic consumption was at times and particularly when world prices were firm and rising a little higher than the export price but was never less than that price. Nock, p. 17,  
ll. 4 to 29  
Williams, J.,  
p. 112, ll. 24 to 33  
Dixon, J., p. 150,  
ll. 12 to 14

16.—A group of Acts with respect of the Wheat Industry were passed by the Commonwealth Parliament in 1938 as follows:—

- 20           Flour Tax (Wheat Industry Assistance) Assessment Act No. 48  
                  of 1938.  
                  Flour Tax Act No. 49 of 1938.  
                  Flour Tax (Stocks) Act No. 50 of 1938.  
                  Flour Tax (Imports and Exports) Act No. 51 of 1938.  
                  Wheat Tax Act No. 52 of 1938.  
                  Wheat Industry Assistance Act No. 53 of 1938.

30 From these Acts it appears that the Government of the Commonwealth and of the States in that year took the broad view that while the export value of wheat was below 5/2d. a bushel bagged f.o.r. Australian ports, the Australian public as consumers of bread should be taxed indirectly to provide a subsidy for wheat growers but if and when the export value of wheat exceeded 5/2d. the price which the wheat growers would otherwise have received for their wheat should be reduced by the wheat merchant or exporter having to pay a tax not exceeding 1/- a bushel on the wheat which he purchased and that the proceeds of this tax should be used as a subsidy to keep down the local price of flour. Williams, J.,  
p. 114, ll. 28 to 48 ;  
pp. 115, 116 and  
117, ll. 1 to 9

40 To this end the Flour Tax Act provided for the imposition of a tax upon flour of such an amount as would bring the cost of the wheat to the miller up to the sum of 5/2d. having regard to the actual price paid by him for wheat for gristing. The legislation provided for the proceeds of this tax to be distributed amongst wheat growers. Latham, C.J.,  
p. 125, ll. 9 to 45  
Dixon, J., p. 164,  
l. 47 ; p. 165,  
ll. 1 to 24

The Wheat Tax Act provided for the imposition of a tax upon all wheat sold up to a maximum of 1/- per bushel if and when the price of wheat exceeded 5/2d. per bushel. The legislation provided for the distribution of this tax amongst millers with the object, so far as the maximum sum of 1/- per bushel would extend, of maintaining the cost of flour to the miller at 5/2d. per bushel.

These two Acts were operative at all relevant times, although no proclamation has at any time been made of a date for the purposes of the Wheat Tax Act, s. 4.

Exhibit, p. 327

17.—The world market in the cereal year 1945–1946 was at all times firm and rising, reaching the sum of 13/6d. per bushel by the end of the year. 10

Williams, J.,  
p. 112, ll. 33 to 35

18.—The said Board sold for home consumption 63,000,000 bushels of the said wheat, which represented approximately one half thereof. The said 63,000,000 bushels were sold by the said Board at the following prices :—

Perrett, p. 45, l. 48

(a) 32,000,000 bushels were sold to millers for gristing into flour for local consumption at 3/11½d. a bushel. This price had been fixed by the said Board in 1941 when it conformed to export parity and thereafter it remained pegged by the said Board, notwithstanding the considerable rise in export prices. It was admitted 20

Perrett, p. 84,  
ll. 44 to 47  
Perrett, p. 85,  
ll. 1 to 15

Perrett, p. 90,  
ll. 21 to 27  
Perrett, p. 86,  
ll. 31 to 33

by Mr. C. J. Perrett the General Manager of the said Board that the price of 3/11½d. a bushel at which flour was sold by the said Board to millers did not represent the market price of wheat at the date of its acquisition. Notwithstanding the rise in export prices and the terms of the Flour Tax Act 1938, the Flour Tax had been kept at £2 8s. 10d. a ton (an amount appropriate for the year 1941) in order to avoid “administrative inconvenience.” The maximum retail price for bread had been fixed in many localities of the Commonwealth both under State laws and under the National Security Price Regulations, at approximately 6d. a 2-lb. loaf. The price of flour had been similarly fixed at figures which would permit the sale of bread at that price ; 30

