[HIGH COURT OF AUSTRALIA.]

CROWE AND OTHERS . . . . PLAINTIFFS;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

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ADELAIDE, *Sept.* 17, 18.

SYDNEY, *Oct.* 17.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Constitutional Law (*Cth.*) — *Whether preference to State by law of trade or commerce — Delegation of legislative power to Governor-General — Trade and commerce with other countries — Legislation with extra-territorial operation — Regulations giving full control to board — Validity — The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (I.), (XXXIX.), 99 — *Dried Fruits Export Control Act* 1924-1935 (*No.* 40 *of* 1924 — *No.* 3 *of* 1935) — *Dried Fruits Export Control* (*Licences*) *Regulations* (*S.R.* 1935, *No.* 30).

Sec. 4 of the *Dried Fruits Export Control Act* 1924-1935 constitutes a Dried Fruits Control Board and provides that the board shall consist of (amongst others) two representatives elected by growers in Victoria and one representative elected by growers in each of the States of New South Wales, South Australia and Western Australia.

Held that this section does not contravene sec. 99 of the Constitution.

Nature of "preference" prohibited by sec. 99 discussed.

Sec. 13 of the *Dried Fruits Export Control Act* 1924-1935 provides: "For the purpose of enabling the board effectively to control the export and the sale and distribution after export of Australian dried fruits, the Governor-General may by proclamation prohibit the export from the Commonwealth of any dried fruits except in accordance with a licence issued by the Minister subject to such conditions and restrictions as are prescribed after recommendation to the Minister by the board."

Held that this section contains no improper delegation of the legislative powers of the Commonwealth.

Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. *Dignan*, (1931) 46 C.L.R. 73, applied.

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The *Dried Fruits Export Control Act* and regulations made thereunder purport to control the distribution overseas of dried fruits exported from Australia and to penalise certain acts that may be done outside Australia.

Held that the Act is authorized by sec. 51 (I.) of the Constitution, and that neither the Act nor the regulations are invalid on the ground that they have extra-territorial operation.

Croft v. *Dunphy*, (1933) A.C. 156, applied.

The regulations give the board a control which enables it to govern in detail every dealing with dried fruits from shipment to final sale, and to do so by means of an uncontrolled discretion.

Held that the regulations are authorized by the Act.

DEMURRER.

William Joseph Crowe and others brought an action in the High Court against the Commonwealth and the Dried Fruits Control Board.

The statement of claim was, in substance, as follows :—

1. The plaintiffs are fruit merchants, residing and carrying on their respective businesses in the State of South Australia and each of them has so carried on the like business in the said State for a number of years.

2. In the course of their respective businesses the plaintiffs (and each of them) engage extensively in the acquisition (by purchase or otherwise), and sale, of " dried fruits " (within the meaning of the Commonwealth *Dried Fruits Export Control Act* 1924-1935). A large proportion of the dried fruits sold by each of the plaintiffs is exported from the Commonwealth, and from the year 1925 to the year 1928 (by the terms of the South Australian *Dried Fruits Act* 1924 (if valid)) and since about the month of September 1928 (by the terms of the Commonwealth *Dried Fruits Act* 1928 (if valid)) the plaintiffs, and each of them, have, and has, been required to export from the Commonwealth a large proportion of such dried fruits. Such proportion varies from time to time but by a determination made by the Minister of State for Commerce dated 20th February 1935 and made in respect of the 1935 dried fruit crop the respective proportions so required to be exported are as follows : currants 87½ per cent, sultanas 90 per cent, lexias 75 per cent.

3. The principal markets available for the sale of dried fruits exported from the Commonwealth are those of the United Kingdom, Canada and New Zealand, and almost the whole of the dried fruits of each of the plaintiffs so exported by them respectively is disposed of by them on one or the other of such markets. By expending large sums of money and much care and attention and with the aid of brokers and agents in one or the other or all of the said countries, and in Australia, each of the plaintiffs has built up a large connection in one or the other or all of the said markets, and there is now a steady demand from, and in, the said countries for the dried fruits of each of the plaintiffs.

4. In 1924 the Parliament of the Commonwealth of Australia passed the *Dried Fruits Export Control Act* 1924 (secs. 1, 2, 5 and 29 of which commenced on the 20th October 1924 and the remainder of which commenced on the date fixed for that purpose by proclamation, namely 6th February 1925). The said Act was amended by the *Dried Fruits Export Control Act* 1930 and further amended by the *Dried Fruits Export Control Act* 1935; and the principal Act, as amended, is now cited as the *Dried Fruits Export Control Act* 1924-1935 (hereinafter referred to as "the Act"). Regulations have from time to time been made by the Governor-General under the Act. The material regulations so made are the *Dried Fruits Export Control* (*Licences*) *Regulations* (S.R. 1935, No. 30).

