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UNIVERSITY OF LONDON

No. 7 of 1950. 30 MAR 1951

INSTITUTE OF ADVANCED LEGAL STUDIES

In the Privy Council.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

UNIVERSITY OF LONDON
W.C.1.
17 JUL 1953
INSTITUTE OF ADVANCED LEGAL STUDIES

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.*

Case for the Respondents.

RECORD.

1. This is an appeal from an order of the High Court of p. 177.
Australia dated 31st May 1948 dismissing on an even division of p. 122.
opinion an appeal from the order of Williams J. a Justice of the High
Court dated 2nd July 1947 dismissing an action in which the Appellant p. 2, l. 23.
claimed against the Respondents compensation for its wheat acquired p. 7, l. 20.
by the Commonwealth, and declarations of the invalidity of the p. 8, l. 26.
National Security (Wheat Acquisition) Regulations (as amended) or
of Regulation 19 and of an order made under the Regulations
purporting to acquire with certain exceptions all wheat harvested in
10 Australia.

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p. 15, ll. 20-30.
p. 4, ll. 9-12.

p. 40, ll. 10-14.

p. 40, ll. 42-47.

p. 23, ll. 22-36.

2. The Appellant is a company which at all material times was a grower of wheat in New South Wales. The Respondent William James Scully was at the time of the issue of the writ the Minister for Commerce and Agriculture. The Respondent Board is a body corporate consisting of one representative of the Commonwealth Government seven representatives of Australian wheat growers and one representative of Australian flour millers. In the 1939-1940 wheat season and in each season thereafter the Board has administered a pool into which pursuant to the National Security (Wheat Acquisition) Regulations (hereinafter called the Regulations) wheatgrowers including 10 the Appellant put all their wheat harvested during the relevant season.

p. 23, l. 44—p. 24,
l. 29.
p. 63, ll. 12-32.

3. The contest between the parties arises in relation to the ninth such Pool comprising the harvest of 1945-1946. The Appellant, after duly delivering as in previous years all the wheat grown by it to the Board and accepting two payments out of the Pool on account of the price therefor, changed its position and put forward a claim to be compensated at common law for the wheat it had delivered either on the footing of a hypothetical market price calculated at the time of its acquisition or on some other basis of calculation unrelated to the operations of the Pool through which in fact all 20 Australian wheat was disposed of.

4. The various contentions raised by these claims bring up a number of questions for discussion on this appeal. Some of them involve the consideration of placitum (xxxii) of section 51 of the Australian Constitution, which enables the Parliament of the Commonwealth to make laws with regard to “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.” The principal questions raised on the appeal are the following :—

(a) Whether the appeal is from a decision of the High Court 30 upon a question or questions as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, in respect of which a certificate of the High Court is required under section 74 of the Constitution.

(b) Whether the Regulations and the order made thereunder on 16th November 1939 purporting to acquire for the Commonwealth all wheat harvested in Australia are within the legislative

competence of the Parliament of the Commonwealth and in particular whether, if Regulation 19 provides an exclusive method of obtaining compensation for wheat acquired under those Regulations :—

(i) Regulation 19 is beyond the legislative powers of the Commonwealth Parliament.

10 (ii) Section 5 of the National Security Act 1939-1943, in so far as it authorises the Governor-General to make regulations for securing the public safety and the defence of the Commonwealth and in particular for authorising the acquisition on behalf of the Commonwealth of any property other than land in Australia, empowered the Governor-General to make regulations for the general acquisition of wheat on the terms provided by Regulation 19.

(c) Whether provision for the pooling of all wheat of a season compulsorily acquired under the Regulations and the payment from the pool proceeds of a dividend to each grower is valid as constituting “ just terms ” within the meaning of placitum (xxxii) of section 51 of the Constitution.

20 (d) Whether a grower can by conduct elect or otherwise become bound to take a dividend from such a pool in place of compensation assessed by a court independently of the proceeds of the pool.

(e) Whether if the Regulations are invalid in whole or in part the delivery of wheat thereunder by a grower to an authority of the Commonwealth gives any right of action to the grower in tort contract or otherwise.

30 (f) If so what basis should be adopted for the assessment of compensation for wheat so acquired or of damages for tort or breach of contract resulting from such delivery of wheat.

(g) What matters of a legislative executive administrative or economic character can be considered in assessing such compensation or damages.

(h) Whether the Wheat Tax Act 1946 was within the legislative power of the Commonwealth Parliament.

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5. The Respondents respectfully submit and will raise by way of preliminary objection that this appeal is incompetent either in whole or in part by reason of the provisions of section 74 of the Constitution, which provides :—

“ 74. No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question 10 is one which ought to be determined by Her Majesty in Council.

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

“ 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 20 asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty’s pleasure.”

The Respondents contend that of the above questions (b) (i) and (ii), (c) and (h) are questions as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States within the meaning of the above section.

6. The Regulations were made under the National Security Act 1939-1940. The Appellant, a licensed wheatgrower, had since its incorporation delivered all wheat harvested by it in seasons prior to the 1945-1946 season to a licensed receiver pursuant to Regulation 16 30 and had completed forms and received certificates in respect of such wheat, which had become part of Pools administered by the Respondent Board. The forms and certificates were similar to those later used in the 1945-1946 season in respect of the No. 9 Pool.