Perrett, p. 46, l. 47  
Perrett, p. 86, l. 37  
Starke, J., p. 143,  
ll. 33 to 35

Perrett, p. 47, l. 32

(b) A further part of the said 63,000,000 bushels was sold by the Board to breakfast food manufacturers at 3/11½d. a bushel ;

Perrett, p. 46, l. 1

(c) a further part thereof was sold by the said Board for stock feed at prices which varied between 3/3¼d. and 4/11d. a bushel ;

(d) a further part thereof was sold by the Board to produce brokers at 4/3d. a bushel.

The prices stated in (b), (c) and (d) hereof and the quantities sold at such prices were fixed under ministerial directions. 40

Exhibit, pp. 322  
and 323

19.—The remainder of the 1945–46 wheat crop amounting to approximately 60,000,000 bushels was sold by the Australian Wheat Board



for export at prices ranging from 9/8¼d. f.o.b. main Australian ports to 10/10½d. f.o.b. main Australian ports. The prices obtained for wheat by the Board at the date of the delivery of the Appellant's wheat to it was:—

- (a) bagged wheat 10/- f.o.b.
- (b) bulk wheat 9/9d. f.o.b.

The Board obtained the best possible price for export wheat but it could have sold much more wheat at export prices than it did.

Williams, J.,  
p. 113, ll. 39 and 40  
Perrett, p. 76,  
ll. 41 to 43

20.—During the period covered by the 1945–46 cereal year the said Board conducted what it styled “ Pool No. 9 ” into which was paid the proceeds of wheat sold by it during that period whether the wheat was of that year or not.

Perrett, p. 73,  
ll. 8 to 48

Perrett, p. 74,  
ll. 35 to 38

21.—The price credited to the said “ Pool ” in respect of wheat sold to Australian millers was 3/11¼d. a bushel which did not represent the value of the wheat so sold.

Latham, C.J.,  
p. 132, ll. 14 and 15

22.—Into this “ Pool ” was also paid part of the proceeds of the said Flour Tax and also any subsidy which the Government made available to the said Board in that period. The sums thus credited to the “ Pool ” were sufficient to enable a payment to growers who delivered f.a.q. wheat to the said Board in that period of 6/6¾d. a bushel for bulk wheat and 6/8¾d. a bushel for bagged wheat.

Exhibit, pp. 322  
and 323

23.—After the acquisition of the 1945–46 wheat crop and before action brought the said Board made certain advances:—

The first advance was 4/1d. a bushel for bulk wheat and 4/4d. a bushel for bagged wheat;

Perrett, p. 52, l. 18  
Nock, p. 24, l. 12

The second advance was 1/- a bushel less a deduction of 5·384d. for railage from siding to seaboard and for storage;

Perrett, p. 52, l. 23

The third advance was 6d. a bushel;

Perrett, p. 53, l. 6

The fourth advance was 6d. a bushel.

Perrett, p. 53, l. 8

24.—Prior to the commencement of the action the said Board announced that a further advance would be made but no determination has at any time been made by the Minister in accordance with Regulation 19 of the said Wheat Acquisition Regulations.

Perrett, p. 53, l. 20  
Perrett, p. 53, l. 18  
Perrett, p. 83, l. 24

25.—The Appellant received the first and second advances made by the Board but refused to accept the third and fourth advances.

Nock, p. 24,  
ll. 12 to 38

26.—The said Board has not at any time made any recommendation to the Minister as to the amount of compensation to be paid to growers in respect of the wheat of the 1945–46 crop, nor has the Minister at any time made any determination of the amount of such compensation.