5. Since 6th February 1925 the defendant board has controlled the export, and the sale and distribution after export, of all the dried fruits of the respective plaintiffs exported by them from the Commonwealth or sold or distributed by them after export, and in particular:—(1) The board has forbidden or prevented and still forbids or prevents each of the plaintiffs (even though they hold export licences under the Act and regulations) from booking orders for the sale of, or selling, their dried fruits in New Zealand or from exporting their dried fruits to New Zealand pursuant to contracts for the sale thereof made by the plaintiffs (whether through brokers in Australia or New Zealand or without the intervention of brokers) or from exporting their dried fruits to New Zealand on consignment for the purpose of selling the same or having the same

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sold there on their behalf. The sole rights of booking orders for the sale of Australian dried fruits in New Zealand were and are granted by the board to two Australian dried fruits merchants (not being any of the plaintiffs) and all such orders so booked are in all respects subject to the approval of the board and are made at such prices, and upon such terms and conditions, as the board in its absolute discretion from time to time determines. The orders so booked are lodged with the board, which allocates the same, in its absolute discretion, amongst the exporters of dried fruits from Australia who hold export licences. Any exporter to whom any order is allocated is required to pay a commission, or brokerage, to the two, or one or the other, of the said merchants on any orders so allocated to them by the board. The board will not allocate to any person who is not the holder of an export licence any orders for the sale or disposal of dried fruits in New Zealand, and any person who does not hold an export licence is unable to dispose of any dried fruit in New Zealand by any means whatsoever. (2) The board has forbidden or prevented and still forbids or prevents the plaintiffs (whether or not they are for the time being holding export licences) from booking orders for, or otherwise entering into forward contracts for the sale of, their dried fruits in the United Kingdom or from exporting their dried fruits to the United Kingdom pursuant to contracts for the sale thereof (whether made to merchants in the United Kingdom through the intervention of brokers there or in Australia or without the intervention of brokers). The plaintiffs (if they desire to export dried fruit to the United Kingdom, are required to consign the whole of their dried fruits intended for sale there to the United Kingdom, where, on arrival, the value of such dried fruits is appraised by the London agency (referred to in sec. 11 of the Act) or other the officer or agent of the board, and the plaintiffs are permitted to sell only at the price so appraised and upon such terms and conditions as are fixed by the board, the London agency or other the officer or agent of the board. (3) The board has threatened to forbid (and unless restrained by the order of this honorable Court) will forbid or prevent the plaintiffs from selling, booking orders for or consigning their dried fruits to Canada except

in accordance with some arrangement which the board proposes to make which will ensure what the board claims to be an equitable distribution of dried fruits amongst the various exporters of dried fruits from Australia and the board has intimated that if and when such arrangement is made or brought into force the issue of export licences will be along lines which will involve the despatch of a certain proportion of the dried fruits held by the individual exporters to the United Kingdom, thus limiting the licences for the proportion of dried fruits of each individual exporter which may be shipped to the Canadian market. (4) The board refuses to allow the plaintiffs or any of them to reserve shipping space for the export of any dried fruits to Canada unless and until the contracts in respect thereof have been approved by the board and then only by such shipping companies as the board approves. (5) The board from time to time limits and restricts the quantity of dried fruits which the plaintiffs can export in any month from Australia. (6) The board from time to time fixes the prices at which the plaintiffs are permitted to sell their dried fruits in Canada, and will not permit the export of dried fruits to Canada, where sales have been made at less than the prices so fixed. The last notification of prices so fixed received by the plaintiffs was dated 9th March 1935 and an intimation was therein given that the prices so fixed could be varied by the board without notice. (7) The board by circular dated 9th March 1935 notified the plaintiffs that the general conditions under which export licences would be issued as from the said date as regards dried fruits to be exported to Canada would include the following :— (*a*) The minimum shipment permitted to any one buyer (in Canada) would be 10 tons of sultanas and/or currants and/or lexias. (*b*) Licences would only be issued in respect of dried fruits sold to buyers (in Canada) who had provided an irrevocable letter of credit on any bank providing for the payment of the fruit to be made to shippers by draft under such letter of credit and that any such draft should have a currency of not more than 90 days sight on London. (*c*) All quotations for the sale of dried fruits in Canada must be made "f.o.b. Australian ports" and freight must be payable by the buyers (in Canada) at destination. (*d*) The contract should be subject to the Canadian buyer paying insurance and it should

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be the buyer's responsibility (as regards exchange) to provide the money in London. (*e*) No licence would be issued unless a letter of credit provided by the Canadian purchaser or the Commonwealth Bank of Australia or other bank approved by the board had been produced to the board. (*f*) All orders for dried fruits from purchasers in Canada must be submitted for approval of the board immediately on receipt thereof by the plaintiffs or their agents. (*g*) No licence would be issued in respect of dried fruits shipped to Canada directly or indirectly on consignment and the plaintiffs and other exporters must be prepared to furnish a certificate in writing as to the bona fide nature of any sale reported to the board. (8) The board fixes the maximum brokerage which exporters are allowed to pay in respect of any dried fruits exported by them, whether the same is payable to brokers in Australia or elsewhere or partly in Australia and partly elsewhere, and no dried fruits can be exported by the plaintiffs if the total brokerage payable by them whether in Australia or elsewhere exceeds the said amount so fixed as aforesaid; and the plaintiffs and other exporters are required to certify to the board from time to time the total brokerage allowed on the sale of any parcel of dried fruits so exported and that no rebate, commission or allowance has been granted to the purchaser or to any person connected with the sale of such dried fruit, other than the brokerage so permitted by the board. (9) The board has exercised against the plaintiffs (whilst they were the holders of export licences) all the powers purported to be or have been conferred on it by the Act and/or by the regulations in operation up to 8th April 1935; and the board intends and threatens to exercise against the plaintiffs (if they hold export licences) all the powers purported to be conferred on the board by the Act and the regulations and to refuse to permit them or any of them to export any dried fruits unless and until they hold export licences under the Act and regulations.

