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24, 1956

No. 8 of 1956

In the Privy Council

On Appeal from the High Court of  
Australia

IN THE MATTER of the Metropolitan and Export Abattoirs Act, 1936-1952 (South Australia), and in the matter of the Commerce (Meat Export) Regulations (Commonwealth) made under and pursuant to the Commonwealth Customs Act, 1901-1951,

and

IN THE MATTER of a Special Case referred by the Supreme Court of South Australia pursuant to Section 40A of the Commonwealth Judiciary Act, 1903-1950.

BETWEEN

Thomas O'Sullivan

(COMPLAINANT)  
APPELLANT

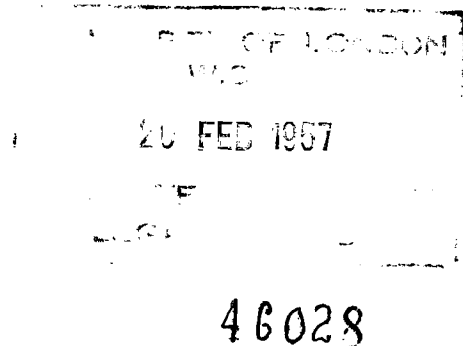
AND

Noarlunga Meat Limited

(DEFENDANT)  
RESPONDENT

CASE FOR THE APPELLANT

BLYTH, DUTTON, WRIGHT & BENNETT.  
112, GRESHAM HOUSE, E.C.2.





## CASE FOR THE APPELLANT.

Record.

### A. INTRODUCTORY.

1. This is an appeal brought by Special Leave granted by Her Majesty by P. 39.  
Order in Council dated 21st June, 1955, against an Order of the Full High Court P. 37.  
of Australia dated 17th December, 1954, answering two questions of law reserved  
on the 29th March, 1954, by a Special Magistrate, in the Court of Summary Pp. 5, 6.  
Jurisdiction at Adelaide, for the Supreme Court of South Australia, by way of  
a Special Case.
2. The said Order in Council saved and excepted from such Special Leave  
10 any question as to the limits *inter se* of the constitutional powers of the Common-  
wealth and the State of South Australia, and imposed the condition that the  
Petitioner (the abovenamed Appellant) should not in any event ask the  
Respondent to pay his costs.
3. An application was, on the 13th October, 1955, made to the said High P. 42.  
Court for the grant of a certificate that any question arising in this cause as to  
the limits *inter se* of the constitutional powers of the Commonwealth and the  
said State was one which ought to be determined by Her Majesty in Council, P. 53.  
but the said application was, on the 2nd March, 1956, refused.
4. By its judgment and order of 17th December, 1954, the High Court held  
20 that section 52a of the South Australian Metropolitan and Export Abattoirs  
Act, 1936-1952 (hereinafter referred to as "the Act") was inconsistent with the  
Commonwealth Commerce (Meat Export) Regulations (hereinafter referred to  
as "the Regulations") and was therefore by virtue of section 109 of the Com-  
monwealth of Australia Constitution Act (hereinafter referred to as "the  
Constitution") inoperative and invalid. P. 9  
(A (i) and  
A (ii)).
5. The questions involved in the case, upon which decisions were given  
were:—
- One:* Whether the Regulations were *ultra vires* the Commonwealth  
30 Customs Act, 1901-1951, which the Respondent claimed authorised their  
making.
- Two:* Whether, if the Customs Act did authorise the making of the  
Regulations, it was invalid as going beyond the legislative powers of  
the Parliament of the Commonwealth conferred by section 51 (i) of the  
Constitution which the Respondent claimed authorised the Customs Act.
- Three:* Whether the Act was inconsistent with the Regulations, if  
valid, and so was itself invalid by reason of section 109 of the Constitu-  
tion, as was contended by the Respondent.
6. On these questions the High Court expressed the following opinions:—
- Question One:* The Chief Justice (Sir Owen Dixon) and Justices Fullagar  
40 and Kitto, held that the Regulations were within the regulation-making power  
conferred by the Customs Act, 1901-1951 (section 270 (1) (c)). The other three  
members of the Court (Justices McTiernan, Webb and Taylor) expressed no  
conclusion on this point. Section 270 (1) (c) is as follows:—
- "(1) The Governor-General may make regulations not inconsistent with this  
Act prescribing all matters which by this Act are required or  
permitted to be prescribed or as may be necessary or convenient to

*Thacker says He  
inter se*

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be prescribed for giving effect to this Act or for the conduct of any business relating to the Customs, and in particular for prescribing—

(a) . . . .

(b) . . . .

(c) the conditions of preparation or manufacture for export of any articles used for food or drink by man or used in the manufacture of articles used for food or drink by man; . . . .

. . . .”

The Appellant respectfully submits that this section does not authorise the making of regulations prescribing, completely or exhaustively, what shall be the requirements of the law with respect to premises for the purpose of slaughtering stock for export, as was held to be the case by the Chief Justice and Justices Fullagar and Kitto. 10

7. *Question Two*: Four members of the High Court (the Chief Justice and Justices McTiernan, Fullagar and Kitto) held that the Regulations were not outside the legislative power of the Commonwealth conferred by section 51 (i) of the Constitution. The remaining two members (Justices Webb and Taylor) expressed no opinion on this question. This question is conceded to be one as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the States, as to which by virtue of section 74 of the Constitution no appeal lies to Her Majesty in Council without the certificate of the High Court. 20

8. *Question Three*: On this question the High Court was equally divided, and the opinion of the Chief Justice (who held there was inconsistency) prevailed, pursuant to section 23 of the Commonwealth Judiciary Act, 1903-1946. In addition to the Chief Justice, Justices Fullagar and Kitto held that there was inconsistency; Justices McTiernan, Webb and Taylor held there was not. On this question the Appellant respectfully adopts the arguments of Justices McTiernan, Webb and Taylor and submits that the Act and the Regulations are complementary and not contradictory or inconsistent and even accepting the test of inconsistency adopted by the prevailing opinions, that not only do the Regulations evince no intention to express completely and exhaustively the requirements of the law with respect to the use of premises for the slaughter of stock for export, but, on the contrary, that they evince a clear intention that they should be cumulative upon State law. 30

B. SECTION 74.

9. As has been already stated the High Court refused a certificate under section 74. In doing so members of the Court expressed certain views about the *inter se* questions involved in the case. It was accepted by all the Court that the second question stated above was an *inter se* question but some members of the Court indicated that in addition the interpretation of section 109 of the Constitution as distinct from its application was itself an *inter se* question. The only member of the Court to express a concluded view on this was Kitto J., whose view was that it was. 40

Pp. 49-51.

The other members of the Court reserved their views although Dixon C.J. and Williams, Webb and Fullagar J.J. made certain observations with regard to it.

10. The Appellant respectfully submits that the only *inter se* question involved is the question of the power of the Parliament of the Commonwealth to enact a law which authorises the making of regulations prescribing completely and exhaustively the requirements of the law with respect to premises for slaughtering for export. This appeal does not involve that question.

11. The question whether the Regulations are authorised by the Customs Act 1901-1953 is not a constitutional question at all. The question whether the Act is invalid by reason of inconsistency with the Regulations is a constitutional question but it is not an *inter se* question.

10 12. With respect to the view adopted by Kitto J. upon the certificate application, the Appellant would, if the point were to arise, respectfully submit that section 109 is not concerned in any way with the powers of the Parliament of the Commonwealth, and furthermore that it is fallacious to regard any case which involves the application of section 109 as not being concerned with its meaning. As Fullagar J. said in the prevailing judgment, in which Dixon C.J. P. 24. and Kitto J. concurred: "Two questions are thus raised. The first is whether there is an inconsistency within the meaning of section 109. The second (which need not be considered unless the first question is answered in the affirmative) is whether the Commonwealth Regulations are valid. The latter question is, on the view which I take, a question of 'limits *inter se*'. The former is not such a question." The Appellant would respectfully submit that this is correct, and is to be preferred to anything to the contrary that it may be argued is contained in any of the judgments delivered upon the application for a certificate.

13. However, the Appellant is unwilling to jeopardize his appeal by submitting for decision by the Privy Council the question whether the meaning of section 109 adopted by the High Court is correct. For the purposes of this Case the Appellant accepts the decision of the High Court upon that point. Subject to this the questions which the Appellant submits for decision are those numbered One and Three in paragraphs 6 and 8 of this Case. X

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### C. SUMMARY OF THE FACTS.

#### (a) COMPLAINT.

14. By a complaint taken on the 18th March 1954 Noarlunga Meat Limited, a company registered under the Companies Act, 1934-1952 (S.A.), was charged with the simple offence of having, on the 27th day of November, 1953, in a part of the State outside the Metropolitan Abattoirs Area, namely, Noarlunga, used certain premises for the purpose of slaughtering stock for export as fresh meat in a chilled or frozen condition: contrary to the provisions of section 52a of the Act. The essence of the charge was that the company used the premises for the purpose alleged without, at the time of such use, being the holder of a licence from the Minister of Agriculture authorising it to use those premises for that purpose, as required by section 52a (1) of the Act. P. 5.

#### (b) AGREED STATEMENT OF FACTS.

15. The Special Magistrate, in paragraph 4 of his Special Case found the facts contained in a Statement of Agreed Facts tendered by Counsel for the Complainant at the hearing, to be proved, and attached the said Statement to the Special Case. P. 6. P. 7.

16. The Respondent maintains, and has for several years maintained, a slaughter house at its premises at Noarlunga, which are situated outside the

Metropolitan Abattoirs Area, about 30 miles from the Metropolitan Abattoirs at Gepps Cross, near Adelaide.

P. 9. 17. The Respondent's slaughter house has at all material times been licensed by the District Council of Noarlunga, pursuant to Part XXVII of the Local Government Act, 1934-1952 (S.A.) and to the council's by-laws; and at all material times has held Licence No. 232 issued in the form pursuant to the Meat Export Control (Licences) Regulations of the Commonwealth.

