

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

20 FEB 1957

46029

CASE FOR THE RESPONDENT

CASE FOR THE RESPONDENT

1. This is an appeal by special leave from an order of the Full Court of the High Court of Australia dated the 17th December 1954 on a special case stated for the opinion of the Supreme Court of South Australia and removed into the High Court of Australia under section 40a of the Judiciary Act 1903-1950 of the Commonwealth of Australia. Pp. 39-41.
Pp. 37-38.
Pp. 6-7.
P. 15.

2. The special case sought the opinion of the Court on the questions whether section 52a of the Metropolitan and Export Abattoirs Act 1936-1952 (hereinafter referred to as "the State Act") is a valid and operative enactment of the State of South Australia and whether on the facts set out in the special case the Defendant was guilty of an offence against the said section. The High Court answered both questions in the negative. Pp. 6-7.
P. 37.

3. The main issues in the case may be summarised as follows:—

- (a) Whether the Commerce (Meat Export) Regulations (hereinafter referred to as "the Commonwealth Regulations") of the Commonwealth of Australia are a valid exercise of the powers conferred by the Customs Act 1901-1951 of the Commonwealth of Australia;
- (b) whether, if the Customs Act did authorise the making of the Commonwealth Regulations, that Act is invalid as going beyond the legislative powers of the Parliament of the Commonwealth conferred by section 51 (1) of the Commonwealth of Australia Constitution Act 1900 (hereinafter referred to as "the Constitution");
- (c) whether section 52a of the State Act is inconsistent with the Commonwealth Regulations, if valid, and therefore invalid by reason of section 109 of the Constitution; and
- (d) whether the meaning and application of section 109 of the Constitution is a question as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of the States within the meaning of section 74 of the Constitution.

4. Section 52a of the State Act provides:—

"52a. (1) No person shall in any part of the State outside the Metropolitan Abattoirs Area use any premises for the purposes 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 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:

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. 10

(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."

5. The Commonwealth Regulations are an elaborate and detailed code consisting of more than one hundred regulations relating to—

- (a) the registration of establishments for the slaughter, treatment and storage of meat, meat products and edible offal for export;
- (b) the standard requirements with which establishments must comply in order to qualify for registration; 20
- (c) the supervision, inspection, transportation, marking and trade description of meat intended for export;
- (d) the procedure to be followed in the exportation of meat, meat products and edible offal;
- (e) the registration of brands; and
- (f) miscellaneous matters.

6. The most material part of the Commonwealth Regulations is Part II which is entitled "Registration of Premises and Standard Requirements Therefor". This Part comprises some forty regulations setting out standard requirements to be observed in the erection and maintenance of premises in order that they may qualify for registration under the Regulations. The standard requirements provided for in the Regulations relate to such matters as— 30

- (a) the location of premises;
- (b) the drainage of premises;
- (c) the distance of premises from possible sources of infection;
- (d) the construction, maintenance, hygiene, sanitation, ventilation and lighting of premises;
- (e) the provision of chilling and freezing accommodation at premises;
- (f) the provision of accommodation for employees; and 40
- (g) other allied matters.

In addition, under Regulation 6 a certificate of registration of premises is issued only to an approved applicant.

7. Regulation 5 provides that all premises used for the slaughter, treatment and storage of meat, meat products and edible offal for export shall be registered. By Regulation 4B, it is prescribed, *inter alia*, that the exportation of all meat, meat products or edible offal is prohibited unless—

- (a) the treatment and storage of the meat, meat products or edible offal has been carried out in an establishment registered in accordance with the Regulations; 50

- (b) the provisions of the Regulations have been complied with; and
- (c) the exporter has received an export permit in respect of the goods in accordance with the Regulations.

Applications for registration are required to be made in accordance with Form A set out in the First Schedule to the Regulations, and Regulation 6 (2) provides that:—

“(2) The Secretary shall issue to an approved applicant a certificate of registration in accordance with Form B which shall specify—

- 10 (a) all operations which may be conducted in the establishment to which it refers; and
- (b) the conditions and restrictions under which the registration is granted.”