6. On or about 4th April 1935 the board sent to each of the plaintiffs a copy of the regulations and a form of application for the issue of a general licence (being Form A of the schedule to the regulations) and intimated that before the plaintiffs would be allowed to export any dried fruits after 4th April 1935 they and

each of them would be required to hold a general licence (being a licence in the form of Form B of the schedule to the regulations).

7. Under the general licence (if valid) each of the plaintiffs would be required (if they were the holders of such licences) to comply with all the provisions of the Act and regulations and all the terms and conditions of the licence) and in particular the terms and conditions set out in reg. 7 of the regulations) and each of the plaintiffs would be subject to all the powers of control purported to be conferred by the Act and/or regulations on the board (including not only control over export but also control over the sale and distribution after export) of their respective dried fruits.

8. By letter dated 24th April 1935 from the plaintiffs' solicitors to the board, the plaintiffs objected that the Act and regulations were invalid and intimated that they were not prepared to apply for licences thereunder.

9. The plaintiffs are and each of them is unable (without an export licence) to export their dried fruits from the Commonwealth or to have allotted to them by the board any orders for the supply of fruit to New Zealand and generally they are unable to carry on their said respective businesses. They (and each of them) have (and has) in fact tendered dried fruits to shipping agents for export from the Commonwealth but such shipping agents have refused to accept such dried fruits for shipment unless and until the plaintiffs obtain a licence, and the board by its officers or representatives has refused to allow the export of any dried fruits by the plaintiffs unless and until they hold an export licence.

10. The plaintiffs contend that they should not be required to take out licences and that the defendants have no power and should not insist on their taking out licences (or alternatively taking out licences which are subject to the conditions and restrictions set out in reg. 7 of the regulations) before being allowed to export their dried fruits from the Commonwealth and that shipping companies should not be required by the defendants to refuse to carry the plaintiffs' dried fruits as aforesaid and that the board or its representatives should not prevent the plaintiffs from exporting their dried fruits unless and until they hold an export licence.

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11. The plaintiffs fear that unless restrained by the declaration, order or injunction of this honorable Court, the defendants or the Minister of State for Commerce or the London agency of the board or officers or representatives of the defendants will continue to act as aforesaid and prevent the plaintiffs from carrying on their said businesses. The plaintiffs' businesses as dried fruits merchants and exporters are being greatly interfered with and their dealings with merchants, brokers and agents in other countries impeded and they are unable to sell their dried fruits intended for export, either before or after the same have been exported, except upon taking out export licences and then only in the circumstances permitted by the board and subject as aforesaid. The plaintiffs further fear that, unless restrained by the declaration, order or injunction of this honorable Court, the board will further extend its control over the export or sale or distribution after export of the dried fruits of each of the plaintiffs.

12. The plaintiffs claim:—(1) The following declarations:—(*a*) That the *Dried Fruits Export Control Act* 1924-1935, or some part or parts thereof, is or are *ultra vires* the Parliament of the Commonwealth of Australia and invalid; (*b*) alternatively to (*a*), that it is not competent for the Parliament of the Commonwealth to control or authorize the defendant board to control the export or the sale or distribution after export of the plaintiffs' dried fruits in the manner provided for by the said Act; (*c*) alternatively to (*a*) and (*b*), that the defendant board is invalidly constituted by the said Act in that its constitution is a contravention of sec. 99 or sec. 117 of the Constitution; and (there being no validly constituted board for the purposes of exercising the control intended to be exercised) the whole Act is invalid or unconstitutional and the proclamation of the Governor-General hereinafter referred to is of no effect, and that it is not competent to require the plaintiffs or any of them to apply for or hold export licences before being allowed to export their respective dried fruits from the Commonwealth; (*d*) that the regulations purporting to have been made under the said Act (S.R. 1935, No. 30), are not authorized by the said Act and/or are inconsistent with the said Act and/or are invalid; (*e*) alternatively to (*d*), that there has been no valid prescribing of the conditions and