P. 10. 18. The Respondent's said premises have at all material times been registered under the Regulations as an establishment in which the operations of slaughtering and freezing of mutton and/or lamb for export "may be conducted" (Certificate 767). 10

According to the decision of the High Court and the Respondent's contentions, "may", in this Certificate 767 means, in effect, "may whatever is the operation of, and notwithstanding, any State law."

19. The Appellant contends that "may" here means, in effect, "may so far as these Regulations, and this administrative authority, are concerned, but only providing the operations in question are carried on in accordance with general (State) law." Were it not for Commonwealth and State legislation, people could do what they wished about slaughtering for export (within the framework of the Common law); but when there are two Parliaments or law-making 20 authorities which have power to impose restrictions, then those restrictions should be regarded as restrictions upon a *prima facie* right or power and not as enabling legislation. In particular, the Commonwealth laws should not be construed as enabling a person to slaughter for export in entire disregard of State law.

P. 8. 20. The Respondent (in paragraph 16 of the Statement of Agreed Facts) admits having on the 27th day of November, 1953, on the company's said premises slaughtered and frozen 152 lambs for export as fresh meat in a frozen condition. In paragraph 6 of the same document, the Respondent admits that P. 7. at no material time has it been in possession of a licence from the Minister of 30 Agriculture of South Australia under section 52a of the Act, and that its application to the said Minister for such a licence was refused.

21. It therefore follows that if section 52a of the Act is valid and operative, the Respondent was guilty of the offence charged in the complaint.

#### D. SUMMARY OF RELEVANT LEGISLATION AND REGULATIONS.

##### (a) STATE SCHEME OF LEGISLATION.

22. Section 52a of the Act, and the Act itself, form part of a State legislative scheme covering the slaughtering of stock for all purposes throughout the State and other allied matters.

23. It is the Appellant's contention that in such a matter of concurrent 40 legislative jurisdiction as trade and commerce with other countries, the laws of the State (of which the said legislative scheme forms an important part) necessarily provide the background against which the Commonwealth laws will operate.

24. The principal State Acts which comprise this legislative scheme are:—

- (1) The Abattoirs Act, 1911-1950.
- (2) The Local Government Act, 1934-1952.
- (3) The Health Act, 1935-1952.
- (4) The Metropolitan and Export Abattoirs Act, 1936-1952.
- (5) The Port Lincoln Abattoirs Act, 1937.

25. The general purpose and effect of these Acts is:—

(1) THE ABATTOIRS ACT, 1911-1950.

This Act applies generally throughout the State, except Central Districts Nos. 1 and 2 of the Legislative Council (which comprise, in general, Adelaide and her suburbs), and provides for the taking of polls within Local Government areas to decide whether such areas are to be proclaimed “abattoirs areas” or whether they are to remain subject to the relevant provisions of the Local Government Act. If any poll succeeds and the necessary arrangements are approved by the Minister, the area in question is proclaimed an “abattoirs area” and an Abattoirs Board is set up. The Board is then required to establish an abattoir for the area, which the Minister administering the Act may register. Thereafter all slaughtering in the proclaimed area must be done in the abattoir so set up, and the sale or disposal of meat not so slaughtered is prohibited. All private abattoirs are closed, except abattoirs used or intended to be used for the purpose of slaughtering stock for export and other subsidiary purposes. There are elaborate provisions for the prevention of distribution of meat from diseased stock; slaughtering is to be done under the supervision of inspectors; and carcasses must not leave the abattoir until passed by an inspector.

There are other provisions relating to the branding of carcasses, the inspection of premises, the destruction of diseased animals and other similar matters.

In addition, the Central Board of Health set up under the Health Act has certain supervising and overriding powers in relation to inspection and regulation. Proclamations have been made under this Act. The District Council of Noarlunga is not a proclaimed abattoirs area under the Abattoirs Act.

(2) LOCAL GOVERNMENT ACT, 1934-1952.

Part XXVII of this Act makes provision for slaughter houses generally in cases which are not covered by the Abattoirs Act or Metropolitan and Export Abattoirs Act: it applies in effect outside the metropolitan area (which in substance means Adelaide and her suburbs).

This part provides for the licensing or establishment of slaughter houses for all purposes by councils of Local Government areas. It is made an offence to slaughter in such areas except pursuant to licence. Noarlunga Meat Limited, as appears from paragraph 3 of the Statement of Agreed Facts, holds a licence issued under this part. Pursuant to this licence it is engaged (as appears from paragraph 2 of the Statement of Agreed Facts) in legitimate slaughtering for intra-State purposes.

Slaughter houses which are not within the metropolitan area or any Local Government area are licensed and controlled by the Central Board of Health pursuant to the Health Act.

(3) HEALTH ACT, 1935-1952.

By this Act, the Central Board of Health, set up thereunder, is charged with the task of securing the proper sanitary condition of the State. It contains numerous provisions applicable generally and covering slaughter houses and abattoirs, except where the special provisions of the Acts, which form part of the scheme now being outlined exclude their operation. Abattoirs erected pursuant to the Metropolitan and Export Abattoirs Act, however, are under the provisions of the Health Act.

## (4) THE METROPOLITAN AND EXPORT ABATTOIRS ACT, 1936-1952.

26. This is the Act in which section 52a appears, which was held inconsistent with the Commonwealth Regulations. This Act, which binds the Crown, applies within the Metropolitan Abattoirs Area, which, in substance, comprises Adelaide and her suburbs, both inlying and outlying. It sets up a Metropolitan and Export Abattoirs Board as a statutory corporation, the members of which, so far as reasonably practicable, represent all the interests affected by the slaughtering and sale of meat. The general scheme of the Act is to set up a stock market and abattoirs under public control, for the purpose of all slaughtering of meat within the metropolitan area, and to entrust to the Board the control 10 of these activities, including the slaughtering of stock for export in a chilled or frozen condition, in conjunction with the State Government Produce Department. This is a large-scale public undertaking, and the legislation is designed to divert this activity into one channel for reasons both of public health and economic efficiency.

The main scheme of the Act is worked out by sections 50, 50a, 51, 52 and 52a. The Board has the sole right within the Metropolitan Abattoirs Area to slaughter stock for export as fresh meat in a chilled or frozen condition (section 50 (1)) but the Minister of Agriculture may grant, in his discretion, and subject to such restrictions, terms and conditions as he thinks proper, a permit to any 20 person to slaughter swine for export as fresh meat in a chilled or frozen condition at a slaughter house or abattoirs within the Metropolitan Abattoirs Area which is licensed as such by a council or Board of Health (section 50a). The Board must slaughter its stock for export for, and on account of, and in the manner directed by the Manager of the Government Produce Department (section 50 (3)) and the Manager of the Government Produce Department must not procure the slaughter of any stock for export except upon condition that he is appointed by the owner of the stock as agent to arrange for the slaughter, freezing and shipment thereof and, where required, to market the meat and by-products, and that he is to be paid an inclusive fee for all these services 30 (section 50 (4)). The Board has power to buy and sell stock, carcasses and meat but may not sell any meat by retail (section 51).

The Board may by public notice fix the maximum number of stock to be sold in any one day in any market under the Board's control, and may refuse to receive for marketing any stock in excess of that number (section 52). Section 52a provides as follows:—

“(1) No person shall in any part of the State outside the Metropolitan Abattoirs Area use any premises for the purpose of slaughtering stock for export as fresh meat in a chilled or frozen condition unless he is the holder of a licence from the Minister of Agriculture authorising 40 him to use those premises for that purpose.

Any person who contravenes this subsection shall be guilty of an offence and liable to a fine not exceeding one hundred pounds and in the case of a continuing offence to an additional fine not exceeding twenty pounds for every day on which the offence continues.

(2) The Minister of Agriculture shall have a discretion to grant or refuse any application for a licence under this section after due consideration of the following matters:—

(a) Whether the applicant is a fit and proper person to hold a licence under this section; and



- (b) whether the place where it is proposed to establish the premises to be used under the licence is a suitable place for the establishment of such premises; and
- (c) whether the premises are necessary to meet the requirements of the public:

10 Provided that the Minister shall not refuse an application for such a licence if the premises for which the licence is required are to be erected at least eighty miles from all premises, existing at the date of such application, and established within the State for the purpose of slaughtering stock for export as aforesaid.

(3) Every licence shall be for such period and contain such restrictions, terms and conditions as the Minister thinks proper.

(4) This section shall not apply to the Government Produce Department''.

27. It is to be noticed that the Minister of Agriculture has no power to refuse an application for a licence under section 52a if the licence for which the premises are required are at least 80 miles from all existing premises. It does not follow from this that the State Government is renouncing its interests in, and control over, such matters as health, town planning, Local Government, 20 noxious trades and the like. Section 52a (3), in the Appellant's submission confers upon the said Minister the power to impose such terms and conditions as considerations of health, town planning, Local Government, noxious trades and other allied matters might render desirable. In addition, a considerable measure of control is retained and effected by the other Acts summarised in this part.

Part III of the Act deals with financial matters and other associated administrative details.

30 Part IV provides for the Board's abattoirs. By section 68 provision is made for the establishment of abattoirs by the Board on land to be acquired (pursuant to its compulsory acquisition powers—Part VI).

28. The abattoirs established in the outlying suburb of Adelaide known as Gepps Cross was set up under this section. The slaughtering and dressing of stock in the Metropolitan Abattoirs Area, except in abattoirs established under the Act, is prohibited: Also, the sale in the Metropolitan Abattoirs Area of any carcass of meat unless slaughtered, or (in certain limited cases) inspected and branded by an abattoirs inspector, is prohibited (section 70) subject to a few exemptions specified in sections 76 and 77. Later sections in that part deal with the licensing of slaughtermen, the inspection and branding of meat, diseased stock and carcasses and preventive measures against disposal of 40 diseased meat. Section 91 confers on the Board exclusive rights of delivering of meat from the abattoirs.

Part V empowers the Board to establish stock markets to the exclusion of private competitors. The stock market for the metropolitan area adjoins the abattoirs at Gepps Cross.

Part VI confers on the Board wide powers of compulsory acquisition of land.

(5) PORT LINCOLN ABATTOIRS ACT, 1937.