7. In November and December 1945 and January 1946 the Appellant delivered to a licensed receiver for the Commonwealth pursuant to Regulation 16 wheat of the 1945-1946 season amounting

in all to 14,284 bushels of fair average quality of that season, of which 3,768 bushels were in bulk and 10,498 bushels were bagged. This wheat became part of the No. 9 Pool.

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8. The Appellant when delivering the wheat filled in forms headed " Australian Wheat Board—National Security Act 1939-1940—Wheat Acquisition Regulations—No. 9 Pool " whereby the Appellant declared that it had delivered wheat grown under a specified licence to a licensed receiver or to the Government Grain Elevators in accordance with the particulars set out, and claimed compensation in accordance with the Regulations, and named a particular bank through which compensation was to be paid. Similar procedure had been adopted with respect to all previous pools, and all growers who had delivered wheat completed like forms.

9. The Board accordingly received and dealt with the Appellant's wheat as part of the 1945-1946 crop in No. 9 Pool. Subsequently the Board caused to be issued and sent to the Appellant certificates with coupons attached entitling the Appellant to receive advances as declared from time to time in respect of the wheat so delivered by the Appellant. No. 9 Pool comprised all wheat of the 1945-1946 crop harvested and acquired by the Commonwealth, amounting to 123,926,955 bushels, of which 87½ per cent. was of fair average quality and the balance was either low grade or premium (of high quality) wheat. All fair average quality wheat lost its identity as soon as it was delivered and intermixed with wheat of other growers. Low grade wheat was segregated into classes and the wheat in each class was intermixed. Premium wheat was treated separately so that the particular grower could get the benefit of the premium price of his wheat.

10. The 1945-1946 crop acquired by the Commonwealth was subsequently sold and disposed of by the Board in pursuance of the Regulations. Approximately one-half thereof, which was required to meet domestic needs, was sold and disposed of within the Commonwealth (such sales being hereinafter called " local sales "); the other half was exported. The prices received in respect of wheat sold within the Commonwealth were less than the prices obtained for wheat exported.

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p. 45, ll. 42-45.

11. The procedure adopted by the Board was as follows :—

(a) The Board made sales of wheat in Australia for gristing for use in the Commonwealth, for feeding to stock in the Commonwealth, and for special purposes such as the manufacture in the Commonwealth of breakfast foods. The remainder was sold for export.

p. 73, ll. 1-19.

p. 83, ll. 28-36.

p. 50, ll. 7-22.

(b) The Board opened three No. 9 Pool accounts with the Commonwealth Bank of Australia : a Working Account from which advances were made to growers; a General Expenses Account from which the costs of administration were paid; and a Proceeds of 10 Sale Account.

p. 68, l. 43—p. 69,
l. 30.p. 75, l. 46—p. 76,
l. 7.

p. 92, ll. 23-27.

(c) Exports of wheat and flour were made by the Board to countries outside the Commonwealth only in accordance with arrangements and allocations made by the International Emergency Food Council, an international body consisting of representatives of various nations including the Commonwealth of Australia.

p. 50, ll. 9-38.

p. 53, ll. 22-28.

p. 43, ll. 15-25.

p. 53, ll. 12-16.

(d) Advances were made by the Board to all growers who submitted claims for compensation in respect of the acquisition of wheat of the 1945-1946 harvest, in amounts determined by the 20 Minister for Commerce and Agriculture, at rates per bushel upon the total amount of wheat delivered by each grower, with a deduction for low grade wheat and an addition of three pence (3d.) per bushel for bagged wheat.

p. 50, ll. 23-27.

12. Upon delivery of wheat to the No. 9 Pool and from time to time thereafter advances were made by the Board to the growers on account of dividends of the net proceeds in the said Pool. These advances were based on the proportion of the total wheat in the Pool delivered by each grower. The Appellant had received, from all previous pools to which it had delivered wheat, advances as declared 30 from time to time and a final dividend paid when all the wheat in the relevant pool had been sold and disposed of. The advances payable in respect of No. 9 Pool were as follows :—

p. 25, ll. 25-41.

p. 52, l. 17—p. 53,
l. 10.

First Advance 4s. 1d. bulk per bushel payable on delivery on or after 15th December 1945.

Second Advance 1s. per bushel (less freight from point of delivery to nearest terminal port) payable 22nd August 1946.

Third Advance 6d. per bushel payable 11th December 1946.

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Fourth Advance 6d. per bushel payable 13th May 1947.

The Appellant accepted the first advance and thereafter on p. 24, ll. 20-30. 24th July 1946 commenced these proceedings. At or about the end p. 63, ll. 12-32. of August 1946 the Appellant accepted the second advance, the two advances amounting in all to £3,441 10s. 1d. In or about December 1946 however the Appellant declined to accept any further advances as declared although the Respondents offered and were ready to pay p. 10, ll. 10-16. the said advances.