restrictions to which export licences are to be subject, and in particular and without limiting the foregoing that it is not a valid exercise of the power of prescribing the said conditions and restrictions (purported to be conferred by sec. 13 of the said Act) to require (as the said regulations in effect purport to require) that in all things relating to the export or the sale or distribution after export of dried fruits the holders of export licences shall be subject entirely to the directions of the said board, or its London agency or other its officers or representatives, or that they shall be required to comply with all regulations and such other conditions as are from time to time prescribed; (*f*) that all the forms in the schedule to the said regulations, all licences and certificates of authority to export dried fruits issued by the defendant board, or by it required to be obtained by the plaintiffs and each of them before they are allowed to export any dried fruit from the Commonwealth, all the conditions and restrictions to which such licences are made subject by the said regulations, and by the form of licence appearing in the schedule to the said regulations, and issued by the defendant board, or required by it to be taken out by the plaintiffs, and each of them, before exporting or being allowed to export dried fruits from the Commonwealth, and all acts, matters or things done, or purporting to be done, or threatened or intended to be done by the defendant board, under or pursuant to the said Act and/or regulations, and/or in and about the export, or the sale or distribution after export, or the refusal to permit the export, of dried fruits from Australia, or, alternatively, some one or more, or part or parts of the said forms, licences, conditions and restrictions, acts, matters or things and/or each of them are, or is, not authorized by the said Act or regulations and/or are inconsistent with the said Act or regulations and/or are invalid; (*g*) that the proclamation dated 25th February 1925 and published in the Commonwealth *Gazette* of 26th February 1925 whereby the Governor-General purported to prohibit the export from the Commonwealth of any dried fruits except in accordance with a licence issued by the Minister of State for Commerce should not be effective, unless and until lawful provision has been made for the issue of licences to export dried fruits from the Commonwealth and/or valid and lawful conditions

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and restrictions to which such licences should be subject have been prescribed. (2) The following orders or injunctions:—(*a*) An order or injunction restraining the defendant board from interfering with, or preventing the plaintiffs or any of them from exporting dried fruits from the Commonwealth; (*b*) an order or injunction restraining the defendant board from interfering with the business of the plaintiffs or any of them, (i.) by refusing to allow the plaintiffs or any of them to export dried fruit from the Commonwealth except under a licence or certificate of authority to export; (ii.) by preventing the plaintiffs and each of them from selling or distributing their respective dried fruits after export except at the prices and/or on the terms and conditions fixed by the defendant board, its London agency or other its agents, officers or servants: (iii.) by refusing to allow the plaintiffs or any of them to book orders for, or otherwise sell, their dried fruits, in New Zealand or elsewhere; or (iv.) otherwise howsoever. (3) Such further or other or consequential order or relief as the Court may see fit to grant.

The defendants demurred to the statement of claim and delivered a defence thereto.

The demurrer was substantially as follows:—The defendants demur to the whole of the statement of claim and say that the facts alleged therein do not show any cause of action. A ground in law for the demurrer is that the *Dried Fruits Export Control Act* 1924-1935 and the *Dried Fruits Export Control (Licences) Regulations* made by Statutory Rules 1935, No. 30, are valid laws of the Commonwealth of Australia and the acts which the defendants are alleged to have done were authorized by the said Act or regulations validly made thereunder.

It was ordered that the issues of law be heard and determined before the issues of fact, and the demurrer was entered for argument before the Full Court.

Cleland K.C. and *Ward*, for the plaintiffs. The Act and the regulations are invalid because they purport to have extra-territorial operation. Where power to legislate extra-territorially is intended, the Constitution expressly grants it, as in clause 5 and sec. 51 (x.). The dried fruits export control legislation is not authorized by sec.

51 (I.), which empowers Parliament to make laws as to such matters as trade arrangements and treaties with other countries. The words are " with other countries," not " in other countries " (*Toronto Electric Commissioners* v. *Snider* (1)). The legislation must be general regulation, not particular regulation of particular transactions of particular individuals (*Attorney-General for Canada* v. *Attorney-General for Alberta* (2)). Whatever the meaning of sec. 51 (I.), international commerce begins with the first act of export and ends with the conclusion of the export voyage. The legislative control of the Commonwealth ceases as soon as the goods are in the other country. Extra-territorial legislation is not justified unless necessarily implied by powers conferred (*Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (3); *Delaney* v. *Great Western Milling Co. Ltd.* (4); *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* [*No.* 3] (5)). Sec. 13 of the *Dried Fruits Export Control Act* 1924-1935 at least is invalid to the extent that it authorizes regulations to control sale and distribution after export. As soon as the act of export ceases, the international character of the transaction is lost, and it becomes subject to the laws of the other country, not of the Commonwealth. [Counsel also referred to *Robtelmes* v. *Brenan* (6); *Hughes* v. *Munro* (7); *British Coal Corporation* v. *The King* (8).] Assuming the Act not to be invalid on the ground of extra-territoriality, sec. 13 contains an improper delegation of the legislative power of the Commonwealth. Parliament cannot pass a short general Act conferring any power on any person, and transfer of one power only does not better the matter (*Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (9); *Roche* v. *Kronheimer* (10)). The limit to the power is that Parliament can transfer only such of its powers as are in respect of matters incidental to the execution of its own formulated legislative action—powers that are administrative and not legislative

(1) (1925) A.C. 396, at p. 409.
(2) (1916) 1 A.C. 588, at p. 596.
(3) (1913) 16 C.L.R. 664, at pp. 676, 678, 690, 703.
(4) (1916) 22 C.L.R. 150, at pp. 165, 167.
(5) (1920) 28 C.L.R. 495, at p. 502.
(6) (1906) 4 C.L.R. 395, at p. 404.
(7) (1909) 9 C.L.R. 289, at pp. 294, 297.
(8) (1935) 51 T.L.R. 508.
(9) (1931) 46 C.L.R. 73.
(10) (1921) 29 C.L.R. 329.