29. This short Act sets up a State owned abattoirs at Port Lincoln with similar exclusive rights to kill both for local consumption and export excepting 50 only abattoirs for curing bacon and ham and slaughtering meat for export

otherwise than as fresh meat in a chilled or frozen condition: the latter may be licensed by a council or Board of Health (section 8).

30. The effect of the legislation is that the business of slaughtering in the State—

(a) is under the supervision and control of the appropriate regional authority or board,

(b) is under the supervision of the health authorities,

(c) may be carried on—

in the metropolitan area only by the public board in the abattoirs established under the Metropolitan and Export Abattoirs Act; 10

in areas proclaimed under the Abattoirs Act as abattoirs areas only in the premises maintained by the local boards;

in other Local Government areas by or by licence of the local governing authority. Outside Local Government areas under the control of the Central Board of Health.

31. Speaking generally, the killing of stock for export in a chilled or frozen condition can only be done in the Metropolitan Abattoirs Area by the Metropolitan and Export Abattoirs Board, and elsewhere in the State only on licence by the Minister. 20

(b) CUSTOMS ACT, 1901-1953 (COMMONWEALTH).

32. This Act is the chief Commonwealth Act governing the importation and exportation of goods from the Commonwealth of Australia, and establishing the organisation controlled and administered by the Minister of State for the Commonwealth administering the Customs, and by the said Minister's permanent head of Customs, the Comptroller-General of Customs.

33. The Act is divided into Parts and Divisions as follows:—

Part I—Introductory.

Part II—Administration.

Part III—Customs Control, Examination, Entries and Securities Generally. 30

Part IV—The Importation of Goods.

Division 1—Prohibited Imports.

Division 2—The Boarding of Ships and Aircraft.

Division 3—The Report of the Cargo.

Division 4—The Entry, Unshipment, Landing and Examination of Goods.

Part V—The Warehousing of Goods.

Division 1—Licensed Warehouses.

Division 2—King's Warehouses. 40

Part VI—The Exportation of Goods.

Part VII—Ships' and Aircrafts' Stores.

Part VIII—The Duties.

Division 1—The Payment and Computation of Duties Generally.

Division 2—*Ad valorem* Duties.

Division 3—Deposits, Abatements, Remissions and Refunds of Duties.

Division 4—Disputes as to Duties.

- Part IX—Drawbacks.  
 Part X—The Coasting Trade.  
 Part XI—Agents.  
 Part XII—Officers.  
     Division 1—Powers of Officers.  
     Division 2—Protection to Officers.  
 Part XIII—Penal Provisions.  
     Division 1—Forfeitures.  
     Division 2—Penalties.
- 10 Part XIV—Customs Prosecutions.  
 Part XV—Settlement of Cases by the Minister.  
 Part XVI—Regulations.  
 Part XVII—Miscellaneous.

34. Those parts with which this appeal is particularly concerned are Parts VI (The Exportation of Goods) and XVI (Regulations) which contain sections 112 to 270 respectively.

35. Certain matters (material to this case) “required or permitted to be prescribed” are set out in section 112. In the Customs Act, 1901-1949, this section read:—

20 “(1) The Governor-General may, by regulation, prohibit the exportation of any goods—

(a) being arms, explosives, military stores, or naval stores, or being goods which, in his opinion, are capable of being used as or in the manufacture of arms, explosives, military stores or naval stores, or for any purpose of war; or

(b) the exportation of which would, in his opinion, be harmful to the Commonwealth; or

30 (c) the prohibition of the exportation of which is, in his opinion, necessary for the preservation of the flora or fauna of Australia; or

(d) which have not been prepared or manufactured for export under the prescribed conditions as to purity, soundness or freedom from disease, or which do not conform to the prescribed conditions as to purity, soundness, or freedom from disease; or

(e) the prohibition of the exportation of which is, in his opinion, necessary for the protection of the revenue, or the prevention of fraud or deception.

40 (1A) In time of war the Governor-General may by proclamation prohibit the exportation of any goods.

(2) The power contained in subsection (1) or (1A) of this section shall extend to authorise the prohibition of the exportation of goods generally or to any specified place, and either absolutely or so as to allow of the exportation of the goods subject to any condition or restriction.

(3) All goods the exportation of which is prohibited shall be prohibited exports to the extent to which the prohibition extends.

Any proclamation made under subsection (1A) shall be notified to each House within seven days of the issue of such proclamation if the Parliament is in session, but if not in session then within seven days after the meeting of Parliament.”

36. This section and the Regulations made in pursuance thereof were amended and validated by the amending Act No. 56 of 1951 (which was assented to on 11th December, 1951) the material sections of which run—

“1. (1) This Act may be cited as the Customs Act, 1951.

(2) The Customs Act, 1901-1950, is in this Act referred to as the Principal Act. 10

(3) The principal Act, as amended by this Act, may be cited as the Customs Act, 1901-1951.

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

5. Section one hundred and twelve of the principal Act is repealed and the following section inserted in its stead:—

‘112. (1) The Governor-General may, by regulation, prohibit the exportation of goods from Australia.

(2) The power conferred by the last preceding subsection may be exercised— 20

(a) by prohibiting the exportation of goods absolutely;

(b) by prohibiting the exportation of goods to a specified place; or

(c) by prohibiting the exportation of goods unless prescribed conditions or restrictions are complied with.

(3) Goods the exportation of which is prohibited under this section are prohibited exports.’

7. All regulations made under the Customs Act, 1901-1934, or under that Act as amended, prohibiting the exportation of goods whether absolutely or subject to conditions or restrictions, shall be deemed to have been at all times, and to be, as valid and effectual as if made under the principal Act as amended by this Act.” 30

37. It is to be noticed that Statutory Rule No. 36 of 1953 (Amendment of Commerce (Meat Export Regulations)) dated 1st May, 1953 was passed *after* this Act. Regulation 4B in this Statutory Rule is, in the Appellant’s submission, the principal Regulation to which all the remaining Regulations of the Meat Export Regulations are accessory; all of these Regulations were made in reliance on section 112 (2) (c) and section 270 (1) (c) read in conjunction.

(c) MEAT EXPORT REGULATIONS. 40

38. The overall purpose of the Regulations is to prohibit the export of meat, meat products or edible offal except upon the conditions therein prescribed, and designed to maintain the standard of Australian products shipped overseas.

39. Part I of the Regulations deals with the usual formal matters—short title, parts, and definitions—exempts from their operation ships’ stores shipped in Australia, prohibits the export of whalemeat, and then concludes with what the Appellant submits is the governing provision of the Regulations—Regulation

P. 9  
(A (ii)).

P. 9  
(A (i) and  
A (ii)).

4B. By Regulation 4B, which was inserted by Statutory Rule 36 of 1953 (referred to above), the exportation of all meat, meat products or edible offal is prohibited unless the treatment and storage of the meat, meat products or edible offal has been carried out in accordance with the Regulations, the provisions of the Regulations have been complied with, the exporter has received an export permit in respect of the goods in accordance with these Regulations, and the export permit is in force at the time of the exportation of the goods (Regulation 4B (1) (a), (b) and (c)). Regulation 4B also contains certain immaterial provisions dealing with rabbits and hares, and with the required  
10 hardness of freezing, deterioration in goods, packing, covering, cleanliness, storage and the like.

40. Part II of the Regulations, which, together with Regulation 4B, forms the foundation of the Regulations, is headed "Registration of Premises and Standard Requirements therefor." It in turn is divided into Divisions 1 (Regulations 5-11, 2 (Regulations 12-39A), 3 (Regulations 40-43) and 4 (Regulations 44-49), headed respectively "Registration of Premises", "Standard Requirements for Registered Establishment", "Sanitation", and "Yards, Lairs, Pens and Ramps." All establishments used for the slaughter treatment and storage of meat, meat products or edible offal for export must be registered (Regulation  
20 5). Applications for registration are, by Regulation 6, required to be in accordance with Form A of the First Schedule to the Regulations, and the Secretary (defined by Regulation 3 (1) as "the Secretary of the Department of Commerce and Agriculture") issues to an "approved applicant" a certificate of registration in accordance with Form B of the said schedule. Certificate No. 767 (Annexure D to the Statement of Agreed Facts) was issued to Noarlunga Meat Limited in pursuance of Regulation 6. Certificates of registration expire on 31st December of each year and are renewable on written application (Form C of the said schedule). The Secretary also furnishes to the proprietor of the registered establishment an establishment number (Regulation  
30 11). An application for registration must be accompanied by certain documents, namely, the complete plans and specifications and a full description of the establishment, the details of the operations proposed to be carried on therein, and a clear photograph of the site of the establishment showing its relation to the land or other property adjoining the establishment (Regulation 7). All alterations or additions to registered establishments (other than minor alterations not involving questions of sanitation) must be first approved by the Secretary (Regulation 8). When, after the commencement of the Regulations, it is intended to erect premises to be registered as an establishment under the Regulations, registration of the establishment may not be granted unless the  
40 Secretary approves of the site prior to the erection of the premises (Regulation 9). If any registered establishment is leased or sold, the lessee or transferee is prohibited, without the approval of the Secretary, from using the establishment for the slaughter, treatment and storage of meat, meat products or edible offal for export. Regulation 12 (in Division 2) provides that no premises or buildings erected after the commencement of the Regulations shall be registered as an establishment under the Regulations, unless it conforms to such requirements prescribed in Part II as are applicable. The remainder of Division 2, and Divisions 3 and 4 of Part II, contain rules and specifications to which registered premises are required to conform, and prescribe what shall and what  
50 shall not be done to maintain cleanliness and sanitary conditions generally in the premises and in the appliances and fittings used therein, and amongst the employees.

41. Regulation 49 (the last Regulation in Part II) provides that any person who intends to erect an establishment for the treatment of meat for export may submit to the Secretary plans involving the use of methods or materials differing from those prescribed in Part II and if, in the opinion of the Secretary, the sanitary objectives aimed at by Part II will be attained by the use of the methods or materials proposed, he may permit the use of those methods or materials either wholly or in part in lieu of the methods or materials prescribed in Part II.