8. A certificate dated the 9th September 1953 was issued to the Respondent in pursuance of Regulation 6 of the Regulations. Omitting formal parts, the certificate is in the following terms:—

P. 10, line 30-

P. 11, line 14.

“I HEREBY CERTIFY that subject to the conditions hereunder indicated the premises situated at Noarlunga in the State of South Australia have been registered in the name of Noarlunga Meat Limited of Noarlunga as an establishment in which the following operations may be conducted:—

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Slaughtering and freezing of mutton and/or lamb for export.
Subject to the following provisions:—

30

- (a) The frozen carcasses to be transferred to another approved registered establishment for storage.
- (b) Slaughtering to be limited to the freezing capacity of the chamber or chambers set aside exclusively for export operations.
- (c) The maintenance of satisfactory freezing temperatures in the chamber or chambers being used for the export operations.

and that the registered number of such establishment is 767.

This certificate is granted subject to the conditions that operations will be conducted in accordance with the requirements prescribed under the Customs Act, 1901-1951, and the Commerce (Trade Descriptions) Act, 1905-1950, and that it will be liable to be withdrawn in the event of a contravention of the Commerce (Meat Export) Regulations or other applicable Regulations in force for the time being.”

- 40 9. The Respondent conducts a slaughter house and abattoirs at Noarlunga in the State of South Australia. The Respondent's premises are outside the Metropolitan Abattoirs Area as defined in the State Act, and are about 30 miles from the Metropolitan Abattoirs at Gepps Cross near Adelaide. The Respondent has at all material times been licensed under the Local Government Act 1934-1952 of the State of South Australia and is therefore entitled to slaughter cattle, sheep and swine at its premises. If section 52a had not been inserted in the State Act, the Respondent would have been entitled to slaughter for export under the laws of the State of South Australia. On the 31st January 1953, the Respondent applied for a licence in pursuance of section 52a of the State Act and on the 9th July 1953, the Minister of Agriculture refused to

P. 7, lines 16-20.

P. 7, lines 25-28.

P. 7, lines 20-25.

P. 8, lines 1-3.

P. 8, lines 41-42. grant the Respondent a licence. The Respondent on the 27th November 1953 used its premises for the purpose of slaughtering stock for export, and it was subsequently charged with an offence against section 52a of the State Act.

P. 5.

10. The material sections of the Constitution are as follows:—

“51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:—

(i) Trade and commerce with other countries, and among the States:”

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

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

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.” 20

“109. 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.”

11. On the first question referred to in paragraph 3 hereof Dixon C.J., Fullagar and Kitto J.J. held that Part II of the Regulations was within the power conferred in terms by section 270 (1) (c) of the Customs Act. His Honour Mr. Justice Fullagar (with whose judgment Dixon C.J. and Kitto J. agreed) said:—“The Regulations purport to be made under the Customs Act and the Commerce (Trade Descriptions) Act. Only Part II of the Regulations is relevant in the present case, and Part II is, in my opinion, within the power conferred in terms by section 270 (1) (c) of the Customs Act. That provision, so far as material, authorizes the Governor-General to make regulations not inconsistent with the Act for prescribing ‘the conditions of preparation or manufacture for export of any articles used for food or drink by man’.” The other Justices who constituted the Court (McTiernan, Webb and Taylor J.J.) did not find it necessary to express an opinion on the point. 30 40

P. 29, lines 34-39.

P. 36, lines 39-41.

Pp. 16-19.

Pp. 29-32.

P. 36, lines 39-41.

12. On the second question referred to in paragraph 3 hereof Dixon C.J., McTiernan, Fullagar and Kitto J.J. held that section 270 of the Customs Act was within the legislative powers of the Commonwealth conferred by section 51 (1) of the Constitution and therefore valid. Webb and Taylor J.J. did not express any opinion on the matter.

Pp. 23-29.

13. On the third question referred to in paragraph 3 hereof Dixon C.J., Fullagar and Kitto J.J. held that section 52a of the State Act was inconsistent 50

with the Commonwealth Regulations and, therefore, invalid by reason of section 109 of the Constitution. The remaining Justices, McTiernan, Webb and Taylor J.J. decided that there was no such inconsistency. By virtue of section 23 of the Judiciary Act 1903-1950 of the Commonwealth of Australia the opinion of the Chief Justice prevailed.

Pp. 19-22.

Pp. 22-23.

Pp. 32-36.

14. The Justices of the High Court all applied the same test of inconsistency to the facts. Their Honours applied the test which was laid down by the High Court in *Clyde Engineering Co. v. Cowburn* (1926) 37 C.L.R. 466, and has since been followed by the Court in a long line of cases. That test is stated by Isaacs J. in *Clyde Engineering Co. v. Cowburn* at page 489 in the following terms:—

“If a competent Legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another Legislature assumes to enter to any extent upon the same field”.