10 13. At the time of the institution of this suit the whole of the wheat in the No. 9 Pool had not been sold and disposed of and a final p. 53, ll. 18-21. dividend had not been declared. The Appellant claims the right to withdraw from the No. 9 Pool and to receive compensation independently of that Pool and at a rate which it claims will yield an amount exceeding the dividend which would be yielded by the Pool.

14. The total amount which became payable by way of advances to growers from the No. 9 Pool was 6s. 1d. per bushel less freight pp. 322-323. and it appeared on the hearing that a further sum of approximately 1s. 3d. would become payable out of the Pool subject to the deduction pp. 371-373. of wheat tax as hereafter mentioned. The Appellant however claims 20 that it is entitled to compensation for the whole of its wheat on the basis of the prices at which wheat was exported and sold by the Board p. 2, ll. 31-43. p. 7, ll. 30-42. abroad at the date of acquisition after deduction of rail and handling charges. The rate thus claimed is 9s. 6d. per bushel for bulk wheat and 9s. 9d. per bushel for bagged wheat. The Appellant therefore now claims the sum of £3,118 1s. 3d. in addition to the sum of £3,441 10s. 1d. already paid to it.

15. In the Respondents' submission it is clear that no grower of wheat who remained outside the Pools could have profitably marketed 30 his wheat so as to secure as favourable a price as he received from the Pools because—

(a) each Pool from No. 4 to No. 9 inclusive was increased by p. 63, l. 46. subsidies amounting in all to approximately £13,500,000 and by p. 67, ll. 10-45. p. 328. appropriations from the flour tax hereinafter referred to; p. 63, l. 44.

(b) only the Board had the services of grain merchants and p. 26, l. 46-p. 27, l. 15. brokers, since they all had been appointed as licensed receivers p. 41, ll. 2-29. and their services were not available to other persons; pp. 311-321. p. 315.

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p. 46, ll. 14-40.
pp. 299-310.

p. 44, ll. 29-44.

p. 68, l. 43-p. 69,
l. 30.

p. 75, l. 46-p. 76,
l. 7.

p. 26, l. 39-p. 27,
l. 4.

p. 33, ll. 1-12.

p. 47, ll. 12-19.

p. 75, ll. 37-39.

p. 76, ll. 18-29.

(c) the sale of wheat for gristing was entirely governed by contracts in force between the Board and all the millers;

(d) all silos for bulk wheat and stacking sites at railway stations for bagged wheat were controlled by the Board;

(e) the export of wheat was conditioned by the allocation of the sources and markets by the International Emergency Food Council and the Board fulfilled that Council's requirements;

(f) the export of wheat was also conditioned by transport difficulties in Australia and in particular by the shortage of shipping and cargo space which was subject to the control of 10 the British Ministry of War Transport.

16. For a proper appreciation of the operations of the Board it may be desirable at this stage to refer to various steps taken to bring about a satisfactory stabilisation of the wheat industry in Australia. The most important matters were as follows :—

p. 17, ll. 4-17.
p. 31, ll. 11-18.

(i) For some years before the outbreak of war in 1939 the price obtained by wheat growers in Australia had been governed by the price on world markets, which because of over supply had been very low.

(ii) At a conference on the 29th August 1938 referred to in 20 the preamble to the Wheat Industry Assistance Act 1938 the Premiers of the States sought the co-operation of the Commonwealth Government to put into operation a scheme to ensure to wheat growers what was described as " a payable price " for wheat. Under the scheme it was proposed that each State would by legislation provide for the fixing of such prices for flour sold for home consumption as would provide for wheat growers a payable average price for all their wheat, the machinery being a tax by the Commonwealth on such flour the proceeds of which would be distributed among growers in proportion to the 30 quantities of wheat produced by them.

(iii) The scheme, which was put into operation, is fully described in *Deputy Federal Commissioner of Taxation v. W. R. Moran Pty. Ltd.* (1939) 61 C.L.R. 735; (1940) A.C. 838, and proceeded on the basis that 5s. 2d. per bushel of bagged wheat was a payable price to the grower. Hence the Commonwealth was to impose a tax upon flour when flour was at a less price than

the equivalent of wheat at 5s. 2d. per bushel bagged. The proceeds of this tax (subject to certain deductions including an amount of £500,000 for each of five years) were to be paid to the several State Governments for distribution to wheat growers, to provide them a stable return of 5s. 2d. per bushel for wheat sold for milling into flour to be used in Australia. When the price of wheat exceeded 5s. 2d. per bushel, a tax on wheat was to be imposed by the Commonwealth and the proceeds paid to the miller, so as in effect to reduce the price paid by him for wheat to 5s. 2d. per bushel and thereby stabilize the price of flour at £12 10s. 0d. per short ton and bread at an average price 6d. for a 2 lb. loaf.

(iv) The scheme was duly implemented by the following Commonwealth legislation :—

Flour Tax (Wheat Industry Assistance) Assessment Act 1938 (No. 48 of 1938).

Flour Tax Act 1938 (No. 49 of 1938).

Flour Tax (Stocks) Act 1938 (No. 50 of 1938).