Pleadings, p. 3

27.—On the 24th July, 1946, the Appellant commenced proceedings against the Respondents and by the Amended Statement of Claim dated the 9th September, 1946, the Appellant claimed a balance of £3,118 1s. 3d. made up as follows :—

	£	s.	d.
Wheat delivered to silos—3,786 bushels at 9/9d. ...	1,845	16	9
Bagged wheat—10,498 bushels at 10/- ... ..	5,249	8	4
	<hr/>		
	7,095	5	1
Less rail and handling charges ... ..	535	13	9
	<hr/>		
	6,559	11	4
Less compensation received ... ..	3,441	10	4
	<hr/>		
	£3,118	1	3
	<hr/> <hr/>		

Pleadings, p. 9

28.—By the Amended Statement of Defence dated the 22nd October, 1946, the Respondents :—

- (a) alleged that the Statement of Claim disclosed no right in the Appellant to be paid any sum of money in excess of the said sum of £3,441 10s. 4d. ;
- (b) offered to pay to the Appellant two further advances each of 6d. a bushel in respect of the wheat referred to in the Amended Statement of Claim ;
- (c) alleged that the Appellant had become liable to pay to the Respondent Commonwealth Government a provisional tax under the Wheat Tax Act 1946 at the rate of 1/0<sup>1</sup>/<sub>8</sub>d. a bushel in respect of the wheat referred to in the Amended Statement of Claim and further alleged that the said provisional tax was a proper deduction or set-off against any claim the Appellant might have for compensation in respect of the said wheat.

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Exhibit, p. 371

29.—The amount of the provisional tax referred to in the preceding paragraph hereof was alleged by the Respondents to be £805 18s. 2d.

30.—Subsequent to the commencement of the said action the Commonwealth Parliament passed certain further Acts affecting the Wheat Industry—

- (a) The Wheat Tax Act 1946 (No. 78 of 1946) imposed a tax payable by the grower upon all wheat acquired by the Commonwealth on or after the 1st October 1945. It provided that the Minister should notify a “provisional rate of tax” to be effective until the final figures for the season were available and enable the final rate of tax to be assessed ; s. 6 of the said Act provided that

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the amount of tax payable by a grower might be deducted by the Commonwealth or the Australian Wheat Board from all moneys payable by the Commonwealth or the Board to the growers in any account whatever ;

- (b) the Wheat Industry Stabilisation Act (No. 2) 1946 (No. 80 of 1946) which by s. 11, provided that :—

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“ The Order made by the Minister of State for Commerce under Regulation 14 of the National Security (Wheat Acquisition) Regulations and published in the Gazette on the 16th day of November 1939, shall be deemed to be, and at all times to have been, fully authorised by that regulation, and shall have, and be deemed to have had, full force and effect according to its tenor in respect of wheat harvested in any wheat season up to and including the 1946-47 season.”

31.—The said action was heard by His Honour Mr. Justice Williams on the 13th, 17th, 18th, 19th, and 20th June, 1947, and on the 2nd day of July, 1947, he gave Judgment dismissing the said action with costs.

32.—During the hearing of the action by His Honour Mr. Justice Williams the following facts were established with respect to the price of Australian wheat :—

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- (a) that until the price of wheat for home consumption was artificially “ pegged ” by the said Board at 3/11¼d. in 1941 there was one price only for Australian wheat irrespective of whether the wheat was for export or for home consumption ; Perrett, p. 84, ll. 14 to 38
- (b) that in 1941 the price of wheat for home consumption was “ pegged ” by the said Board at 3/11¼d. a bushel and that at that price it has remained “ pegged ” notwithstanding that such price ceased to represent the market value of the wheat ; Perrett, p. 85, ll. 40 to 47  
Perrett, p. 86, ll. 31 to 33
- (c) that from 1942 onwards the price of wheat which has been expropriated has been constantly rising : Exhibit, p. 327

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1942	4/3d.	a bushel ;		
1943	Highest price	4/7¾d.,	Lowest price	4/1½d.
1944	„	„ 6/6¼d.	„	„ 4/5¾d.
1945	„	„ 9/6d.	„	„ 7/5¼d.
1946	„	„ 13/6d.	„	„ 10/-
1947	„	„ 16/-	„	„ 14/-

33.—The trial Judge found :—

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- (a) That the Appellant’s wheat had been validly acquired and that the Appellant was entitled to be compensated upon common law principles in respect of the said 14,284 bushels of wheat ; Williams, J. p. 111, ll. 34 and 35