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(*Baxter* v. *Ah Way* (1)). If Parliament can delegate the powers it has purported to delegate here, there is nothing it cannot delegate. Here the transfer of legislative power is, in effect, to the board. The Governor-General has not prescribed conditions and restrictions. All conditions and restrictions are to be fixed by the board. If Parliament has power to transfer legislative powers, it can transfer to the Governor-General only (*Roche* v. *Kronheimer* (2) ; *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3) ; *In re Initiative and Referendum Act* (4) ; *Geraghty* v. *Porter* (5)). Sec. 4 of the Act contravenes sec. 99 of the Constitution. The Commonwealth Parliament has no power to exclude certain States from representation on the Dried Fruits Board or to give one State double the representation of others (*R.* v. *Barger* ; *The Commonwealth* v. *McKay* (6) ; *Cameron* v. *Deputy Federal Commissioner of Taxation* (7) ; *James* v. *The Commonwealth* (8)). Sec. 13 of the Act is not a regulation of trade or commerce at all and is accordingly open to objection. Sec. 13 is so wide that its very width prevents it from being a regulation of trade or commerce. The regulations are invalid on the ground that they exceed the powers conferred by the Act. Under sec. 13 the board is intended primarily to recommend and, having recommended, to police. The regulations themselves contain no conditions and restrictions but merely say that these shall be such as the board shall fix (*Cameron* v. *Deputy Federal Commissioner of Taxation* (*Tas.*) (9) ; *Melbourne Corporation* v. *Barry* (10)).

Ligertwood K.C. (with him *Brebner*), for the Commonwealth. Sec. 4, by merely constituting a board, gives no preference in trade, commerce or revenue. The board, when constituted, must obey sec. 99 of the Constitution. No State has any controlling representation on the board. Alternatively, the board is constituted under sec. 51 (XXXIX.) of the Constitution, not under sec. 51 (I.), for

(1) (1909) 8 C.L.R. 626.
(2) (1921) 29 C.L.R. 329.
(3) (1931) 46 C.L.R. 73.
(4) (1919) A.C. 935.
(5) (1917) N.Z.L.R. 554.
(6) (1908) 6 C.L.R. 41, at pp. 105, 110, 130-133.
(7) (1923) 32 C.L.R. 68, at pp. 72, 79, 80.
(8) (1928) 41 C.L.R. 442, at pp. 455, 462, 464.
(9) (1924) 34 C.L.R. 8.
(10) (1932) 31 C.L.R. 174, at p. 208.

the constitution of corporate bodies comes within the incidental power. On the question of extra-territoriality the only relevant inquiry is whether the Act is a law with respect to trade or commerce with other countries. If so, it is good. The regulations are valid. Under sec. 13 the export and the sale and distribution after export may be prohibited except in accordance with a licence. There is no limit to the conditions of licence which may be prescribed, and there is nothing to prohibit regulations which make everything subject to the one condition that the licensee shall do nothing without the approval of the board.

Sir *John Latham* K.C. (with him *Mulvany*), for the defendant board. There is no infringement of the Constitution. Sec. 99 of the Constitution forbids a preference as to trade or commerce, but a law of trade or commerce here means a law which deals with acts in trade or commerce. In *James* v. *The Commonwealth* (1) there was a direct interference in commercial dealings. Sec. 99 does not prohibit preference on a matter which is merely incidental to trade or commerce (*Pennsylvania* v. *Wheeling and Belmont Bridge Co.* (2)). Sec. 99 is limited in its effect to laws which depend for their validity on sec. 51 (I.). This legislation depends on sec. 51 (XXXIX.), for power to establish a corporation must be found there (*Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (3) ; *M'Culloch* v. *Maryland* (4)). If, then, there be any preference here, it is not a preference under sec. 99, for it is not in a regulation of trade or commerce. The Act has no provisions which operate extra-territorially, though the regulations do so operate by reason of the conditions attached to licences coupled with the penal provisions of sec. 15. But this does not avoid either the Act or the regulations (*Croft* v. *Dunphy* (5) ; *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (6) ; *Trustees, Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (7)). *Macleod* v. *Attorney-General for New South Wales* (8) was decided on

(1) (1928) 41 C.L.R. 442.
(2) (1855) 59 U.S. 433 ; 15 Law Ed. 435.
(3) (1908) 6 C.L.R. 309, at pp. 361, 375.
(4) (1819) 17 U.S. 315 ; 4 Law Ed. 579.
(5) (1933) A.C. 156, at p. 163.
(6) (1913) 16 C.L.R., at p. 703.
(7) (1933) 49 C.L.R. 220, at pp. 232 et seq.
(8) (1891) A.C. 455.