Flour Tax (Imports and Exports) Act 1938 (No. 51 of 1938).

Wheat Tax Act 1938 (No. 52 of 1938).

Wheat Industry Assistance Act 1938 (No. 53 of 1938).

(v) By virtue of the four first-mentioned Acts a flour tax was imposed on all flour at a rate per ton of flour equivalent to the amount by which the price per ton of flour based on the price of wheat f.o.r. Williamstown was less than what the price per ton of flour would have been if the price of wheat f.o.r. Williamstown were 5s. 2d. per bushel. These Acts governed the position when the export price of wheat was less than 5s. 2d. per bushel.

(vi) By virtue of the Wheat Tax Act 1938 and the Flour Tax (Imports and Exports) Act 1938 a wheat tax was imposed on all wheat grown in Australia and sold or exported after a proclaimed date, the rate of such tax per bushel (not to exceed 1s. per bushel) being the amount which bore the same proportion to the excess of the price of a bushel of wheat f.o.r. Williamstown over 5s. 2d. per bushel as the quantity of wheat to be consumed in Australia (as wheat or wheat products) in a specified annual period bore to the total crop to be harvested in that period. These Acts were to govern the position when the export price of wheat rose above

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5s. 2d. per bushel. Pursuant to the Flour Tax (Wheat Industry Assistance) Assessment Act 1938 such tax was to be levied and paid upon wheat grown in Australia and sold to a wheat merchant, and the tax was to be paid by the wheat merchant to whom the wheat was sold.

(vii) At the time when this legislation came into force the price of wheat was below 5s. 2d. per bushel and remained below that figure until 1944. No steps were taken to bring the wheat tax into operation but the flour tax was imposed and varied from time to time as the export price of wheat varied. 10

pp. 361-369.

(viii) The several State Governments caused legislation to be passed providing for the fixing of prices of flour and wheat products for sale and consumption in the several States of Australia but such Acts were not in identical terms.

pp. 369-370.

(ix) The scheme worked effectively until the outbreak of war in 1939. The flour tax varied from time to time, according as the price of wheat varied, until October 1940, when the flour tax was proclaimed at £2 8s. 10d. per ton, and so remained until after the institution of this suit, although the export price of wheat has varied and since 1944 has risen above 5s. 2d. per bushel. 20

(x) After the outbreak of war in 1939 the Commonwealth acquired all wheat harvested, and consequently amendments were made in the legislation.

(xi) On 21st September 1939 the Regulations were made under the National Security Act 1939 constituting the Respondent Board and establishing a compulsory wheat pool to be administered by that Board.

(xii) On the 16th November 1939 the Minister of State for Commerce made and caused to be published in the *Gazette* an order under Regulation 14 acquiring and vesting in the Common- 30 wealth (with certain immaterial exceptions) all wheat (a) harvested on or before the 8th October 1939 and which was in Australia when the order was published in the *Gazette* or (b) harvested in Australia on or after the date of such publication. By virtue of section 11 of the Wheat Industry Stabilization Act (No. 2) 1946 (No. 80 of 1946) this order is deemed to be and at all times to

have been fully authorised by Regulation 14 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.

(xiii) After the Regulations were made and during the period of hostilities the following Commonwealth legislation was passed :—

10 (a) Wheat Industry (War-time Control) Act 1939 (No. 84 of 1939) under which the proceeds of the flour tax should be paid to the Commonwealth Bank of Australia in part repayment of advances made by the Bank under Regulation 28 of the Regulations, so that the proceeds of the flour tax in effect became part of the moneys received by the Board. This Act was amended by the Wheat Industry (War-time Control) Act 1940 (No. 70 of 1940) and the Wheat Industry (War-time Control) Act 1944 (No. 19 of 1944).

20 (b) National Security (Wheat Industry Stabilization) Regulations made under the National Security Act 1939 in November 1940, providing for the licensing of wheat growers and the control of the acreage used for wheat growing.

(c) Wheat Subsidy Act 1944 (No. 17 of 1944), which provided for the payment of a subsidy for the assistance of wheat growers, based on a minimum aggregate return each year of 3,000 bushels at a rate of 4s. per bushel for the year 1942 and at a rate of 4s. 1½d. for any subsequent year.

(xiv) Since the cessation of hostilities the following legislation has been passed by the Commonwealth :—

30 (a) Wheat Industry Stabilization Act 1946 (No. 24 of 1946), part of a Commonwealth scheme needing supplementary State legislation which had not been passed at the time of this action. Section 18 contemplated 5s. 2d. per bushel as the basic price for wheat.

(b) Wheat Export Charge Act 1946 (No. 25 of 1946), which Act imposed a charge of fifty per centum (unless a lower rate were prescribed) of the amount by which the f.o.b. price Williamstown of wheat should exceed 5s. 2d. per bushel, on

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all wheat harvested and exported by the Board or by any person on or after 1st October 1945, and a like tax on the wheat equivalent of all wheat products exported.