42. Part III of the Regulations is headed "Supervision, Inspection, Preparation, Transportation, Marking and Trade Description of Meat Intended for Export" and is divided into two Divisions—Division 1 (Regulations 50-79) is headed "Supervision, Inspection, Preparation and Transportation"; Division 2 (Regulations 80-88) is headed "Marking and Trade Description." Division 1 of Part III contains detailed provisions relating to the slaughtering of animals, the inspection of carcasses (with special rules relating to diseased animals and the disposal of their carcasses), freezing, packing, canning and otherwise preparing the carcasses and cuts for export, and the inspection, sampling, transportation and loading of meat, meat products and edible offal of all kinds for export. Division 2 contains numerous administrative provisions relating to the marking and authorised trade descriptions of all meat found to be fit for human food or fit for export.

43. Part V of the Regulations (Regulations 94-98) is headed "Registration of Brands". This is a purely administrative part and contains provisions requiring the Secretary to keep a register of brands registered as Trade Marks under the Trade Marks Act, 1905-1922 (Commonwealth) and used by owners for any meat, meat products or edible offal, intended for export (Regulations 94-96). Notice of the transfer of any such brand is to be given to the Secretary (Regulation 98 (1)). Part VI of the Regulations (Regulations 99-107) is headed "Miscellaneous". It deals with such matters as penalties for breaches of regulations (Regulation 99), fees (Regulation 100), the compulsory furnishing of information by proprietors of registered establishments to the inspector in charge (Regulation 102), and the appointment and certificates of analysts (Regulations 104-106).

P. 23.

44. Regulation 103 (commented on in judgment of Webb J.) provides that where by the law of any State any goods are required to be inspected and approved by a State authority before export, and the Minister is satisfied that such inspection and approval are as efficient as inspection and markings under these Regulations, the Minister may direct that such inspection and approval shall be accepted, wholly or partly in lieu of examination and marking under the Regulations.

(d) MEAT EXPORT CONTROL (LICENCES) REGULATIONS.

P. 9 (B).

45. These Regulations are hereinafter referred to as the "Licence Regulations". All the Licence Regulations have been in force since, at the latest, 1st July, 1936, and their validity has never been, and is not now, disputed.

46. The Regulations most material to this case are 4, 7 and 14. By Regulation 4 the export of meat, meat products or edible offal is prohibited except by persons who hold licences, and subject to the conditions and restrictions prescribed by the Licence Regulations. Regulation 7 requires a Licensee to comply with the Commerce (Meat Export) Regulations and the Customs (Prohibited Exports) Regulations in so far as those Regulations are applicable to him.

47. It was to Regulations 4 and 7 (*inter alia*) that Taylor J. was apparently referring when he said "In the main the Regulations (*i.e.*, the Meat Export Regulations) merely prescribe conditions designed to secure standards of purity, quality and condition at the point of export and *these are the conditions which, if observed, will entitle an applicant to an export permit.*" P. 36.

48. Regulation 14 is also of significance here: it provides that a licensee shall, whenever so required by the Australian Meat Board by notice in writing signed by its Secretary or an authorised person, withhold from export the whole or any portion of any meat, meat products or edible offal intended for export.

10 49. Apart from these three Regulations, the Licence Regulations contain a number of administrative provisions. An application for a licence to export meat, meat products or edible offal must be in accordance with Form A of the Schedule to the Licence Regulations and the resulting licence in the Form B of the same Schedule (Regulation 5).

50. Licensees are required to ship all meat, meat products or edible offal through shipping companies determined by the Australian Meat Board (Regulation 8) and by Regulations 9, 10 and 11 various returns, in accordance with the appropriate Forms in the Schedule, must be made of the details of shipments. Regulations 1, 2 and 3 deal with the usual introductory topics of citation, commencement and interpretation, and Regulations 12, 15, 16, 17 and 18 with immaterial miscellaneous matters. 20

51. Regulation 13 provides that a licensee upon request in writing by the Secretary to the Australian Meat Board or an authorised person must furnish forthwith or within the time (if any) specified in the request, such information as is required in relation to the export or the intended export by the licensee of any meat, meat products or edible offal or in relation to any meat, meat products or edible offal at any time owned by, or in the custody, possession or power of the licensee. This Regulation appears to be supplementary (*inter alia*) to Regulations 4, 7 and 14.

30 (e) SECTION 109 OF THE COMMONWEALTH OF AUSTRALIA CONSTITUTION.

52. Section 109 of the Constitution is in these terms:—

"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

The test of inconsistency, which in the circumstances the Appellant, for the purposes of this case, accepts, is that stated by Dixon J. in *Ex parte McLean* (1930) 43 C.L.R. 472, 483, in the passage cited by Fullagar J. as follows:— P. 27.

40 "When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and section 109 applies. That this is so is settled, at least when the sanctions they impose are diverse (*Hume v. Palmer* (1926) 38 C.L.R. 441). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency

does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."

E. SECTION 52a OF THE METROPOLITAN AND EXPORT ABATTOIRS ACT AND THE MEAT EXPORT AND LICENCE REGULATIONS: SCOPE COMPARED. 10

53. The Appellant respectfully submits that the scope and purview of section 52a of the Act is entirely different from the scope and purview of the Regulations. The Act and Regulations properly construed, reveal no more than two complementary and cumulative sets of restrictions imposed upon the liberty, which exists at common law and is subject thereto, to slaughter for any purpose, by any process, in any premises however constructed and wherever situated; the Act and the Regulations are not inconsistent, conflicting or repugnant in any sense whatever.

54. The three matters to which the Minister of Agriculture is required by section 52a to give due consideration before exercising his discretion to grant or refuse an application for a licence under the section—namely, whether the applicant is a fit and proper person to hold a licence under the section, whether the place it is proposed to establish the premises to be used under the licence is a suitable place for the establishment of such premises, and whether the premises are necessary to meet the requirements of the public—are entirely distinct from the matters controlled by the Regulations. 20

55. There is, firstly, nothing in the Regulations which indicates that the Secretary must consider whether an applicant, as such, and apart from the fact that he is or intends to be the occupier of a slaughter house, is a fit and proper person to be licensed. The Appellant submits that the "suitability of the applicant" is not, in any reasonable sense, a matter with which the Regulations are concerned. There is a clear distinction in the Appellant's submission, between requiring an application for the registration of certain premises which will be judged according as the premises and the activities therein do or do not conform to certain specifications and practices, to be submitted by the person who is, or is to be, occupier, and making the success of such an application depend expressly (*inter alia*) upon the proposed occupier's character, antecedents, capacity, and general suitability for carrying on the business in question. 30

56. There is, secondly, nothing in the Regulations which suggests that they are concerned with the question (referred to in section 52a (2) (b) of the Act) whether the place where it is proposed to establish the premises to be used under the licence is a suitable place for the establishment of such premises, in the sense in which those words are used in the Act. The Regulations are concerned, to a limited extent, with the "site" of the proposed slaughter house but, it is submitted, only for the purpose of ensuring that the slaughter house which is to be established thereon will be fit, *as a slaughter house*, for the purpose for which it is intended. Section 52a (2) (b) contemplates that the Minister of Agriculture will consider the suitability of the place in its geographical setting; 40



such suitability is entirely distinct from the suitability with which the Regulations (such as, for instance, Regulation 14) are concerned.

57. The Appellant respectfully submits that nowhere does it appear that the Regulations, when dealing with "suitability of the site," extend expressly or inferentially, to such matters as nuisance, town planning, public health, transport or feed for stock which are matters that the State Minister would have to take into account.

Cp. p. 28, line 43

58. Thirdly, the question whether the premises proposed to be used as a slaughter house are "necessary to meet the requirements of the public" committed to the consideration of the State Minister of Agriculture by section 52a (2) (c) of the Act, is entirely outside the purview of the Regulations. The Appellant submits that the Minister of Agriculture, in pursuance of this section, is bound and entitled to consider matters at large of State economic policy, public transport and public finance; and there is no suggestion in the Regulations that such matters as these are required by law to be considered before premises are registered, and a certificate issued, under the Regulations. In the Appellant's submission the conclusion of Taylor J. that the Regulations in the main present themselves not as rules of conduct with which the Regulations imperatively require compliance, but as the antecedent specification of conditions, the fulfilment of which will entitle the applicant to the issue of an export permit at the appropriate time, is the conclusion which should be accepted.

P. 35.

59. The key to the Regulations is Regulation 4B. This Regulation is expressed negatively, and not both negatively and positively. It provides, in effect, that the exportation of all meat, meat products or edible offal (hereinafter referred to as "meat") is prohibited *unless* certain conditions are complied with; it does not provide, and it would be illogical and unreasonable to infer from this Regulation, that if the said conditions are complied with, a power to export meat, coupled with an immunity from any State law concerned with the same subject matter, is thereby conferred. The proper interpretation is that compliance with the conditions prescribed by the Regulation relieve the slaughterer and exporter from further control by Commonwealth law, but that the question whether and, if so, to what extent and subject to what limitations, he can slaughter for export in the premises chosen by him is still, as it always has been, a matter for State law.

60. Regulations 5 and 6 should, in the Appellant's submission, be similarly regarded. The heading to Part II in which these Regulations occur gives no hint that the Regulations intended to assume control of every aspect of slaughter houses in the State community and every activity therein or connected therewith. It simply reads "Registration of Premises and Standard Requirements Therefor." This subject matter follows naturally and logically upon Regulation 4B (1) (a).

61. Regulation 5 requires all establishments used for the slaughter treatment and storage of meat to be registered, and when registered a certificate of registration issued in the Form B of the First Schedule, pursuant to Regulation 6, specifies ". . . all operations which *may be conducted* in the establishment to which it refers." It is respectfully submitted that Regulation 5 presupposes the use of the premises therein described; mere registration does not give them that character. Indeed, no Regulation is necessary unless they are establishments "used" for the purposes mentioned.

It follows that before the necessity for registration arises, the question must be considered whether any given establishment is so used. "Used" in this context must, it is submitted, mean "lawfully used" and whether such a use is "lawful" must in the present circumstances be judged in accordance with State law.