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construction. Numerous paragraphs of sec. 51 of the Constitution obviously imply power to legislate extra-territorially, e.g., borrowing powers, naval and military defence, fisheries, immigration and emigration, external affairs and relations with islands of the Pacific. Bargaining, sale and delivery are all within " trade and commerce," and " trade and commerce with other countries " necessarily involves extra-territorial acts. The regulations are valid. There is a complete system of control and, if the board abuses its power, there is a remedy. The purpose of the regulations is found in the opening words of sec. 13. It begins with a prohibition, and the very object of the exception is to enable the board to regulate the conditions and restrictions to which licences shall be subject. This is what has been done. As to power to make regulations, see *Ex parte Cottman*; *In re McKinnon* (1).

Cleland K.C., in reply.

Cur. adv. vult.

Oct. 17. The following written judgments were delivered :—

RICH J. The first and, to my mind, the most serious question raised by this demurrer is whether the constitution of the board offends against sec. 99 of the Commonwealth Constitution. The board is constituted by three members appointed by the Governor-General in Council and five elected members. Of these elected members, one is chosen by the growers of each of the States of New South Wales, South Australia and Western Australia, and two are chosen by the growers of the State of Victoria ; none is chosen by the growers of the States of Queensland and Tasmania. The statute is passed under the trade and commerce power, and the question is whether the lack of uniformity in the basis of election works a preference by means of a law or regulation of commerce. An attempt has been made on the part of the defendants to attribute the constitution of the board to an exercise of the incidental power of legislation, to the exclusion of the commerce power. In the view I take it is unnecessary to deal with this argument, but I should

(1) (1935) 35 S.R. (N.S.W.) 7 ; 52 W.N. (N.S.W.) 9.

not like it to be supposed that it unduly impressed me. In my opinion the basis adopted for selecting the members of the board does not amount to a preference within the meaning of sec. 99. It is neither easy nor safe to attempt a definition of preference. Commercial preference may be accomplished by means which are indirect and ingenious, and it is much easier to say whether a particular thing is or is not a preference than to define the characteristics which a preference must possess. In this case it appears to me that the constitution of the board does not give to the growers of the States who are entitled to elect members any tangible advantage of a commercial character or any legal means of securing it. The adoption of State boundaries appears to be merely a convenient method of defining the territorial limits of the electorates where interested persons exist. The fact that Victorian growers elect two members is only evidence that the framers of the Act considered that a greater number of growers of dried fruits exist in that State. It does not give to that State a commercial preference. The contention that the powers given to the Governor-General amount to a transference of legislative power forbidden by the Constitution is completely answered by *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1). The other points taken depend upon principles which are well settled and, if applicable, might support the plaintiffs' argument; but their application is, in my opinion, negatived by the very terms of the statute itself. Sec. 13 states the purpose of the power to be the control by the board of the export, sale and distribution of dried fruits. The purpose is effected by forbidding exportation except upon conditions and enforcing compliance with the conditions. The subject is plainly trade and commerce with other countries. The act or transaction fastened upon as a central point of the legislative control occurs within the jurisdiction, and it appears to me to be absurd to suggest that, because the conditions relate to things done or omitted out of the jurisdiction, it is beyond the power of Parliament to command their performance. The legislation deals with a matter of Australian concern on the basis of an exportation which it is within the power of the Commonwealth Parliament to

(1) (1931) 46 C.L.R. 73.

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allow or disallow conditionally or unconditionally (cf. *Barcelo* v. *Electrolytic Zinc Co. of Australasia Ltd.* (1)). The purpose of sec. 13 being to enable the board to control the export trade in dried fruits, the means consist in empowering the Governor-General to prohibit export by proclamation and the Minister to except upon terms and conditions, or conditions and restrictions, as they are variously described. Then the Governor-General has power by regulation to prescribe the terms and conditions granted by the Minister. It is evident that no discretionary control can under this scheme be exercised by the board, unless that discretionary control arises under the terms and conditions of the licences. It was, I think, the intention that the regulations prescribing terms and conditions should enable the board to exercise a close control of the whole operation of marketing. The objection that the conditions transfer to the board a power of prescribing what the exporter must do exercisable only by the Governor-General as the regulation-making authority is, in my opinion, made untenable by the very nature of the power which results from secs. 13, 14 and 29.

In my opinion the demurrer succeeds and the action should be dismissed with costs.

STARKE J. The plaintiffs export dried fruits to the United Kingdom, Canada and New Zealand. By their statement of claim in this action, they seek declarations that the *Dried Fruits Export Control Act* 1924-1935, and regulations purporting to have been made thereunder, are invalid, and ancillary relief. The defendants demurred, and also pleaded to this statement of claim. An order was made that the issues of law be heard and determined before the issues of fact, and they were argued before this Court and now fall for decision.

Firstly, it was argued that the Act was invalid because the Parliament of the Commonwealth had no authority to delegate its legislative power, or at least to delegate it in the form adopted in the Act. The basis of the attack was sec. 13 of the Act: "For the purpose of enabling the board"—that is the Dried Fruits Control Board constituted under the Act—"effectively to control the export and

(1) (1932) 48 C.L.R. 391, at pp. 427, 428.

the sale and distribution after export of Australian dried fruits, the Governor-General may by proclamation prohibit the export from the Commonwealth of any dried fruits except in accordance with a licence issued by the Minister subject to such conditions and restrictions as are prescribed after recommendation to the Minister by the board." The power or authority here given to the Governor-General and to the board was contrary, so it was contended, to the provisions of the Constitution. But the validity of legislation in this form is concluded in this Court by the decisions in *Roche* v. *Kronheimer* (1), and the cases there cited, and *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2).