Williams, J., p. 113.  
ll. 45 to 47

(b) that if there had been a free market at the date of the acquisition the Appellant could have obtained from 9/3d. to 9/9d. a bushel for bulk wheat and from 9/6d. to 10/- a bushel for bagged wheat less 9d. a bushel in each case for rail and handling charges ;

Williams, J., p. 113.  
ll. 46 to 48  
Williams, J., p. 118.  
ll. 4 to 6

(c) that the Appellant's contention that it should be paid compensation based upon export prices was well founded but that such prices should apply to one moiety only of the said wheat because :—

Williams, J., p. 118.  
ll. 6 to 9

(i) in assessing compensation it should be assumed that one moiety of the said wheat would be used for export and the other moiety thereof would be for home consumption ;

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Williams, J., p. 118.  
ll. 9 to 12

(ii) but for the existence of the Wheat Acquisition Regulations the legislature or executive would have intervened so as, by act or order, to prevent the price of wheat for internal consumption exceeding 5/2d. a bushel for bagged wheat and 4/11d. a bushel for bulk wheat ;

Williams, J., p. 117.  
ll. 32 to 34

(d) that the Appellant should not be prejudiced by the artificial pegging of the price of wheat for manufacture into flour at 3/11½d. a bushel bulk basis ;

Williams, J., p. 118.  
ll. 25 to 34

(e) that in respect of the said wheat the Appellant was entitled to receive the sum of £4,740 less the sum already paid in account. 20  
The said sum of £4,740 was made up as follows :—

	£	s.	d.
5,249 bushels of bagged wheat at 5/2d. a bushel	1,356	0	0
5,249     "     "     "     9/9d.     "	2,559	0	0
1,893     "     "     "     4/11d.     "	465	7	0
1,893     "     "     "     9/6d.     "	899	0	0
	5,279	7	0
<i>Less handling charges</i> ...     ...     ...	539	13	9
	<u>£4,739</u>	<u>13</u>	<u>3</u>

Williams, J., p. 108.  
ll. 2 to 4

In respect of the said sum the Appellant had received the sum of £3,441 10s. 4d. 30

Williams, J., p. 118.  
ll. 37 to 43  
Williams, J., p. 117.  
ll. 24 to 26

(f) that it was reasonable to assume that if the export value of bagged wheat had been 9/9d. a bushel bulk basis the Flour Tax (Imports and Exports) Act 1938, s. 4 (b) would have been proclaimed and that the purchaser of wheat for export would have had to lower his price by 1/- a bushel and that this sum in respect of 7,132 bushels of the Appellant's wheat amounting to £357 ought to be deducted from the amount of £4,739 thus reducing the balance to which the Appellant was entitled to the sum of £4,383.

Williams, J., p. 118.  
ll. 37 to 43

- (g) that although the Wheat Tax Act 1946 was, in His Honour's opinion, valid, nevertheless any further questions of tax "should perhaps, be left out of account"; subsequent to the making of the Order against which this Appeal is brought and before the grant of leave to appeal herein the Respondents accepted the view that the Wheat Tax Act 1946 was invalid and refunded to growers the amount of the tax collected thereunder and abandoned its defence in this respect ; Williams, J., p. 120, l. 44  
Williams, J., p. 121, l. 5
- 10 (h) that the Appellant would have been entitled to the sum of £4,925 in respect of compensation based upon Regulation 19 of the Wheat Acquisition Regulations and that as that sum was slightly larger than the said sum of £4,740, the action failed. Williams, J., p. 120, ll. 25 and 26  
Williams, J., p. 121, ll. 7 to 9