(c) Wheat Industry Assistance Act 1946 (No. 71 of 1946), whereby the annual deductions of £500,000 for each of five years, which were to be made from the proceeds of the flour tax and were to be paid to certain of the States for the relief of wheat growers, were increased by the sum of £843,000 which was to be applied for the same purposes as were particularly set out in section 7 of the Wheat Industry Assistance Act 1938. 10

(d) Wheat Tax Act 1946 (No. 78 of 1946) which imposed a tax in respect of all wheat which had been or which thereafter should be acquired by the Commonwealth, payable by the grower of the wheat. The rate of tax per bushel was prescribed by section 5 of the Act and section 6 authorised the Board to deduct the tax from moneys payable to growers. By the Wheat Tax (Repeal and Refund) Act 1948, which came into operation on the 25th November 1948, the Wheat Tax Act 1946 was repealed and it was provided that the Board should out of certain moneys received or held by it pay to 20 the persons who suffered the deductions for tax pursuant to the Wheat Tax Act 1946 the amounts deducted by the Board. Such payments by way of refund were duly made by the Board.

(e) Wheat Export Charge Act (No. 2) 1946 (No. 79 of 1946), amending the Wheat Export Charge Act 1946 with the result of postponing the imposition of the wheat export charge under the principal Act as amended, so far as exports by the Board were concerned, until the export of wheat harvested after the 1st day of October 1947. As to exports by other 30 persons the imposition of the charge remained on wheat harvested after 1st October 1945.

(f) Wheat Industry Stabilization Act (No. 2) 1946 (No. 80 of 1946) amending No. 24 of 1946, mentioned in (a) above and validating the order made thereunder on 16th November 1939 referred to in (xii) above.

(xv) Other legislation which may be relevant includes :— RECORD.

(a) A number of orders made under the National Security (Prices) Regulations, and Acts of the several States, fixing the retail price of bread at 6d. per 2 lb. loaf subject to small variations depending upon locality delivery credit and other like considerations. The effect of so fixing the price of bread was automatically to fix a maximum economic price which a baker could afford to pay for flour, and also to control the price at which millers could afford to buy wheat for gristing. pp. 361-369.
p. 27, ll. 41—p. 28,
l. 2.
p. 48, ll. 16-39.
p. 104, l. 39—
p. 105, l. 40.

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(b) Prices Regulation Order No. 1015 made on 12th April 1943 which, with certain immaterial exceptions, fixed the price of all goods other than perishable primary products at the price the seller charged for substantially identical goods sold by him prior to 12th April 1943. pp. 324-326.

(c) Export (Flour) Regulations Statutory Rules 1940 No. 216 which prohibited the export of flour from Australia without a licence. p. 92, l. 44.

(d) Customs (Prohibited Exports) Regulations Statutory Rules 1946 No. 90 which prohibited the export of wheat and wheat products from Australia without a licence. pp. 356-360.

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The regulations referred to in (c) and (d) above were made under section 112 of the Customs Act 1901-1936 which provides that the Governor-General may, by regulation, prohibit the exportation of any goods the exportation of which would in his opinion, be harmful to the Commonwealth. The same section also provides that in time of war the Governor-General may, by proclamation, prohibit the exportation of any goods. These powers may by virtue of the said Act be exercised so as to allow the exportation of goods subject to any condition or restriction.

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17. On the 24th day of July 1946 the Appellant commenced proceedings in the High Court of Australia claiming *inter alia* declarations that the Regulations, Regulation 19, and the Order made under the Regulations on 16th November 1939 were invalid. p. 2, l. 24-30.
p. 7, l. 20-29.

18. By their amended Statement of Defence the Respondents—

(a) sought to uphold the validity of the Regulations and the Order made thereunder; p. 9, l. 16-19.

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p. 9, ll. 22-38.

(b) alleged that the Appellant by its actions had elected and agreed to accept compensation determined in pursuance of Regulation 19 and was precluded from claiming compensation on any other basis;

(c) offered to pay to the Appellant a further sum of one shilling (1s.) per bushel, such sum representing two advances each of sixpence (6d.) mentioned in paragraph 12 above which became payable after the institution of the suit;

(d) claimed a set off against the Appellant's claim, if any, of provisional tax imposed under the Wheat Tax Act 1946 at the rate 10 of one shilling and one penny and one eighth of a penny (1s. 1½d.) per bushel.

19. The action was heard by Williams J. who made the following findings or decisions:—

p. 108, l. 9—p. 111,
l. 5.

(a) That the National Security (Wheat Acquisition) Regulations and the Order made thereunder on 16th November 1939 were valid.

p. 111, ll. 5-34.

(b) That any invalidity in the said Order was cured by section 11 of the Wheat Industry Stabilization Act (No. 2) 1946 which itself was a valid law. 20

p. 111, ll. 35-38.

(c) That the acquisition of the Appellant's wheat was lawful.

p. 111, l. 38—
p. 112, l. 19.

(d) That upon such acquisition the Appellant became entitled under Regulation 14 to a claim for compensation, which was enforceable by means of an action in a court of law, for compensation assessed on general legal principles or alternatively by the procedure prescribed by Regulation 19.

p. 118, ll. 24-35.

(e) That compensation assessed on general legal principles in such an action did not exceed an amount of £4,740.

p. 120, l. 25—
p. 121, l. 9.