15. Fullagar J., with whose judgment Dixon C.J. and Kitto J. agreed, considered it was impossible to deny that the Commonwealth Parliament in passing the Commonwealth Regulations had evinced an intention to “cover the field”, and that section 52a of the State Act prohibited the Respondent using its premises for the very purpose which the Commonwealth had authorised it to use the premises by granting it a certificate under the Commonwealth Regulations. Fullagar J. said:—

“Applying this test” (i.e., the “cover the field” test) “it appears to me 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. The extremely elaborate and detailed character of the regulations seems to me to be itself sufficient to compel this conclusion. Almost every requirement which occurs to one as a relevant requirement is prescribed. But this is not the only feature of the regulations which appears to me to compel the conclusion that there is inconsistency in section 52a of the South Australian Act. It is true that the regulations do not in express terms provide that it shall be lawful for any person who has obtained the registration of premises to slaughter stock for export on those premises. But Regulation 6 (2) requires the Secretary to issue to an approved applicant a certificate of registration, and that certificate must specify the operations which may be conducted in the establishment to which it refers. According to the certificate held by the defendant company the operations which it may conduct on the premises are, as has been said, the slaughtering and freezing of mutton and/or lamb for export. It is clearly contemplated that, when registration has been obtained, the operations referred to in the certificate may be lawfully conducted on the registered premises. Section 52a of the South Australian Act is a clear denial of any such permission.”

P. 28, lines 7-25.

16. McTiernan J. considered that the Commonwealth Regulations left it open to the States to determine who was a fit and proper person to conduct the class of slaughtering operations mentioned in section 52a of the State Act, what was a suitable place for an abattoirs for the conduct of such operations, and whether the premises were necessary to meet the requirements of the public,

P. 21, lines 10-15.

P. 22, lines 18-20. He did not think that the Commonwealth Regulations evinced an intention that the direction to register under regulation 5 was the only law to be obeyed by a person who conducts an establishment for the slaughter of meat for export. His Honour did, however, consider that a reservation ought to be made in respect of subsection (3) of section 52a. His Honour said, "If upon its true construction that provision 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, (1938) A.L.R. 97) would arise." In other words, His Honour 10 considered that it would then be a case of inconsistency.

Pp. 22-23. 17. Webb J. agreed with the reasons of Taylor J., and in addition he relied on Regulation 103 of the Commonwealth Regulations as indicating that the Regulations were not intended to be exhaustive and conclusive of State law. Regulations 103 is as follows:—

"103. Where by 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 20 partly, in lieu of examination and marking under these Regulations."

Pp. 32-36. 18. Taylor J. expressed the view that in the main the Regulations merely prescribe conditions designed to secure standards of purity, quality and condition at the point of export and that observance of the conditions would entitle an applicant to an export permit. His Honour said that the only sanction for the observance of the conditions, including that of registration, was that failure to observe them will or may result in a refusal of an export permit. His Honour considered that, if the view of the effect of the Regulations which he had taken was the correct one, the Regulations were not intended to supersede, *pro tanto*, all other existing requirements for the registration of 30 premises for the slaughter of meat.

Pp. 39-41. 19. By an Order-in-Council dated the 21st June 1955 special leave to appeal to Her Majesty in Council from the judgment of the High Court was granted "save as to any question as to the limits *inter se* of the constitutional powers of the Commonwealth and the State."

P. 42. 20. On the 13th October 1955 the Full High Court of Australia (Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor J.J.) heard an application by the Appellant for a certificate under section 74 of the Constitution certifying that the questions as to the limits *inter se* of the powers of the Commonwealth and the States involved in the decision of the High Court of 40 Australia were questions which ought to be determined by Her Majesty in Council. The Appellant asked for a certificate both in respect of the question referred to in paragraph 3 (b) hereof and also in respect of "all other questions as to limits *inter se* of the powers of the Commonwealth and the States arising in this cause".

P. 42, lines 28-29. 21. The application was heard by the Full High Court of Australia (Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor J.J.) on the 13th October 1955. At the hearing the Respondent and the Commonwealth of Australia as intervener submitted that both the meaning and application of section 109 of the Constitution were questions as to the limits *inter se* of 50

the constitutional powers of the Commonwealth and the States. The Respondent and the Commonwealth of Australia argued that the case was not one in which a certificate under section 74 of the Constitution should be given on any *inter se* question which arose in the case.