62. Again, the word "may" in the form of Certificate and in Regulation 6 (2) (a) cannot in the context of Regulations 4B, 5 and 6, and of Part II generally, be construed to mean "may notwithstanding what State law may ordain to the contrary", but must mean "may so far as these Regulations and the Board which administers them, which has an interest in the ultimate product, 10 are concerned." If this is not the true construction, then the Commonwealth Parliament, or a Commonwealth law-making authority, can effectively exclude the operation of all State laws relative to any given legislative topic, such as, for example, public health, by issuing a certificate (similar to the one issued under the Regulations in this case) the grant or refusal of which is made dependent merely upon compliance with a very limited set of conditions or restrictions, or even one condition or restriction, relative to the same topic. Such a result would leave uncontrolled and uncontrollable by State law innumerable matters of importance in the domain of the legislative topic in question. 20

63. Regulations 4B, 5 and 6, if construed in the manner contended for by the Appellant, cannot conflict in any way with section 52a of the Act.

64. This interpretation of the three last mentioned Regulations accords with the submission that the Act and the Regulations are two cumulative sets of statutory restrictions imposed upon the liberty (itself already controlled and limited by the Common Law and other Statute Laws) of slaughtering stock (or other animals) for export (or home consumption).

65. Under Regulation 6 (2), when an application for registration has been approved, the Secretary is obliged to issue to "an approved applicant" the certificate of registration, and if any registered establishment is leased or sold 30 the lessee or transferee is by Regulation 10 forbidden, without the approval of the Secretary, to use the establishment for the slaughter treatment or storage of meat.

66. In the Appellant's respectful submission it is not possible to contend that these two Regulations encroach in any way on the operation of section 52a (2) (b) of the Act, in virtue of which the State Minister of Agriculture, in the exercise of his discretion whether to grant or refuse an application for a licence, must give "due consideration" to determine whether the applicant is "a fit and proper person". An applicant under Regulation 6 (1) must, by Regulation 7 (c), furnish "the details of the operations proposed to be carried 40 on in the establishment," since, in order to determine whether the premises are fit for the purpose for which they are intended and must be registered, it is necessary to have regard to these details. But because these details (as distinct from the structure, specifications and appointments of the establishment) may vary from applicant to applicant (depending, as it is submitted they do, on the applicant's desires and intentions), it is reasonable for the Secretary to "approve" an applicant, in the light of such furnished details, before registering the premises. To "approve" for such a purpose is an entirely different thing from deciding whether an applicant is "a fit and proper person."

67. Regulations 7 and 8 are simply administrative provisions further enabling the Secretary to obtain necessary details in order to judge an application.

68. Regulations 9, 14, 23 make use of the word "site". Under Regulation 9 the Secretary must, prior to erection, approve the site of premises intended to be erected, and registered under the Regulations. Regulation 14 is designed to ensure that the site of the establishment will admit of the provision of ready and efficient drainage, and that it "*is of such extent* as to allow an interval of at least 20 yards between the main building and the nearest thoroughfare or right-of-way." Regulation 38 (1) provides that the site of buildings (*i.e.*, the individual buildings comprised in the establishment) in which meat is preserved for export shall be such as to allow of proper drainage, free sunlighting of the buildings and free air movement round and through the buildings.

69. Apart from the three last mentioned Regulations, Regulations 14A, 16 (b), 44 (2) and 47 (3) concern matters which, in the Appellant's submission, are allied thereto.

70. The Appellant's contention is that the considerations relating to the required "site" (as the word is employed in Part II of the Regulations) and the other necessary standards specified above, governed and controlled by the said Part II, are entirely different and distinct from the considerations relating to the "place where it is proposed to establish the premises" involved in administering section 52a (2) (b) of the Act. The Appellant respectfully submits that "site" in its context (and especially having regard to its use in Regulation 14 (c)) denotes the plot of land or terrain upon which the establishment is set up and connotes its propinquity to other relevant buildings, ways or establishments; it neither denotes nor connotes the sort of thing implied by the word "place" which, in the Appellant's submission, is "geographical setting."

71. Further, Part II of the Regulations evinces an interest in the "site" of the establishment solely for the purpose of ensuring that "the sanitary objectives (see Regulation 49) aimed at by that part are attained: they clearly have no concern, it is submitted, with the public interest in such matters as nuisance, town planning, health, transport or State economics generally on which the "place" of the establishment might have a marked effect, while its "site" might nevertheless be perfectly satisfactory in the limited sense suggested above.

72. By virtue of Regulation 49 of the Regulations, the Secretary of the Australian Meat Board is given what is in effect a dispensing power. Part II is very largely concerned with methods or materials which have a "sanitary objective", and the Secretary is empowered to permit the use of substitutes wholly or in part in lieu of those prescribed.

73. If the Respondent's contention is accepted as correct, then on the matters committed to the Secretary's discretion, an exercise of that discretion alone will supersede State laws on the many subjects affected, directly or indirectly, thereby. It cannot have been the intention of the Regulations to produce such a result.

74. Regulation 103 appears in Part VI of the Regulations (Miscellaneous). This yields the inference that the Commonwealth Regulations are intended to be, and are cumulative upon, and supplementary to, State law. If this were not so the Regulation must fail to have any operative effect through lack of subject

matter. The assumption carried by this Regulation is, it is submitted, that a State system of inspection and approval (which must be an integral part of any system of laws controlling the slaughter of stock for export) should be already in existence and have a valid operation independently of any Commonwealth Laws.

P. 9 (B (iv)). 75. The Licence Regulations, in the Appellant's submission, are primarily designed to ensure that the Manager of the Australian Meat Board (as he is designated by Statutory Rule No. 109/1949) has in his possession all information necessary to enable the Board to control, so far as it lawfully may, the export of meat of all sorts and meat products. The entire operation of the Act is anterior in point of time to that of the Licence Regulations. The latter carry the assumption that meat has already been slaughtered and prepared (*i.e.*, slaughtered and prepared in accordance with State and other laws) before their sanction takes effect. (Regulations 4, 6, 7, 9, 10, 11 and 14.) In no way are the Licence Regulations concerned with the three matters committed to the administrative responsibility of the Minister of Agriculture by section 52a of the Act. The terms of the various forms (with the exception of Forms A and B) appended to the Licence Regulations confirm this contention: they are fundamentally statistical in their purpose and operation. 10

76. The Regulations and the Licence Regulations both make use of a formal administrative Act (in the former case a certificate and in the latter case a licence) by which ultimate control is maintained over those persons coming within the purview of the Regulations. The Act makes use of a licence for a similar purpose. Quite apart from the contentions above set forth, it could not, it is submitted, validly be argued that because a certificate under the Regulations, and a licence under the Licence Regulations, say that certain acts *may* be done, then any State law which says that they may not is therefore necessarily inconsistent. It must, in the Appellant's submission, first be ascertained what activities or operations are relevant to the question of the grant or refusal of the respective certificates or licences, as the case might be. It is not to the fact of the grant or refusal of a certificate or licence, as such, that regard must be had: it is to the duties and conditions which must first be fulfilled before the certificate or licence will issue, which alone are relevant. If such duties or conditions so required to be fulfilled in order to obtain a certificate under Commonwealth law are entirely independent of other duties or conditions upon which the issue of a licence under State law depends, then the fact that in the former case a formal document is granted, and in the latter case is refused, is irrelevant. Also irrelevant is the fact that certain or all of the activities permitted (so far as the Commonwealth authorities are concerned) through the issue of the licence or certificate pursuant to a Commonwealth law are the same, or substantially the same, as the activities prohibited through the refusal of the licence under State law. The true question is: What are the respective sets of conditions upon the fulfilment of which the grant or refusal of the formal document is expressed to depend? 20 30 40

77. The administrative machinery embodied in section 52a makes use of the licence: the administrative machinery of the Regulations and the Licence Regulations makes use of a certificate and a licence, respectively. The grounds, however, upon which the issue of the licence under the State law depend, are entirely distinct from the grounds upon which the issue of the certificate and the licence under the Commonwealth laws depend. The fact that each law-making 50

authority in appropriate cases grants or refuses a formal document signifying compliance with those duties and obligations insisted upon by its own laws or regulations is, in the Appellant's submission, irrelevant to the question whether the respective laws or regulations are actually inconsistent.

78. It is theoretically possible that a licence issued pursuant to section 52a (2) of the Act might contain terms and conditions (pursuant to section 52a (3)) which were inconsistent with one or more of the Regulations. It cannot validly be argued that such potential inconsistency renders section 52a of the Act invalid. Where a State authority receives from a State law the power  
 10 to do certain acts, some of which, if performed, would, and some of which, if performed, would not, conflict with a Commonwealth law, then no inconsistency can arise under section 109 unless the power under the State law is actually exercised, and when so exercised conflicts with the Commonwealth law: *Victoria v. The Commonwealth* (1937) 58 C.L.R. 618; *Carter v. The Egg Board for the State of Victoria* (1942) 66 C.L.R. 557.

## F. JUDGMENTS OF THE HIGH COURT.

### (a) DIXON, C.J.

79. His Honour the Chief Justice agreed with the judgment of Fullagar J.,  
 which is dealt with below. P. 16.

### (b) McTIERNAN, J.

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80. After stating certain preliminary matters, the judgment presents brief  
 surveys of the Regulations and of section 52a of the Act, both by itself and in  
 its legislative context. It is to be noticed that when dealing with the require-  
 ments relating to "site", His Honour states that "the standards pertaining to  
 the matter of site are not concerned with suitability having regard to  
 the neighbourhood or the effect of starting a meat works on its amenities." Such  
 "suitability", in the Appellant's contention, though not within the purview of  
 the Regulations, is clearly within the purview of the matters specified by section  
 52a (2), and later in his judgment His Honour so held. P. 16, line 28.

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81. McTiernan J. then considered the constitutional validity of the Regula-  
 tions under section 51 (i) of the Constitution. In his opinion the standards  
 required for registered establishments have a real causative relation to the  
 fitness of the meat and other products to enter the stream of trade and commerce  
 with other countries, and Regulations 5 and 6 (which in his view are the material  
 Regulations to consider in connection with any supposed conflict) are reasonable  
 means for securing the prescribed standards. He accordingly held the Regula-  
 tions valid, and proceeded to consider the question of inconsistency. P. 19.