20 34.—That although His Honour Mr. Justice Williams made a deduction of £357 as stated in paragraph 33 (f) hereof he did not consider what would have been the effect of the proclamation of the Flour Tax (Imports and Exports) Act 1938 and the Wheat Tax Act 1938 upon the price of flour. If the two Acts in this paragraph mentioned had been proclaimed they would have resulted in the circumstances obtaining in the said cereal year in the imposition of a tax of 1/- a bushel on the whole of the Australian wheat crop for the cereal year 1945-1946. The yield of such a tax would have exceeded £6,000,000. By reason of the legislation referred to in paragraph 16 hereof such tax would have been used as a subsidy payable to millers in respect of wheat used for gristing into flour. The amount of wheat sold to millers for gristing into flour for the cereal year 1945-1946 was 32,000,000 bushels. The millers would therefore have received a subsidy of rather less than 4/- a bushel which would have enabled them to pay a price for wheat almost equivalent to the price at which wheat was sold for export and while paying that increased price they would still have been able to sell bread at the controlled price of 6d. a loaf. Exhibit, pp. 322 and 323

30 35.—The said prices of 5/2d. and 4/11d. mentioned by His Honour Mr. Justice Williams were prices which had been thought in 1938 in circumstances which then prevailed to be prices which would give the Australian wheat grower a "payable price" for his wheat. Williams, J., p. 118, ll. 28 to 30  
Latham, C.J., p.125 ll. 20 to 24

36.—From this decision of His Honour Mr. Justice Williams the Appellant appealed. The said appeal was heard in November, 1947, before the full Court of the High Court of Australia consisting of their Honours the Chief Justice, and Mr. Justice Rich, Mr. Justice Starke, Mr. Justice Dixon. Mr. Justice McTiernan and Mr. Justice Webb. Notice, p. 123

40 37.—On the hearing of the said appeal, it was argued on behalf of the Appellant :---

- (a) that Regulation 19 was severable from Regulation 14 and that the Appellant's wheat was validly acquired ;

- (b) that the Appellant was entitled to be paid compensation for the wheat delivered by it to the Board upon ordinary principles of compensation and that consequently it was entitled to be paid the value of its wheat at the date of its acquisition ;
- (c) that in determining that value :—
- (i) an open market should be assumed and that the existence and operation of the general scheme of acquisition and of any governmental action depressing the value of wheat should be ignored ;
  - (ii) that any conjecture as to what legislative or executive steps might have been taken had the scheme of acquisition not been adopted ought not to enter into the assessment of compensation and that in particular as the scheme of acquisition with compensation had been adopted as the means of carrying out the policy set out in Regulation 14 it should not be assumed when assessing compensation that if the wheat crop of Australia had not been so acquired, the legislature or executive would have taken measures to depress the value of that wheat ;
- (d) that as there could be only one price for wheat in Australia and as that price was always determined by the price offered by shippers the Appellant ought to be paid the export price which the Board could and did obtain at the date of the delivery to it of the Appellant's wheat less the necessary amounts to cover the cost of bringing the wheat to the seaboard ;
- (e) that in determining value prices fixed under price fixing regulations which may be used as an instrument of government policy and which do not limit the price fixation to the determination of a fair price as between seller and buyer ought not to be taken into consideration.
- (f) that as the Wheat Tax Act 1938 was an existing statute and as upon the price of wheat exceeding 5/2d. a bushel bagged f.o.r. Williamstown, it was probable that that Act would have been put into operation the Appellant conceded that from the price mentioned in the preceding paragraph the appropriate amount of the Wheat Tax should be deducted namely the maximum sum of 1/- a bushel ;
- (g) that paragraph (b) of the Order of the Minister dated the 16th day of November 1939 was not in any event authorised by the terms of Regulation 14 and that it was not validated by s. 11 of the Wheat Industry Stabilisation Act (No. 2) 1946 ;
- (h) that if the said Regulations or the said Order were invalid the delivery by the Appellant to the Board of the said wheat was not

voluntary being induced by menace of authority and that the dealing by the said Board with the said wheat was tortious and the Appellant was therefore entitled to damages accordingly ;

(i) that the damages to which the Appellant would thus be entitled would be the same sum as that arrived at by the application of paragraphs (c) to (f) above ;