22. On the 2nd March 1956 the High Court delivered its decision on the application and unanimously held that the case was clearly not one in which the Court should grant a certificate under section 74 of the Constitution. P. 53.

23. Dixon, C.J., Williams, Webb and Fullagar J.J., having regard to the view which they took that the case was not one in which a certificate under section 74 should be granted, did not find it necessary to decide whether the meaning and application of section 109 of the Constitution was a question as to the limits *inter se* of the Constitutional powers of the Commonwealth and the States. Their Honours did, however, indicate that they considered that it was. McTiernan J. did not find it necessary to make any observation on this matter. Kitto J. held that the meaning of section 109 of the Constitution was an *inter se* question and he refused to grant a certificate under section 74 on this question as well as on the question whether the Commonwealth Regulations were within the legislative power of the Commonwealth. Taylor J. did not find it necessary to consider the matter, but he did say "there may be some force in the contention that the meaning of that section" (*i.e.*, section 109 of the Constitution) "itself raises an *inter se* question". Pp. 43-47.
P. 46.
Pp. 47-48.
Pp. 49-51.
Pp. 51-52.
P. 52, lines 2-4.

24. The Respondent contends that the meaning and application of section 109 of the Constitution is an *inter se* question. In the Respondent's respectful submission there are three steps involved in the decision that section 52a of the State Act is inconsistent with the Commonwealth Regulations, namely:—

- (a) section 51 (i) of the Constitution authorises the passing by the Commonwealth Parliament of a law prescribing completely and exhaustively what shall be the requirements with respect to the use of premises for the purposes of slaughtering stock for export;
- (b) the Commonwealth Regulations operating under section 270 of the Customs Act amount to a law which prescribes completely and exhaustively the requirements for the use of premises for the purposes of slaughtering stock for export; and
- (c) section 52a of the State Act is inconsistent with the Commonwealth Regulations because it is directed to and deals with the subject of the use of premises for the purposes of slaughtering stock for export.

25. The Respondent respectfully submits that in determining the scope and operation of the trade and commerce power (section 51 (i) of the Constitution) the three steps or matters cannot be dealt with in isolation. It is submitted that any decision as to the extent and operation of the trade and commerce power must to a great extent depend on and be controlled by the particular view which the Court takes of the meaning and application of section 109 of the Constitution.

26. It is respectfully submitted that the principle laid down by Your Lordships' Board in the Banking Case 1950 A.C. 235 at pp. 298 and 299, in the Nelungaloo Case, 1951 A.C. 34 at p. 53, and in Maslen's Case, 1952 A.C. 215 at p. 227, that an appellant may accept the determination of the High Court of Australia on an *inter se* question and appeal to Your Lordships' Board on questions involved in the case which are not *inter se* questions, should not

extend to cases where the legal conclusion is in fact single, although the steps in arriving at the conclusion are capable of being separately recognized. It is contended that where the determination of an *inter se* question is so intermingled with other questions which, if considered in isolation, may not be *inter se* questions, that an Appellant should not be permitted to notionally distinguish the steps in reasoning which are *inter se* questions, except the High Court's determination on these questions and appeal to Your Lordships' Board in respect of the other questions, as if in themselves they were independent and substantial questions.

27. The Respondent further respectfully submits that a question as to the meaning or interpretation of section 109 of the Constitution is a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States. The determination of the question involves a decision as to the extent to which State laws are to be rendered inoperative by Commonwealth laws dealing with the same subject matter. A decision as to the meaning of section 109 has a direct bearing in fixing the boundary between the paramount legislative powers of the Commonwealth and the absolute legislative powers of the State. In this connection the Respondent respectively refers to and relies upon the passage from the Judgment of Dixon C.J., Williams, Webb and Fullagar J.J. in which the learned Justices stated as follows:—

P. 46, lines 25-36.

“It is the first time, so far as is known, that this argument has been advanced. What is said is that the meaning and general operation assigned to section 109 determines the extent to which all legislative powers exercisable by the Commonwealth are paramount over the legislative powers of the States. Correspondingly it determines the extent to which a concurrent legislative power of the States is subordinate and liable to be defeated by an exercise of Commonwealth power. This means that the doctrine explained in *Ex parte Nelson No. 2*, 1929 42 C.L.R. 258, at pp. 270-2, and in *Nelungaloo Pty. Ltd. v. Commonwealth*, 1952 85 C.L.R. at pp. 562-4, is given a new application, a general application to all paramount concurrent powers of the Commonwealth alike. It means that a question as to the meaning and operation of section 109 is a question within section 74.”