82. His conclusion that the Regulations are valid does not, however, mean  
 that McTiernan J. thereby gives to them as extensive an operation as  
 40 Fullagar J., who also held them valid. On the contrary, he expresses the  
 conclusion that the Regulations do not manifest an intention to operate so widely  
 that sections 50a, 79, 109 and (as he also held) section 52a of the Act, are  
 rendered inconsistent therewith and invalid to the extent of the inconsistency. P. 21.

83. The inference to be drawn from this conclusion, it is submitted, is that  
 His Honour reads the Regulations in the limited sense contended for by the  
 Appellant, and not in the extended sense claimed by the Respondent. On this  
 aspect of the case His Honour stated: "In my opinion they (*i.e.*, the Regula-  
 tions) do not disclose the intention that the direction to register under  
 Regulation 5 is the only law to be obeyed by any person who conducts an  
 P. 22, line 18.

establishment for the slaughter, treatment and storage of meat, meat products and edible offal to qualify him to carry on the establishment lawfully." The Appellant respectfully adopts this statement of the effect of the Regulation.

P. 20, line 37.

84. In considering the field marked out by section 52a of the Act (so that comparison could be made between the operation of that section and that of the Regulations), McTiernan J. has regard to the matters which the section says are to be taken into consideration by the Minister in exercising the discretion given to him to grant or refuse a licence. In treating the field as so indicated, McTiernan J. impliedly affirms that the presence or absence of the formal imprimatur of a certificate or licence is irrelevant to the question of inconsistency. 10

P. 21.

85. In McTiernan J.'s opinion, an examination of the respective fields shows that the Commonwealth Regulations leave it open to the States to determine who is a fit and proper person to conduct the class of slaughtering operations mentioned in section 52a of the Act; what is a suitable place for an abattoirs in which such operations are conducted; and whether the establishment of any new abattoirs of that kind is necessary to meet the requirements of the public.

86. McTiernan J.'s further reasoning on the question of the effect of the Regulations and their inconsistency with section 52a of the Act may be summarised thus:— 20

- (a) The description in Regulation 5 of the establishments directed to be registered is "all premises used for the slaughter, treatment or storage of meat, meat products or edible offal for export."
- (b) Implicit in this description is the acceptance or recognition of determinations made, or conditions imposed, by State law.
- (c) Registration under the Regulations does not bring premises within this description: the premises are not directed to be registered *unless* they are *already* within the description.
- (d) Premises can only be within the description if they are *lawfully* within it. 30
- (e) Whether premises are *lawfully* within the description depends, in part, in the present case, on State law. McTiernan J. said, "Upon the very terms of Regulation 5 an establishment is not made subject to the direction given by the Regulation unless it is an establishment used for those purposes (*i.e.*, the purposes mentioned in Regulation 5). Whether it is lawfully used may depend on State law."

87. His Honour's comparison of the Act with the Regulations leads, in the Appellant's respectful submission, to two basic conclusions (both of which the Appellant adopts):—

- (i) The respective fields marked out by section 52a of the Act and the Regulations are entirely independent of one another. 40
- (ii) The Regulations carry an implicit recognition and acceptance of State law on the very topics covered by the Act.

P. 22, line 23.

88. McTiernan J. made a reservation about subsection 3 of section 52a of the Act. In his opinion, if section 52a (3) authorises the Minister of Agriculture to prescribe a restriction, term or condition, dealing with a matter covered by any of the "standard requirements" prescribed by Part II of the Regulations, a question similar to that considered in *Victoria v. The Commonwealth* (58 C.L.R. 618) would arise. The Appellant concedes this proposition.

It does not, however, affect the reasoning or conclusion either of His Honour or the Appellant, in this case, since the Respondent's complaint is not to the terms of a licence which has been issued, but to the Minister's refusal to issue a licence at all.

(c) WEBB J.

89. His Honour agreed with the judgment of Taylor J., but in addition to the matters relied upon by Taylor J. as indicating that the Regulations are not intended to occupy the field to the exclusion of State law, His Honour relied on Regulation 103 of the Regulations, and concluded that no Regulation, not even  
10 5 and 10, pointed as clearly to the exclusion of State law as Regulation 103 pointed to its continuance. Pp. 22-23.

90. As a statement of the test of inconsistency, Webb J. accepted part of the same passage from *Ex parte McLean* (1930) 43 C.L.R. 472 as that adopted  
by Fullagar J. (*ibid.* at p. 483). P. 27.

91. The substance of Webb J.'s view is that the purpose of Regulation 103 is simply to enable the change from State to Commonwealth control over the matters within that Regulation's purview to be brought about without a duplication of effort. The correct view of the Regulations, in Webb J.'s opinion, is that the State is permitted to remain in the field so that advantage  
20 of its services may be taken from time to time if that appears desirable to the authorities administering the Regulations.

92. Webb J. regarded Regulation 103 as an important provision for the co-operation of Commonwealth and State in securing and maintaining the standard of meat for export. In his opinion the States are at least as much concerned as is the Commonwealth in securing and maintaining those standards and where a State is very largely dependent upon its export trade in a certain commodity, as South Australia is in the lamb export trade, and Tasmania in the fruit export trade, the State may have the greater interest.

93. The effect of His Honour's judgment may, in the Appellant's respectful  
30 submission, be summarised as follows:—

- (i) He accepts Taylor J.'s reasons for concluding that the Regulations were not intended to occupy the field to the exclusion of State law.
- (ii) In addition, he regards Regulation 103 as connoting an overall intention and scheme (also embodied in the Regulations as a whole) to effect co-operation between the States and the Commonwealth in order to secure and maintain the standard of meat for export.
- (iii) Such a scheme implies that the Commonwealth and State laws were intended to work, the one cumulatively upon the other, towards a common end, and not that the former was intended to override the  
40 latter.
- (iv) In reaching this conclusion, it is proper to have regard to economic realities, and in particular to the fact that both Commonwealth and State have a real economic interest in the export trade of primary products from South Australia.

94. If such respective economic interests are concurrent (as they are taken by Webb J. to be) and not conflicting, then this fact confirms an interpretation which views the Regulations and the Act as cumulative provisions calculated to achieve a common purpose, and not as conflicting and discordant.

## (d) FULLAGAR J.

P. 23.

95. Fullagar J. begins his judgment with a general survey of the material provisions of the Act, and then states the two questions raised by the case in these terms: "The first [question] is whether there is inconsistency within the meaning of section 109. The second (which need not be considered unless the first question is answered in the affirmative) is whether the Commonwealth Regulations are valid. The latter question is, on the view which I take, a question of limits '*inter se.*' The former is not such a question."

P. 24, line 37.

P. 27.

96. Fullagar J. then embarks upon an examination of the nature and content of a number of the Regulations which he regards as being material. Their overall effect His Honour summarises in this manner: ". . . they [*i.e.*, the Regulations adverted to] constitute an extremely elaborate and detailed set of requirements which must be complied with before registration can be obtained of premises to be used for the slaughter of stock for export. They relate to site, materials of construction, arrangement, dimensions and many other matters. It is an offence to use premises for the slaughter of meat for export unless the premises are registered. Registration cannot be obtained except upon compliance with all these detailed provisions, and in addition the applicant must be 'approved'. But if all these provisions are complied with, an approved applicant is entitled to a certificate specifying the operations which may be conducted on the premises. In my opinion, a State Statute which has the effect of prohibiting the use of premises registered under the Commonwealth Regulations for the very purpose for which they have been registered under these Regulations is plainly inconsistent with those Regulations."

97. In the Appellant's respectful submission, Fullagar J.'s summary of the effect and purview of the Regulations, his reasoning thereon and his conclusions, are erroneous in the following respects:—

(i) The last sentence in this passage contains a basic fallacy. Fullagar J. has assumed that the permission conferred by registration to carry on the operations specified in the associated certificate is a permission "in gross", that is, is a liberty to carry on the said operations unimpeded by the sanctions imposed by the Regulations, but coupled with an immunity from all other laws—including all State laws—which may impinge on any aspect, or result, of carrying on the registered slaughter house. So to read the Regulation is, in the Appellant's submission, a mistake. It is, in the Appellant's submission, a misconstruction of the Regulations to view the registration and the associated certificate as anything more than purely administrative devices used to indicate in a formal manner that the requirements of Commonwealth law have, to the extent indicated thereby, been complied with. It is unnecessary to read the Regulations as widely as Fullagar J. appears to have done, since the effective control of the premises and the operations carried on therein is in no way advanced by regarding such Regulations as the whole, rather than a complementary part, of the law on the topic of slaughter houses.

Furthermore, if the Regulations are to be interpreted in the way suggested, then not only will the Act prove to be invalid, but so also will important parts of a number of other State Statutes and by-laws, in so far as the same apply, or but for the operation of the Regulations, would apply, to slaughter houses registered under the Regulations.



Examples of such State Statutes are:—

- The Health Act, 1935-1954;
- The Noxious Trades Act, 1943;
- The Town Planning Act, 1929;
- The Industrial Code, 1920-1951;
- The Local Government Act, 1934-1954;
- The Building Act, 1923-1953;
- The Prevention of Cruelty to Animals Act, 1936-1949;
- The by-laws of many Local Authorities prohibiting nuisances of different sorts.

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It is submitted that important parts of the Common Law in force in the State such as the law relating to nuisance will be similarly affected. The Appellant contends that, in the absence of some clear indication, it is unlikely that mere Regulations were intended to cover such an extensive field already governed and controlled domestically and in such detail, by State Statute, and other State, laws.

- (ii) It is a mistake to state without qualification that where registration is granted the applicant "must be 'approved' ". It is necessary to 'approve' an applicant because only by an examination of his individual intentions can the necessary details be obtained to satisfy Regulation 7 (c), and only by ascertaining such details can the appropriateness of the subject premises be judged. But it would be wrong to suggest that such 'approval' entered the same field as the approval of the applicant under section 52a (2) of the Act as a 'fit and proper person' ". The Regulations advert only to a specific and limited intention of the applicant; the Act adverts to his character, antecedents, and ability in general. P. 27, line 13.