(f) That compensation assessed in accordance with Regulation 19 of the National Security (Wheat Acquisition) Regulations, which 30 the Respondents were prepared to pay and which the Appellant would receive from No. 9 Pool, would be £4,925 apart from any tax or charge under the Wheat Tax Act 1946 or the Wheat Export Charge Act 1946.

p. 121, ll. 2-9.

(g) That in making a comparison between the two amounts of £4,740 and £4,925 it was unnecessary to take into consideration

proper deductions pursuant to the Wheat Tax Act 1946 or alternatively to have regard to the effect which the charge payable under the Wheat Export Charge Acts 1946 would have produced on the price in Australia of any wheat not acquired pursuant to the Regulations.

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(h) That the Wheat Tax Act 1946 was a valid enactment of the Commonwealth Parliament. p. 120, l. 44.

10 (i) That as the amount specified in (f) exceeded the amount specified in (e) it was unnecessary to decide whether the Appellant had elected or agreed to accept compensation determined in accordance with Regulation 19. p. 121, ll. 10-14.

(j) That the Appellant was not entitled to interest. p. 121, ll. 15-30.

(k) That the Appellant had not satisfied the Court that it could have converted its wheat into money on an ordinary market more speedily than the Board realised the whole crop and distributed the proceeds. p. 121, ll. 11-38.

20 (l) That as the Appellant had not shown that the compensation to which it would be entitled would exceed the amount which would be yielded from the No. 9 Pool the action should be dismissed and judgment entered for the Respondents. p. 121, ll. 7-9, 46.

20. In assessing the amount of compensation to which the Appellant would be entitled on general legal principles Williams J. held :—

(a) That at the time of acquisition of the Appellant's wheat there was no ordinary market for the sale of Australian wheat either for local use or export. p. 113, ll. 26-29.

30 (b) That the prices obtained by the Board for wheat exported were evidence of what the value of Australian wheat would have been under the ordinary law of supply and demand in a free market. p. 113, ll. 39-46.

(c) That it could not be assumed that if each harvest had not been acquired by the Commonwealth— p. 114, ll. 1-6.

(i) the price of wheat for local use would have been allowed to rise to such an extent that the price of bread would have been affected; or

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- (ii) that the Commonwealth would have allowed any wheat to be sold for export except such wheat as was in excess of local requirements.
- p. 118, l. 6-10. (d) That if the 1945-1946 harvest had not been acquired by the Commonwealth purchasers in an ordinary market could only have reasonably expected to be allowed to export half the wheat they purchased.
- p. 114, ll. 12-18. (e) That the proper approach to the problem was to assume that the Board, which was in possession of all the facilities for handling the wheat, was the only possible purchaser, but that the 10 growers could only be expected voluntarily to sell their wheat to the Board at the same price as they would have obtained if there had been an ordinary market.
- p. 118, ll. 9-12. (f) That the maximum price for wheat for local use in an ordinary market under war conditions in 1945-1946 would have been 5s. 2d. per bushel of bagged wheat f.o.r. Australian ports.
- p. 114, ll. 19-21. (g) That in estimating the price which the growers could reasonably expect to receive in a market such as is mentioned in (e) all the probable circumstances should be taken into account including—
- 20
- p. 114, l. 22-
p. 117, l. 9. (i) the legislation passed by the Commonwealth and the States to give effect to the agreement referred to in the preamble to the Wheat Industry Assistance Act 1938;
- p. 117, ll. 10-12. (ii) the prohibition imposed on the export of flour by the Export (Flour) Regulations as from 3rd October 1940;
- p. 117, ll. 12-18. (iii) the fixing of prices for bread under the National Security (Prices) Regulations and under the legislation of the several States;
- p. 117, ll. 18-20. (iv) Prices Regulations Order No. 1015 (known as the ceiling price order) made under the National Security (Prices) 30 Regulations, which fixed the prices of all goods and services at those prevailing on 13th April 1943;
- p. 117, ll. 20-27. (v) the probability of the Wheat Tax Act 1938 and Flour Tax (Imports and Exports) Act 1938 being brought into operation by proclamation if the price of wheat for local use rose to 9s. 6d. per bushel;

(vi) the fact that there was no prohibition on the export of wheat required for local use because no such prohibition was necessary while the whole of the wheat was being disposed of by the Board; and

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p. 117, ll. 27-30.

(vii) the fact that at the date of acquisition there was a general system of price control operating under the National Security (Prices) Regulations to prevent the risk of inflation, and that in particular it was essential to control the prices of such necessities of life as food clothing and shelter.

p. 117, ll. 42-48.

10 (h) That in addition to the matters referred to in the preceding sub-paragraph (g) it was permissible to have regard to certain matters which occurred in 1946 after the date of acquisition, namely :—

(i) the introduction on 22nd May, 1946, of a prohibition on the export of wheat and wheat products pursuant to the Customs Act 1901-1935 unless the approval of the Department of Commerce and Agriculture were obtained;

p. 119, ll. 1-5.