(j) that the Wheat Tax Act 1946 was invalid :—

(i) as being contrary to s. 51 (xxxix) of the Australian Constitution, and

10 (ii) as being in contravention of s. 55 of the Australian Constitution

and that therefore, whether the wheat was validly acquired or not, no deduction should be made under the provisions of the Wheat Tax Act from the amount to be paid to the Appellant ;

(k) that the Appellant was not required to make any election between the compensation which might become payable under Regulation 19 and that to which it would be entitled under Regulation 14 until the Minister had made a determination under Regulation 19 and that in any case the Appellant had not made any election which  
20 precluded it from making the present claim

(l) that in any case the amount of compensation under Regulation 19 had no relevance as the amount had not been nor has it since been determined by the Minister who is not compellable to make any such determination.

38.—The Appellant formally submitted that the Regulations were invalid but did not argue the point having regard to the decision of the High Court of Australia in the *Australian Apple and Pear Board v. Tonking*, 66 C.L.R., p. 77.

39.—The Respondents argued on appeal :—

30 (a) that a free market could exist only in normal times and that during abnormal times such as war years, conditions and circumstances of the National interest are such as to necessitate the imposition of controls, restrictions and prohibitions upon the marketing of wheat ; that during the war shipping was very short and was wholly conducted by Government or governmental bodies ; that a grower was, as a prudent person, compelled to put his wheat under the control of the Australian Wheat Board to obtain the best prices ; that the price of wheat on the local  
40 market was controlled by the price of bread and flour which, in its turn, was fixed from time to time by statute ;

- (b) that the fact that the acquisition was by the Government did not entitle the grower to a price higher than the price he would have obtained from an ordinary person ; that the price fixed by law became the market price, and that price also is a fair price ;
- (c) that the Appellant had delivered its wheat voluntarily to the said Board and that if there were any tort the Appellant had waived the tort ;
- (d) that as the Appellant had made a claim and received advances under Regulation 19 it was bound by its choice and could not claim under Regulation 14 ;
- (e) that the relevant legislation passed in 1946 provided for the stabilisation of wheat prices over a period of years ; that the tax under the Wheat Tax Act 1946 was to be paid into the Stabilisation Fund to ensure to the growers a guaranteed price ; that this price was a tax on wheat acquired by the Australian Wheat Board, but was not taxation on or deduction from the compensation as such.

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Latham, C.J., p. 138  
ll. 35 to 37  
Latham, C.J.,  
pp. 124 to 138  
McTiernan, J.,  
pp. 174 and 175  
Webb, J.,  
pp. 175 to 177  
Rich, J.,  
pp. 138 to 140  
Starke, J.,  
pp. 141 to 149  
Dixon, J.,  
pp. 149 to 173

40.—The Justices of the High Court were evenly divided as to whether the appeal should be allowed and in accordance with the provisions of s. 23 (2) (a) of the Judiciary Act 1903–1947 the decision of the Trial Judge was affirmed and the appeal was dismissed. Their Honours, the Chief Justice and Mr. Justice McTiernan and Mr. Justice Webb were in favour of dismissing the appeal and their Honours, Mr. Justice Rich, Mr. Justice Starke and Mr. Justice Dixon were in favour of allowing the appeal. The reasons for Judgment of their Honours are reported in 75 C.L.R. 495.

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Latham, C.J.,  
p. 132, l. 43 to  
p. 134, l. 7  
McTiernan, J.,  
p. 175, ll. 18 to 20  
Webb, J., p. 176,  
ll. 1 to 4

41.—Their Honours the Chief Justice, Mr. Justice McTiernan and Mr. Justice Webb were of the opinion that the appeal should be dismissed on the ground that the Appellant had elected to deliver “ its ” wheat to the Wheat Board and to accept compensation under Regulation 19 of the National Security (Wheat Acquisition) Regulations and that it was not afterwards permitted to withdraw from that election.

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Rich, J., p. 139,  
ll. 45 to 48  
Rich, J., p. 140,  
ll. 1 to 7  
Dixon, J., p. 158,  
ll. 31 to 36

42.—Their Honours Mr. Justice Rich, Mr. Justice Starke and Mr. Justice Dixon were of opinion that the regulations did not impose any obligation on the Appellant to elect.