Secondly, that the Act and regulations controlled acts of exporters and the disposition of dried fruits beyond the territorial jurisdiction of Australia, and were consequently beyond the legislative power reposed in the Parliament of the Commonwealth. The Act and regulations do undoubtedly control the disposition overseas of dried fruits exported from Australia, and do penalize acts done outside Australia. (See Act, secs. 13, 15, and regulation, No. 30 of 1935, clause 7 (2) (*b*), (*c*), (*d*) and (*g*).) The *Statute of Westminster* (22 Geo. V. c. 4), sec. 3, has not yet been adopted in Australia. But the power of self-governing Dominions to make laws having extra-territorial operation was considered by the Judicial Committee in *Croft* v. *Dunphy* (3). Once it is found, as I gather from that case, that the particular topic of legislation is with respect to one of its powers enumerated in sec. 51 of the Constitution upon which the Commonwealth Parliament may competently legislate for the peace, order and good government of the Commonwealth, then no reason exists for restricting the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign State. Export, transport and sale, are all parts of that class of relation which constitutes trade and commerce. The subjects of legislation in the present case are the control of the export of Australian dried fruits, and the sale and disposition of such fruits after export. But those subjects are part of the concept of trade and commerce with other countries. The restrictions imposed

(1) (1921) 29 C.L.R. 329. (2) (1931) 46 C.L.R. 73.
(3) (1933) A.C. 156.

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by the Act and regulations are all connected with the exportation of dried fruits from Australia (Act, sec. 15 ; regulation, No. 30 of 1935, clause 9). The legislative authority of the Commonwealth is thus attracted, and the legislation falls within the power to make laws for the peace, order and good government of the Commonwealth with respect to trade and commerce among other countries (cf. *W. & A. McArthur Ltd.* v. *Queensland* (1)).

Thirdly, that the Act and regulations contravene the inhibition contained in sec. 99 of the Constitution: "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof." The attack was based upon the provisions of sec. 4 of the Act:—"(1) For the purposes of this Act there shall be a Dried Fruits Control Board. (2) The board shall consist of" (among others) "(*b*) Two representatives elected by growers in the State of Victoria and one representative elected by growers in each of the States of New South Wales, South Australia and Western Australia." Victorian members of the board are thus twice as many as those representing each of the other named States, and the States of Tasmania and Queensland have no voice in the selection of members of the board. The argument is untenable. The preferences prohibited by sec. 99 are advantages or impediments in connection with commercial dealings based upon distinctions of locality. The selection of the members of a board gives no preference to any State or part of a State in connection with such dealings, and confers no authority upon the board to grant any such preference.

Lastly, it was contended that the regulations are not authorized by the provisions of secs. 13 and 29 of the Act. The objection to the regulations was that they promulgated no rule of conduct, but conferred almost unlimited discretion upon the Dried Fruits Control Board, in the control of the export, and the sale and distribution after export, of Australian dried fruits. The scheme of the Act is to prohibit trade and commerce in dried fruits with other countries except in so far as it may be permitted by regulations recommended by the Dried Fruits Board. The purpose is to enable the board to control such trade and commerce. But to make such control

(1) (1920) 28 C.L.R. 530, at pp. 546, 550.

effective, discretion must necessarily be conferred upon the board both generally and in particular cases. The various regulations do not, having regard to the nature and object of the legislation, transcend the extremely wide power of making regulations contained in sec. 29 of the Act.

The result is that the demurrer to the statement of claim should be allowed.

DIXON J. The plaintiffs complain of the restrictions imposed by the *Dried Fruits Export Control* (*Licences*) *Regulations* (S.R. 1935, No. 30), which came into force on 8th April 1935. To relieve themselves of the operation of those regulations, they seek to have them declared void and of no effect. They contend that they are not and could not be authorized by the provisions of the *Dried Fruits Export Control Act* 1924-1935 under which they profess to be made, and that, in any event, that statute is itself invalid.

The statute erects and incorporates a board called the "Dried Fruits Control Board." It is composed of eight members. Three are appointed by the Governor-General in Council. The remaining five consist of "two representatives elected by growers in the State of Victoria and one representative elected by growers in each of the States of New South Wales, South Australia and Western Australia" (sec. 4 (2) (*b*)).

A power to make regulations is reposed in the Governor-General in Council. It extends to prescribing all matters which by the Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act (sec. 29). Of such matters the most important appear to be the terms and conditions, or conditions and restrictions, subject to which licences to export may be granted when the free exportation of dried fruits has been prohibited by proclamation under the Act.