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- (iii) In order to determine the respective fields of the Commonwealth and State laws, Fullagar J. has, it is respectfully submitted, erroneously directed his mind to the consequences of the applications under the Regulations and the Act, respectively, rather than to the matters to be taken into consideration in exercising the discretion whether to grant or refuse registration and the certificate, or a licence, as the case may be.

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98. Fullagar J. then lays down the test of inconsistency which is "generally applied". He states first (what the Appellant has always conceded) that there may be inconsistency within the meaning of section 109 between two laws, although it is quite possible to obey both. The test which he then adopts he states to have been "analysed and fully stated by Dixon J." in *Ex parte McLean* (1930) 43 C.L.R. at p. 483. The passage previously quoted in this case is then cited. P. 27.

99. The Appellant submits that this test was not correctly applied. Fullagar J. in applying the test said it appeared to him impossible to deny that the Regulations evince an intention to express completely and exhaustively "the requirements of the law" with respect to the use of premises for the slaughter of stock for export. Fullagar J. did not, in so holding, draw any distinction between "the requirements of" State and of Commonwealth "law", and, in the Appellant's submission, this can only mean that he considered that whatever legislative topic was adverted to expressly or impliedly by the Regulations must be regarded as being completely and exhaustively provided for thereby for all purposes. P. 28.

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100. Fullagar J. appears to have given two reasons for reaching the conclusion just stated:—

P. 28.

(i) He said “The extremely elaborate and detailed character of the Regulations seems to me to be itself sufficient to compel this conclusion [*i.e.*, the stated conclusion as to the intention of the Regulations]. Almost every requirement which occurs to one as a relevant requirement is prescribed.” This argument in the Appellant’s respectful submission, begs the question. The true question, in this context, is not “what requirements have been prescribed” but “*in respect of what legislative field or topic* have the respective requirements of State and Commonwealth law been prescribed.” The Appellant concedes that the Regulations may have exhaustively prescribed the requirements of slaughter houses for export *in so far as such requirements render them fit, as such slaughter houses, for the purposes for which they are intended*. But their intrinsic fitness for such purpose is not the sole consideration to which a responsible law-making authority should be confined. A perfectly constructed slaughter house may be run by an unsuitable person such as a person with numerous convictions for breaches of noxious trade laws; it may be sought to be established in the heart of a residential area or next to a hospital, or in an area which the movement of cattle will turn into a “dust bowl”; its mere establishment, or its establishment in the place planned for it, may, in the circumstances of time and place, be economically harmful to the public. To these further considerations the Regulations do not advert either expressly or impliedly, and, a fortiori, not exhaustively.

Furthermore, because an intention to ordain what shall be the entire law on the topic of slaughtering stock for export was (as the Appellant submits, wrongly) ascribed to the Regulations, an entire legislative field—comprising such matters as the suitability of the applicant as such, the suitability of the place (as distinct from the site) where the premises are intended to be erected or maintained, and the economic requirements and interests of the State generally—has in fact been left uncontrolled and is, so long as these Regulations remain in force, uncontrollable.

P. 28, line 23.

(ii) Fullagar J. also placed reliance on the terms of the certificate issued to the Company. “It is clearly contemplated”, he said, “that when registration has been obtained, the operations referred to in the certificate may be lawfully conducted on the registered premises”. To reason in this way is, in the Appellant’s submission, again to beg the question. To rely on the terms of the certificate to support the conclusion that the Regulations evince an intention to operate exhaustively, is to assume that the words “may be conducted” in the certificate mean “may be conducted, no matter what State law has to say on the various operations and their results carried on on the premises, on the persons who carry on such operations, and on the place of the premises and its neighbourhood”. In the Appellant’s respectful submission this is a completely arbitrary and unjustified assumption. It is more consonant with the comparatively limited aims of the Regulations to view the words “may be conducted” as meaning “may, so far as the Commonwealth Department of Commerce and Agriculture is concerned, be conducted”, and the State licence and Commonwealth Certificate as concurrent qualifications requisite for the operating of a slaughter house. The case of *Colvin v. Bradley Bros. Ltd.* (1943) 68 C.L.R. 151 relied on by Fullagar J. to support his interpretation of, and reliance on, the terms of the certificate, is, in the Appellant’s submission, distinguishable. In *Colvin’s case* the material parts of the order made under

P. 28.

the State Act, and the material clauses of the award made under the Commonwealth Act, purported to govern and control substantially the same activities: in the present case, although both the licensing under the State law, and the registration under the Commonwealth law, relate to slaughter houses for export, the activities governed and controlled through licensing and registration machineries respectively, comprise aspects of maintaining and operating slaughter houses which are distinct and separate.

101. Fullagar J. then considered whether the purpose and object of section 52a of the Act was different from the purpose and object of the Commonwealth Regulations. P. 28.

As to this question, he maintained that "the suitability of the applicant and the suitability of the site are plainly matters with which the Regulations are concerned." The Appellant has already put forward reasons for concluding that it is only in the narrowest sense that the Regulations are "concerned" with the "suitability" of the applicant and of the site. As Mr. Justice Holmes said in *Lorenzo v. Wirth* (1889) 170 Mass. 596 "Too broadly generalized conceptions are a constant source of fallacy." P. 28, line 42.

102. Fullagar J. pointed out, in the second place, that the discretion given to the Minister by section 52a of the Act is absolute. He then continued: "It is true that he is required to consider the matters specified in subsection (2) of section 52a, but subject to the proviso to subsection (2)—and, of course, to the requirement of good faith—the Minister of Agriculture may refuse a licence for any reason whatever which seems good to him. In particular, he could refuse a licence because he thought a Commonwealth requirement which had been complied with, was not sufficiently drastic." P. 28, line 45.

103. To this reasoning the Appellant respectfully submits in answer:—

(i) It is incorrect to conclude that "the Minister of Agriculture may refuse a licence for any reason whatever which seems good to him." See *Shrimpton v. The Commonwealth* (1945) 69 C.L.R. 613. In this case Latham C.J. (at page 620) said: ". . . [It] has been held in this Court, in a series of cases, that discretion or power to grant a licence though conferred in very general terms, does not entitle the authority to which the discretion is granted or upon which the power is conferred, to take into account what have been described as extraneous conditions. The discretion must be used and the power exercised *bona fide* and with the view of achieving ends or objects not outside the purpose for which the discretion or power is conferred." Then, quoting from *Sharp v. Wakefield* (1891) A.C. 173 at 179, Latham C.J. continued: "'Discretion' means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice; not according to private opinion; *Rooke's case* (1598) 5 Co. Rep. 996: 77 E.R. 209: according to law and not humour. It must be, not arbitrary, vague and fanciful, but legal and regular, and it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself: *Wilson v. Rastall* (1792) 4 T.R. 753 at p. 757; 100 E.R. 1286." 30

In the Appellant's submission, the Minister of Agriculture, in considering whether to grant or refuse a licence under section 52a of the Act would be confined in his deliberations to the matters specified in section 52a (2) read in conjunction with the overall purpose of the Act. 40

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It should not be assumed (as Fullagar J. seems to have assumed), in order to apply the accepted test of inconsistency, that the Minister has strayed (of which there is no suggestion in the present case), or will stray, outside the legal and regular limits of the discretion conferred on him.

(ii) It is erroneous to hold that a Minister of Agriculture "could refuse a licence because he thought that a Commonwealth requirement which had been complied with, was not sufficiently drastic." The Appellant concedes that the discretion conferred by section 52a cannot be interpreted as embracing matters already governed and controlled by Commonwealth Law: to avoid inconsistency the discretion should (if it is necessary) be read down. Moreover, if the Minister of Agriculture did refuse a licence on the ground suggested by His Honour (or any other extraneous or unlawful ground) the situation would be readily capable of remedy by mandamus: *Andrews v. Diprose* (1937) 58 C.L.R. 299. 10

P. 29.

104. In dealing with the argument based on Regulation 103 (which commended itself to Webb J.) Fullagar J. said: "But all that Regulation 103 really means is that, if satisfactory machinery happens to exist at any port, the Minister, in the interests of economy, may use it. It is impossible to imply an intention that the export of goods which have received a Commonwealth export permit may be prohibited by a State". 20

In the Appellant's submission, this passage discloses two defects:—

(i) The words ". . . if satisfactory machinery happens to exist at any port . . ." embodies an unreal assumption. If, as Fullagar J. holds, the material State laws are invalid and inoperative, then no such machinery would, in fact, or could, in law, exist.

(ii) The State law is not calculated or designed to prohibit "the export of goods which have received a Commonwealth export permit."

The licence is required by State law to slaughter stock for export as fresh meat in a chilled or frozen condition. The prohibition effected by the withholding of the State licence is not a prohibition of "the export of goods which have received a Commonwealth export permit", but a prohibition of slaughtering for certain defined purposes. 30

P. 29.

105. Fullagar J. next considered whether Part II of the Regulations is within the power conferred by section 270 (1) (c) of the Customs Act, and he held that it is.

The Appellant will offer submissions in "G" hereunder that the said Regulations are *ultra vires* the Act, if given the construction and effect given them by Fullagar J.

P. 29, et seq.

106. Finally, Fullagar J. considered the associated questions: How far do the Regulations go, and are they *intra vires* the Constitution? He here, in effect, lays down three propositions:— 40

(a) The Regulations not only prohibit the export of meat except upon compliance with prescribed conditions; but also

(b) The Regulations regulate and control directly the slaughter of meat for export.

(c) It is within the constitutional power of the Commonwealth to do both these things.