Latham, C.J.,  
p. 134, ll. 13 to 17  
McTiernan, J.,  
p. 175, ll. 32 to 42  
Webb, J., p. 176,  
ll. 12 to 16

43.—Their Honours the Chief Justice, Mr. Justice McTiernan and Mr. Justice Webb further held that quite apart from the question of election, the Appellant had not discharged the onus of showing that more was due to it on general principles of assessment of compensation than the sum which it might expect to receive under Regulation 19.



- 44.—His Honour Mr. Justice Rich agreed with the reasons and conclusions of the learned Trial Judge, with the exception that he held the Wheat Tax Act 1946 to be invalid. His Honour was of opinion that the Appellant was entitled to Judgment in the sum of £1,298 being the difference between the amount found by the Trial Judge to be the value of the Appellant's wheat apart from deductions for tax, and the amount which the Appellant had received in advances from the said Board.
- Rich, J., p. 140, ll. 20 to 22  
Rich, J., p. 140, ll. 46 to 48
- 45.—Their Honours, the Chief Justice, Mr. Justice McTiernan and Mr. Justice Webb all held that the National Security (Wheat Acquisition) Regulations were valid. His Honour Mr. Justice Starke held that Regulation 19 was invalid, but that its invalidity did not affect Regulation 14 which was severable.
- 10 Latham, C.J., p. 128, ll. 42 to 46  
Latham, C.J., p. 129, ll. 1 to 25  
Starke, J., p. 143, ll. 8 to 14
- 46.—Mr. Justice Dixon expressed his personal view as to the construction of the Regulations and as to their validity having regard to his construction of them, but as it was not suggested by Counsel that there was any material relevant difference between the Wheat Regulations and those dealt with by the Court in *Australian Apple and Pear Board v. Tonking*, 66 C.L.R. p. 77 (where it was decided that the counterpart of Regulation 19 was severable from the counterpart of Regulation 14) he dealt with the case upon the basis that the wheat was validly acquired and the Appellant entitled to compensation on ordinary principles.
- 20 Dixon, J., p. 152, l. 37 to p. 156, l. 6  
Dixon, J., p. 173, ll. 40 to 44
- 47.—Their Honours Mr. Justice Starke and Mr. Justice Dixon held that the measure of compensation was a sum calculated upon the export price of wheat at the date of acquisition less one shilling (1/-) being the maximum amount of tax payable under the Wheat Tax Act 1938 and that the Appellant was entitled to Judgment in the sum of £2,225.
- Starke, J., p. 148, l. 45  
Starke, J., p. 149, l. 1 to l. 15  
Dixon, J., p. 173, ll. 45 to 47
- 48.—All members of the Court held that the Order of the Minister dated the 16th November 1939 had been validated by the Wheat Industry Stabilisation Act (No. 2) 1946, s. 11.
- Latham, C.J., p. 130, ll. 5 to 8
- 49.—Their Honours, the Chief Justice and Mr. Justice McTiernan held that, if, contrary to their opinions there had not been a valid acquisition of the Appellant's wheat, the Appellant had voluntarily delivered the wheat to the Respondent Australian Wheat Board and was not entitled to recover in tort in respect of the Board's dealings with the wheat.
- 30 Latham, C.J., p. 130, ll. 16 to 28  
McTiernan, J., p. 174, ll. 10 to 16
- 50.—Their Honours, Mr. Justice Rich, Mr. Justice Starke and Mr. Justice Dixon held that the Wheat Tax Act 1946 was invalid because it infringed s. 51 (xxxi) of the Constitution.
- Starke, J., p. 148, l. 43  
Dixon, J. p. 173, l. 24

51.—(a) The main contentions relied upon by the Appellant are as set out in paragraph 37 hereof which the Appellant repeats with the exception of paragraph (j) which has become irrelevant by reason of the matters stated in paragraph 33 (g) and with the addition of the following :—

(m) that the Appellant in any event was entitled to Judgment for the amount found by His Honour the Trial Judge in the sum of £1,298 9s. 11d.