20 (ii) the coming into force on 9th August, 1946, of the Wheat Export Charge Act 1946 which was amended by the Wheat Export Charge Act (No. 2), 1946;

p. 119, ll. 5-18.

(iii) the passing of the Wheat Tax Act 1946 which was deemed to come into operation on 9th August, 1946; and

p. 119, l. 18—
p. 120, l. 1.

(iv) the Wheat Industry Stabilization Act 1946, section 18 of which contemplated that a price of 5s. 2d. f.o.r. Australian ports for bagged wheat was a fair return to the grower.

p. 120, ll. 1-3.

21. On an appeal by the Appellant to the Full Court the Justices of the High Court were equally divided as to the question whether the appeal should be allowed, and accordingly the appeal was dismissed by reason of section 23 (2) of the Judiciary Act 1903-1947. However, all members of the Court agreed that the Appellant's wheat had been validly acquired and that the order made under the National Security (Wheat Acquisition) Regulations on 16th November 1939 was either valid when made or had been validated by the Wheat Industry Stabilization Act (No. 2) 1946. On the other questions involved in the appeal

p. 138, ll. 35-37.
p. 129, l. 29—
p. 130, l. 8.
p. 139, ll. 20-23.
p. 141, ll. 15-36.
p. 169, l. 29—
p. 170, l. 12.
p. 174, ll. 10-16.
p. 175, ll. 44-46.

- RECORD. the following views were expressed by the several Justices :—
- p. 128, ll. 32-37. (a) *Latham C. J.* held :—
- (i) That it was unnecessary to decide whether Regulation 19 was on the true construction of the Regulations intended to be the only method of assessing compensation.
- p. 133, l. 19—
p. 134, l. 6. (ii) That the Appellant delivered its wheat to the Board upon the terms that it was to be dealt with in the No. 9 Pool, and the Board, upon the invitation of the Appellant, so dealt with the wheat, and the Appellant was not at liberty to seek to change the whole basis of its dealings with the Board. 10
- p. 134, ll. 7-11. (iii) That the action of the Appellant should fail because if Regulation 19 should be regarded as the only means of determining compensation for the acquisition the Appellant was bound by it, whilst if it provided only an alternative optional means of obtaining compensation the Appellant had elected to be bound by it.
- p. 134, ll. 12-17. (iv) That even if the Appellant had a right under the Regulations to have compensation assessed upon general legal principles it had failed to establish that the amount payable to the Appellant under the pooling provisions was less than the compensation so assessed. 20
- (b) *Rich J.* held :—
- p. 139, ll. 28-31. (i) That the Appellant was not restricted to the means provided by Regulation 19 in obtaining compensation for its wheat.
- p. 139, ll. 37-45. (ii) That the Appellant was entitled as its option to sue in a court of law for compensation assessed upon general legal principles irrespectively of the provisions of Regulation 19.
- p. 139, l. 46—
p. 140, l. 7. (iii) That no question of election between such remedies arose and the Appellant was not precluded in the circumstances of the case from pursuing its action at law for such compensation.
- p. 140, ll. 20-25. (iv) That the conclusions arrived at by the trial judge were 30 substantially correct and that no objection could be taken to his finding that leaving aside any question as to the deduction of tax the Appellant was entitled by way of compensation for the wheat which was acquired to the sum of £4,740.
- p. 140, ll. 29-37. (v) That the provisions of the Wheat Tax Act 1946 were inconsistent with the idea of “ just terms ” since it resulted in the Appellant’s compensation being reduced by the amount of the tax.

(c) *Starke J.* held :—

(i) That as a matter of construction Regulation 19 provided an exclusive method of assessing compensation for wheat acquired under the Regulations. p. 142, l. 23-
p. 142, l. 48.

(ii) That the terms thereby provided were not “ just terms ” and consequently Regulation 19 was beyond the legislative power of the Commonwealth Parliament. p. 143, ll. 1-10.

10 (iii) That the provisions of Regulation 19 were severable from those of Regulation 14, and Regulation 19 being invalid the Appellant was left with a claim for compensation which could be enforced by an action at law. p. 143, ll. 11-14.

(iv) That in such an action the Appellant was entitled to recover the market value of its wheat at the time of acquisition, or if no market value was established its pecuniary equivalent ascertained by a consideration of all the facts affecting that value. p. 143, ll. 15-18.

(v) That it was not established, nor could it be assumed in the absence of price control regulations, that export embargoes would be imposed to restrict or lessen the value of commodities in Australia. p. 145, ll. 39-44.

20 (vi) That the prices at which wheat was sold from the No. 9 Pool for home consumption were artificial. p. 147, ll. 33-34.

(vii) That the Wheat Tax Act 1946 was invalid since it operated to take away or diminish the Appellant’s compensation. p. 148, ll. 24-43.

(viii) That the Appellant was entitled in the circumstances to compensation for all of its wheat, calculated at an amount per bushel which represented the price at which wheat was sold overseas by the Board at the time of acquisition. p. 148, l. 44-
p. 149, l. 15.

(d) *Dixon J.* held :—

30 (i) That Regulation 19 provided the exclusive means available to the Appellant of obtaining compensation. p. 152, l. 34-
p. 161, l. 40.