P. 50, lines 20-34.

The Respondent also respectfully refers to and relies upon the following passage from the Judgment of Kitto J.:—

“*Inter se* questions comprise all questions *as to* the constitutional limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States. Usually an *inter se* question is such for the reason I have indicated in relation to questions of the validity of Commonwealth laws, namely that the answer will determine whether a State law inconsistent with a particular existing Commonwealth law is (or if it existed would be) on one side or the other side of the dividing line between the State's absolute power and the Commonwealth's power to override State legislation. That is a question to be answered by applying whatever is considered to be the correct test of inconsistency. But when a Court is called upon to decide what is the correct test of inconsistency, the answer given must have a direct bearing upon every case relating to the location of the boundary between State absolute power and Commonwealth overriding power. Why is not the question in such a case, equally with the question in

the more common type of case, a question 'as to' the limits *inter se* of Commonwealth and State powers?"

28. The Respondent further respectfully submits that a question as to meaning and application of section 109 of the Constitution is a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States. A determination that a law of a State is inconsistent with a law of the Commonwealth is a single legal conclusion which involves a decision as to the correct meaning of section 109 of the Constitution and the application of that meaning to the particular laws under consideration. The conclusion cannot
 10 logically be divided into two completely independent questions, and, therefore, even if when considered in isolation a question as to the application of a given test of inconsistency to particular laws might be regarded as not being an *inter se* question, the two matters cannot be separated in the application of such a fundamental constitutional doctrine as is evidenced by section 74 of the Constitution. It is respectfully submitted, therefore, that the principle laid down by Your Lordships' Board which is referred to in paragraph 26 hereof should not extend so as to permit the Appellant to accept the decision of the High Court as to the meaning of section 109 of the Constitution and proceed with an appeal on the matter of the application of that meaning to the
 20 particular laws.

29. It is further respectfully submitted that the meaning applied by the High Court to section 109 of the Constitution is the correct interpretation of the section. There was no divergence of opinion amongst the six Justices as to the interpretation of the section. Indeed, the Appellant in the High Court argued his case on the basis that the "cover the field" test was the correct interpretation of the section. The test which the Justices applied is one which was laid down by the High Court as long ago as 1926 in *Clyde Engineering Co. Ltd. v. Cowburn*, 37 C.L.R. 466, and it has since been followed by the High Court in a long line of cases. The Respondent respectfully refers to and relies
 30 upon the statement of Isaacs J. in the *Clyde Engineering Company Case* set out in paragraph 14 hereof and to the following passage from the Judgment of Dixon J. (as he then was) in *Ex parte McLean*, 43 C.L.R. 472 at p. 483:—

"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
 40 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
 50 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."

P. 27, line 39-

P. 28, line 6.

30. In the Respondent's respectful submission the decision of Dixon C.J., Fullagar and Kitto J.J. that section 52a is inconsistent with the Commonwealth Regulations is correct. The Respondent respectfully submits that the decision on this aspect of the case is merely one as to whether the Commonwealth Regulations evince an intention to prescribe completely and exhaustively the requirements that are to be observed for the use of premises for the slaughter of stock for export, and whether, if the Regulations do evince that intention, section 52a of the State Act is inconsistent with the Regulations. The Respondent further submits that, even if a test of inconsistency narrower than the "cover the field" test is adopted, there is inconsistency between the Commonwealth Regulations which set out the standards and provide for the registration of premises at which the operation of slaughtering for export may be conducted, and a section of a State Act which forbids a person whose premises are so licensed to use his premises for the very purpose for which the Commonwealth has licensed the premises. 10

31. The Respondent respectfully submits that the decision has no direct application in so far as other State legislation is concerned, and it is irrelevant to consider its affect on other State legislation. In this regard, the Respondent would respectfully refer to and rely upon the remarks of Dixon C.J., Williams, Webb and Fullagar J.J. as follows:— 20

P. 45, lines 27-38.

"It may be observed that in support of the application for a certificate an exaggerated view of the application of the decision was presented to us. Indeed it was even suggested that as a necessary consequence the commerce power would extend over all production, whenever the goods were intended to go into the flow of interstate or overseas commerce. As to this it is enough to refer to the express limitation which Fullagar J. made in the concluding paragraph of his judgment. In the same way an attempt was made to give to the application made in this case of the principles of federal supremacy a wider significance than in fact it possesses. This is in truth a very ordinary case relating to a particular application of the long settled doctrine of this Court with reference to the operation of State and federal laws on the same subject." 30

P. 32, lines 16-18.

P. 27, lines 5-18.

32. The Respondent respectfully refers to and relies upon the passage from the judgment of Fullagar J. quoted in paragraph 15 hereof and also to the following passage from the judgment of Fullagar J.:—

"The above summary, which gives only in bare outline the effect of a large number of regulations, is sufficient to show that they 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 those 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 40 50

been registered under those regulations is plainly inconsistent with those regulations.”