The Appellant accepts (c) and directs no argument to it: in any event the question of constitutional validity does not really arise because, in the Appellant's submission, the Regulations do not as a pure matter of construction directly regulate and control the slaughter of meat for export. The conclusion that they do, is necessarily based on the assumption contained in the following passage from Fullagar J.'s judgment:—

10 "It would perhaps have been better if we had had some evidence before us as to Australia's export trade in meat, and as to the processes involved in the killing and preparation of meat for export and for home consumption respectively. But it seems to me safe to say that Sir Garfield Barwick was entirely right when he said that the expression "slaughter for export" is used in the relevant legislation as a composite expression which would be understood objectively in the trade. Whether "slaughter for export" is taking place is not, from the point of view of the legislator, a question which depends entirely on some intention in the mind of the owner or slaughterer of a beast—an intention which may change from time to time as operations proceed. The whole process from killing to packing will be conditioned in certain respects by the pre-determined destination of the meat, and "slaughter for export" is, in the mind of the legislator, a definite objective conception distinct from slaughter for home consumption. It does not, of course, follow that any corresponding position exists with regard to any commodity other than meat. It may very well be, for example, that such an expression as "mining metals for export" or "sowing wheat for export" is meaningless except by reference to some subjective element."

P. 31, line 6.

107. If Fullagar J. is wrong in his assumption that "slaughter for export" is "a composite expression which would be understood objectively in the trade", that in turn reaffirms the Appellant's contention that (as Taylor J. put it) "The Regulations, in the main, present themselves not as rules of conduct with which the Regulations imperatively require compliance, but as the antecedent specification of conditions, the fulfilment of which will entitle an applicant to the issue of an export permit at the appropriate time." Fullagar J. has treated the Regulations as saying in effect: "If you embark on the objectively ascertainable process of slaughtering for export you must, from start to finish, comply with the Regulations." This implies that the objective process is governed and controlled from start to finish by Commonwealth Regulations. The Appellant submits that what the Regulations as a whole say, is in effect: "Slaughter your meat how you like, though you may thereby suffer penalties under State law, but if you desire to export from the Commonwealth, you must, when you apply for an export permit, produce satisfactory evidence that the prescribed antecedent conditions have been complied with."

P. 35.

108. If the assumption that "slaughter for export" is not such an objectively ascertainable process, then the construction of the Regulations, based on such an assumption, must fail. In the Appellant's submission the assumption should not be made for the following reasons:—

(i) Either the nature of the process is ascertainable without reference to the intention of the occupier-slaughterer, or it is ascertainable only by taking that intention into account. If the latter

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alternative is accepted, then the process ceases to be objectively ascertainable, and regard can be had only to the final intention of the slaughterer, immediately before applying for a permit, because at any time up to then he can change his mind. This in turn, means that such direct control as is effected by the Regulations must be regarded as withdrawn from all processes and activities prior to the stage of an application for a permit. It is one thing to say "these goods must be dealt with in such and such a manner now." It is quite another thing to say "If you intend to export these goods they must, at the point of export, be proved to have been dealt with in such and such a manner." 10  
 In the result, therefore, the Regulations and the Act control two entirely distinct stages of production, one of which (namely, that controlled by the Act) is anterior in point of time to the other (namely, that controlled by the Regulations). If the former alternative is accepted, however, then a slaughterer-occupier who, for the sake of improving the quality of his meat products, conforms in all respects to the requirements, standards and processes prescribed by the Regulations except one, will find himself liable to prosecution under Regulation 99 for such one failure to conform, notwithstanding the fact that his intention, which is capable of incontrovertible proof, is, and always has been, that all 20  
 of his meat products are destined for the home market. Such an unlikely result must, in the Appellant's submission, be avoided if it is possible to do so by adopting a reasonable alternative construction of the Regulations.

(ii) There are numerous Regulations which suggest that the subjective intention of the slaughterer-occupier should be taken into account. Examples are—Regulations 67, 74A, 74B, 74C, 74D, 89 and 90 (and the associated form D).

(iii) There is no evidence, nor was any sought to be adduced, which proves, or from which it could be inferred, that the said process 30  
 is an objectively ascertainable one, known to the trade.

In the Appellant's submission, moreover, the characteristics of a technical trade operation are not facts of which judicial notice should be taken.

(e) KITTO J.

P. 32. 109. His Honour agreed with the judgment of Fullagar J. and had nothing to add.

(f) TAYLOR J.

P. 32. 110. Taylor J. dealt only with the question under section 109, and since he held there was, on the construction which he placed on the Regulations, no inconsistency, he did not consider the question of constitutional validity. 40

111. Taylor J.'s reasoning and conclusions, which the Appellant respectfully adopts may be summarised as follows:—

(i) The extent to which the certificate under the Regulations can operate as a licence to perform the operation of slaughtering and freezing mutton and lamb for export can be ascertained only by a consideration of the provisions upon which its efficacy as a licence depends.

(ii) The effect of the Regulations is not to prohibit the use of establishments which are not registered thereunder for the purpose of slaughtering stock and the preparation of meat for export. 50

(iii) Subject to a few individual exceptions the Regulations present themselves as the antecedent specification of conditions, the fulfilment of which will entitle an applicant to the issue of an export permit at the appropriate time.

(iv) In the main, the only sanction for the observance of these conditions, including that of registration, is that failure to observe them will, or may, result in the refusal of such a permit.

10 (v) The Regulations were not intended to supersede, *pro tanto*, all other existing requirements for the establishment of slaughter houses.

(vi) When the Regulations came into operation, there was in existence in South Australia, and no doubt in other States, legislation providing for the licensing and supervision of abattoirs generally, and it should not, in the absence of a clear intention, be inferred that it was the intention of the Commonwealth to override this legislation so far as the slaughtering of stock for export was concerned.

(vii) Accordingly, Regulation 5 cannot be regarded as the corner stone of a licensing scheme intended to supersede the legislation of the State.

20 (viii) The form of the certificate of registration adds nothing to the defendant's arguments. It merely evidences the fact that for the purposes of the Regulations the defendant Company's establishment is a registered establishment.

#### G. MEAT EXPORT REGULATIONS AND THE CUSTOMS ACT, 1901-1951.

112. The Appellant submits that the decision of the High Court that Part II P. 29. of the Regulations (as construed by Fullagar J.) is within the power conferred in terms by section 270 (1) (c) of the Customs Act, 1901-1951, is erroneous in two respects:—

30 (i) The said section 270 (1) (c) cannot be construed without regard to the terms of section 112 of the Customs Act.

(ii) Even if the terms of section 112 be disregarded, the Regulations are not authorised by section 270 or any other section of the Customs Act.

113. Section 270 (1) (c) runs:—

40 “(1) The Governor-General may make regulations not inconsistent with this Act prescribing all matters which by this Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to this Act or for the conduct of any business relating to the Customs, and in particular for prescribing—

(c) the conditions of preparation or manufacture for export of any articles used for food or drink by man or used in the manufacture of articles used for food and drink by man; . . . .”

114. In the Appellant's submission, the matters comprised in paragraphs (a) to (e) inclusive of subsection (1) cannot be dissociated from the governing words “. . . . which by this Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to this

Act, or for the conduct of any business relating to the Customs . . . .”  
The literal words of any one or more of these five paragraphs read as one cannot be invoked to justify any given set of Regulations: it must first be shown that the questioned Regulations fall within the ambit of the governing words quoted above.

115. In the Appellant's submission, the only section in the Customs Act which can properly be regarded as “requiring or permitting to be prescribed” the Regulations is section 112, in particular section 112 (2) (c). This conclusion is confirmed indirectly by section 7 of the Amending Act No. 56 of 1951 (Customs Act, 1951) and Regulation 4B of the Regulations. 10

116. The sole power conferred by section 112 is to prohibit the exportation of goods from Australia either absolutely or subject to certain conditions or limitations. In particular subsection (2) (c) provides:

“(2) The power conferred by the last preceding subsection may be exercised—

. . . .

(c) by prohibiting the exportation of goods unless prescribed conditions or restrictions are complied with.”

No other paragraph of subsection (2) is appropriate.

117. In the Appellant's submission, if the interpretation placed upon the Regulations by Fullagar J. be accepted, the Regulations plainly proceed beyond the permitted category of Regulations “prohibiting the exportation of goods unless prescribed conditions or restrictions are complied with.” The Appellant concedes that a permitted “condition or restriction” would be a requirement that the products offered for export should *have been* treated registered premises, built according to specifications, by prescribed operations, and should *have been* subjected to inspection and marking, and other detailed and appropriate forms of surveillance. A clear distinction, however, should be drawn between such a condition or restriction, and a requirement that if the objectively ascertainable process (assuming it to be so) of slaughtering for export be embarked upon, it *must* thenceforward conform to the requirements of the Regulations, whatever may be the intended market for the manufactured products. 20 30

118. Further, the Appellant submits that if the Regulations be construed, notwithstanding their comparatively limited purview, as excluding by implication all State laws which in any way impinge, directly or indirectly, on the operation of slaughtering stock for export, then they proceed beyond the limit of any possible provision which could be said to relate to “the conditions of preparation or manufacture for export of any articles used for food or drink by man or used in the manufacture of articles used for food or drink by man.” 40 (Section 270 (1) (c).) In the Appellant's submission, the words “. . . . the conditions of preparation or manufacture . . . .” do not bear the natural meaning “the sole conditions, notwithstanding anything which State law ordains or permits”; and there is nothing in the context or surrounding circumstances which requires or permits such an interpretation. Nor is there any warrant for the suggestion that in order to operate effectively the Regulations must be the sole conditions governing and controlling the persons, the premises and the operations carried on, in all their aspects: it is sufficient in the Appellant's



submission, if the positive provisions of the Regulations are given exclusive operation as far as they in fact operate, and that all other matters touching the persons, the premises and the operations be left to be governed and controlled by State laws.

#### H. CONCLUSIONS.

119. The Appellant therefore submits that the Appeal should be allowed and the questions asked in the Special Case should be answered (1) Yes, (2) Yes, for among others, the following reasons:—

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- (1) Because the Regulations are *ultra vires* the Customs Act.
  - (2) Because the Regulations, upon their proper construction, did not authorise the Respondent to slaughter for export regardless of the Act.
  - (3) Because the Regulations do not prescribe completely and exhaustively the requirements of the law with respect to premises for slaughtering for export.
  - (4) Because upon the test of inconsistency adopted by the High Court the Act was not inconsistent with the Regulations.
  - (5) Because the Act was not invalid by reason of section 109 of the Constitution.

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