(ii) That in the circumstances of the case and in view of the decision in *Apple & Pear Marketing Board v. Tonking* (66 C.L.R. 771) he shall deal with the case on the basis that the Appellant had an alternative right to compensation assessed on general legal principles for which an action might be brought in a court of law. p. 163, ll. 2-8.

(iii) That in the assessment of compensation on this basis the prices at which wheat was sold for export by the Board should be taken as the true value of the Appellant’s wheat. p. 168, l. 48-
p. 169, l. 2.

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p. 173, ll. 24-26.

(iv) That the prices obtained by the Board for sales of wheat in Australia were not a true measure of the value of such wheat.

p. 170, ll. 18-27.
p. 173, ll. 35-39.

(v) That the Wheat Tax Act 1946 was invalid.

(vi) That the Appellant was entitled to recover compensation for all of its wheat based upon the price at which sales overseas were made by the Board on or about the date of acquisition.

(e) *McTiernan J.* held :—

p. 174, ll. 17-37.

(i) That the only right to compensation which the Appellant had was a right to compensation pursuant to Regulation 19.

p. 175, ll. 1-15.

(ii) That Regulation 19 provided just terms for the acquisition 10 of the Appellant's wheat.

p. 175, ll. 15-24.

(iii) That, if the Regulations should be construed as providing an alternative right to compensation assessed on general legal principles, the Appellant had unambiguously elected to take its compensation under the Regulations.

p. 175, ll. 25-42.

(iv) That if the view that the Appellant had so elected was wrong it had failed to establish any probability that it would in the absence of the pool have obtained a better return for its wheat.

(f) *Webb J.* held :—

p. 176, ll. 4-11.

(i) That while he was inclined to think that Regulation 19 20 provided an exclusive method by which compensation could be obtained under the Regulations it was unnecessary to decide this point because the Appellant had adopted Regulation 19 as the means of obtaining payment for its wheat.

p. 176, ll. 11-15.

(ii) That in any event the Appellant had failed to establish that compensation assessed on general legal principles would exceed the dividend from the pool to which the Appellant had become entitled.

22. The Respondents make the following submissions with respect to the judgments of the Justices of the High Court of Australia :— 30

(a) That the judgment of *Williams J.* is right except in so far as his Honour held that Regulation 19 did not provide the exclusive means of obtaining compensation.

(b) That the judgments of *Latham C. J.*, *McTiernan* and *Webb JJ.* are right.

(c) That the judgment of Rich J. is erroneous except in so far as his Honour agreed with such of the conclusions of Williams J. as the Respondents desire to support.

(d) That the judgment of Starke J., except the finding that upon the true construction of Regulation 19 it provided an exclusive method of obtaining compensation under the Regulations, is erroneous and that the reasoning of Latham C. J. McTiernan and Webb JJ. is to be preferred.

10 (e) That the judgment of Dixon J. is right in so far as he expressed the view that Regulation 19 was valid and provided the exclusive means of obtaining compensation.

23. The Respondents therefore submit that this appeal should not be entertained because it is an appeal on questions as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, and no certificate has been granted by the High Court under Section 74 of the Constitution.

24. The Respondents further submit that this appeal should be dismissed with costs for the following, amongst other

REASONS.

- 20 (1) Because the Appellant's wheat was validly acquired by the Commonwealth.
- (2) Because the Appellant's only right was a right to compensation pursuant to Regulation 19, which provided just terms for the acquisition of its wheat.
- (3) Because the Appellant elected and agreed to accept its appropriate share of the net proceeds of the No. 9 Pool as compensation, and it was not open to the Appellant thereafter to withdraw from that Pool.
- 30 (4) Because the share of the net proceeds of the No. 9 Pool which the Respondents had paid and offered to pay to the Appellant exceeded the value of its wheat at the material time.

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- (5) Because the evidence did not establish that the value of the Appellant's wheat exceeded or equalled the amount paid and payable pursuant to Regulation 19.
- (6) Because the evidence did not establish what the value of the Appellant's wheat would have been in the absence of the acquisition effected by the Regulations.
- (7) Because the prices at which wheat was sold overseas by the Board was not a true measure of the value of the Appellant's wheat.
- (8) Because in assessing the value of the Appellant's wheat regard 10 should be had *inter alia* to :—
 - (i) the necessity for retaining and selling in Australia approximately one-half of the 1945-1946 crop for home consumption;
 - (ii) the fact that Commonwealth and State legislation operated in effect, as a matter of Australian policy, to fix 5s. 2d. as the maximum price at which wheat could have been sold in Australia for home consumption;
 - (iii) the probability of future legislation and executive action being taken to prevent the price of wheat in Australia 20 increasing with export prices.
- (9) Because in any event the Appellant has no cause of action in tort.

D. N. PRITT.

A. R. TAYLOR.

FRANK GAHAN.

R. ELSE-MITCHELL.

Appeal No. 7 of 1950.

In the Privy Council.

**ON APPEAL FROM THE
HIGH COURT OF AUSTRALIA.**

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.*

Case for the Respondents.

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