(b) If, and so far as the question of the validity of the National Security (Wheat Acquisition) Regulations and in particular the validity of Regulation 19 becomes material in the consideration of the Appeal, the Appellant in the alternative submits that Regulation 19 is, and if the same be not severable from the rest of the Regulations, the Regulations as a whole are invalid, because they fail to provide just terms of acquisition for the following amongst other reasons :—

- (i) Regulation 19 gave no right to compensation in that the Minister was not bound under the Regulations to make any determination of compensation ;
- (ii) The Minister was not bound by any determination by the Wheat Board ;
- (iii) The said Board was not bound to obtain the best possible price for the wheat handled by it and was subject to ministerial control both in the use and disposal of the said wheat ;
- (iv) That neither the Board nor the Minister in making any determination or recommendation were required to have regard to the value of the wheat.

Orders, p. 122

Orders, p. 177

52.—The Appellant therefore humbly submits that the Order of the Honourable Mr. Justice Williams made on the 2nd day of July 1947 and the Order of the High Court of Australia made on the 31st day of May 1948 should be discharged and that Judgment should be entered for the Appellant for the sum of £3,118 1s. 3d. less such sum as should be deducted by virtue of the hypothetical application of the Wheat Tax Act 1938 and the Flour Tax Act 1938, or in the alternative in any event for the sum of £1,298 9s. 11d., for the following among other

### REASONS

1. BECAUSE the Appellant was entitled to be paid compensation in respect of the expropriated wheat on ordinary principles of compensation.
2. BECAUSE the Appellant was entitled to be paid the value of such wheat as at the date of the expropriation.
3. BECAUSE at the date of expropriation there was only one price for Australian wheat, namely 9/6d. a bushel.

4. BECAUSE the compensation in respect of one moiety of the wheat should not be reduced by approximately one half.
5. BECAUSE when fixing the amount of compensation regard should not be had to possible future executive or legislative action.
6. BECAUSE in fixing the amount of compensation regard should not be had to prices fixed under price fixing regulations.
7. BECAUSE in fixing the amount of compensation regard should not be had to the general scheme under which the expropriation took place.
8. BECAUSE compensation should not be assessed under Regulation 19 of the Wheat Acquisition Regulations by reason of the fact that such Regulation was invalid as not providing for just terms under s. 51 of the Commonwealth of Australia Constitution Act 1900 and/or by reason of such invalidity the whole Regulations were invalid.
9. BECAUSE it was not possible to determine compensation under Regulation 19 by reason of the fact that the Minister had made no determination thereunder.
10. BECAUSE the method of determining compensation adopted by the said Board was not authorised by statute or by statutory order neither did it provide for compensation upon just terms.
11. BECAUSE the amount to which the Appellant was admittedly entitled exceeded the amount which the Respondents had paid or were bound or willing to pay.
12. BECAUSE the Appellant by delivering to the said Board expropriated wheat which was the property of the said Board was not thereby electing to accept compensation under Regulation 19.
13. BECAUSE the Appellant by making a claim for compensation under the said Regulations was not thereby electing to accept compensation calculated in accordance with Regulation 19.

G. E. BARWICK.

# In the Privy Council.

No. 7 of 1950.

ON APPEAL FROM THE HIGH COURT OF  
AUSTRALIA.

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BETWEEN

NELUNGALOO PTY. LIMITED  
(*Plaintiff*) APPELLANT

AND

THE COMMONWEALTH OF AUSTRALIA,  
THE ATTORNEY-GENERAL FOR THE  
COMMONWEALTH OF AUSTRALIA.  
WILLIAM JAMES SCULLY and THE  
AUSTRALIAN WHEAT BOARD  
(*Defendants*) RESPONDENTS.

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CASE OF THE APPELLANT  
NELUNGALOO PTY. LIMITED.

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*Solicitors for the Appellant.*