33. In the Respondent’s respectful submission McTiernan J. was wrong in his opinion 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 State 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. The Commonwealth Regulations do directly
 10 prescribe for these matters. Regulation 6 provides that there shall be issued to an “approved applicant” a certificate of registration. Regulation 7 prescribes that an application for registration shall be accompanied by a clear photograph of the site of the establishment showing its relation to the land or property adjoining the establishment, and Regulation 9 provides that where it is intended to erect premises to be registered under the Regulations, registra-
 20 tion of the establishment shall not be granted unless the Secretary of the Department of Commerce and Agriculture approves of the site prior to the erection of the premises. The Commonwealth Regulations do not entitle a person whose premises comply with the standard requirements set out therein to a certificate, and one of the matters which the Secretary of the Department
 of Commerce and Agriculture would be entitled to take into account in considering an application would be the requirements of the public. In this regard the Respondent respectfully refers to and relies upon the passage from the Judgment of Fullagar J. as follows:—

“It was said that the purpose and object of section 52a was
 different from the purpose and object of the Commonwealth Regula- P. 28, lines 37-45.
 tions. It was said that section 52a was not concerned with the purity and quality of meat intended for export but was concerned with such matters as the suitability of the proprietor of the premises, the
 30 suitability of the site and similar matters of local concern. As to this there are two things to be said. In the first place the suitability of the applicant and the suitability of the site are plainly matters with which the Regulations are concerned. In the second place, the discretion given to the Minister by section 52a is absolute.”

34. The Respondent further respectfully submits that Taylor J. has taken too narrow a view of the scope and extent of the Commonwealth Regulations in holding that, in the main, the Regulations merely prescribe conditions designed to secure standards of purity, quality and condition at the point of export and that these are conditions which, if observed, would entitled an applicant to an
 40 export permit. Pp. 32-36.

35. The Respondent further respectfully submits that Webb J. is wrong in his view that Regulation 103, which authorises the adoption of State inspection and approval of meat for export and consequential marking of such meat, indicates that the Commonwealth Regulations are not intended to be exhaustive and exclusive of State law. The Respondent respectfully refers to and relies on the view taken by Fullagar J. as to the effect of Regulation 103 as
 follows:— Pp. 22-23. P. 29, lines 19-28.

“Indeed, I am not at all sure that it does not indicate a contrary intention, because it applies only where the Minister is satisfied with
 50 regard to State inspection and approval, and the intention seems to be

that, in the absence of satisfaction and direction on the part of the Minister, the Commonwealth system is to supersede any State system. 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 any intention that the export of goods which have received a Commonwealth export permit may be prohibited by a State."

36. The Respondent further respectfully submits that the Regulations are validly made in exercise of the power conferred by section 270 (1) (c) of the Customs Act 1901-1951 and that they are a law prescribing "the conditions of preparation or manufacture, for export of any articles used for food or drink by man." 10

REASONS.

- (1) BECAUSE the decision as to the meaning and application of section 109 of the Commonwealth of Australia Constitution is a decision upon a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the States and section 74 of the Commonwealth of Australia Constitution would on its true construction operate to exclude this question from the jurisdiction of Your Lordships' Board in the absence of a certificate from the High Court of Australia which certificate has been asked for and refused. 20
- (2) BECAUSE the decision of the High Court of Australia rightly followed and applied a long line of decisions as to the meaning of section 109 of the Commonwealth of Australia Constitution.
- (3) BECAUSE the decision of the High Court of Australia that section 52a of the Metropolitan and Export Abattoirs Act 1936-1948 is inconsistent with the Commerce (Meat Export) Regulations and therefore invalid by reason of section 109 of the Constitution, is correct.
- (4) BECAUSE the decision of the High Court of Australia that the Commerce (Meat Export) Regulations are a valid exercise of the powers conferred by the Customs Act 1901-1951 is correct. 30

E. W. PALMER, Counsel for Respondent.