Sec. 13 provides that, for the purpose of enabling the board effectively to control the export and the sale and distribution after export of dried fruits, the Governor-General may by proclamation prohibit the export of any dried fruits, except in accordance with a licence issued by the Minister for the time being administering

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the Act, subject to such conditions and restrictions as are prescribed after recommendation to the Minister by the board. It is to be noticed that in this provision three authorities are specified. The Governor-General is designated as the authority to prohibit export conditionally and to prescribe the conditions upon which the prohibition may be relaxed. The Minister is empowered to grant licences to export subject to the prescribed conditions. The board is to recommend the conditions; otherwise the section does not define its powers. But the effective control by the board of the export and subsequent sale and distribution of dried fruits is declared by the section to be the purpose of the grant of power to the Governor-General and the Minister.

Sec. 14 proceeds explicitly to authorize the Minister to grant licences to exporters for specified periods of time, but subject to such terms and conditions as are prescribed. He is empowered to cancel the licence if the conditions are not fulfilled. And sec. 15 makes it an offence for a person who holds a licence to fail to comply with the terms and conditions upon which it was granted.

The regulations, of which the plaintiffs complain, prescribe terms and conditions for export licences, which, in effect, require the licensee to act under the direction of the board in every respect in marketing his dried fruit abroad. The price at which he sells or contracts to sell dried fruit, or exports it for sale, or authorizes its sale, must not be less than that fixed by or under the authority of the board. The licensee must ship dried fruit through and to agents who are authorized by the board, pay no commission or charges in excess of those fixed by the board, insure every shipment with such person as the board determines, and sell it on terms and conditions approved by the board to such purchasers, in such quantities, and through such agents, as the board determines. If dried fruit is shipped to the United Kingdom on consignment, its sale must be approved by the board's London agency, which may order its treatment by fumigation, recleaning, or otherwise, and the licensee must store it where the board directs.

The holder of a licence for a period is not thereby enabled to export dried fruit without further authority. A condition of the licence requires him to obtain a certificate from the secretary of the board

for each shipment. The certificate specifies the class and grade of the fruit and the consignee, the vessel and the port and the date of shipment. Moreover the licensee must withhold dried fruit from export if he is required to do so by notice from the secretary of the board.

The first objection made to the validity of these regulations is that they do not amount to an exercise of the Governor-General's power to prescribe the conditions and restrictions, or the terms or conditions, of a licence. It is said that they do not specify any conditions to which the licensee must conform, but simply forbid him from acting in all these various respects, except pursuant to the directions of the board given on each particular occasion.

The answer to this contention lies in the nature and object of the power given to the Governor-General. Once it is construed as a power to prescribe conditions which will enable the board to control the export and subsequent sale and distribution of dried fruit, no objection can exist to requiring licensees to conform to the board's directions. And this appears to be its true meaning. It is only by means of conditions attached to the licence to export that control can be given to the board. The conditions must reserve a discretionary authority to the board, otherwise it could exercise no control, and the discretionary authority must be to give particular directions, because that authority arises in each case under a licence obtained by an individual. Indeed no effective control of the export and of the sale and distribution abroad of such a commodity could be exercised except by a close supervision and a detailed direction of the trade. Although the conditions prescribed by the regulations give to the board a control which enables it to govern in detail every dealing with dried fruit from shipment to final sale, and to do so by means of an uncontrolled discretion directed to individual cases and transactions, yet the plan of the regulations is justified by the power under which they are made. It is not necessary to consider the validity of each and every condition separately. It is enough to say that they are not so framed as a whole as to go beyond the power arising under secs. 13, 14 and 29 of the Act.

But assuming the regulations otherwise fell within the authority conferred by these sections upon the Governor-General, it was

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objected on the part of the plaintiffs that the combined effect of the Act and the conditions of the licence would amount to an attempt to regulate acts, matters and things outside the territorial boundaries of the Commonwealth, which it was beyond the powers of the Parliament to affect. It is said, too, that the limits of the commerce power are exceeded because an attempt is made to control transactions occurring after the goods have ceased to be in the course of trade and commerce with other countries, after the international commerce in dried fruits has ended. It is true that sec. 13 professes the purpose of controlling the sale and distribution of dried fruit after export. But it assumes to control it by means which go to the central point of the power over trade and commerce with other countries, the exportation of commodities. The enactment operates upon that fact occurring, as it does, in Australian territory, and it closely concerns "the peace, order, and good government of the Commonwealth." It is for the Parliament to declare what exportation shall be allowed or forbidden. Its authority over exportation is complete, and what it may forbid unconditionally, it may allow conditionally. If the conditions which it imposes or authorizes are of such a nature that the law appears only ostensibly and not actually to be a law with respect to trade and commerce with other countries, it will fall outside the power. But no such question arises in the present case. The conditions actually prescribed are all relevant to trade and commerce. Although the conditions do impose requirements to be fulfilled abroad and the Act penalizes breach of the conditions, it does not follow that the legislation is beyond the power of the Parliament. It all relates to a matter of immediate interest to the Commonwealth. Considered widely, it is concerned with the marketing overseas of part of the annual production of Australian soil. Probably that alone constitutes a sufficient connection with Australia to answer the objection that the statutory provisions are bad for extra-territoriality. The provisions do not go beyond that connection. But, considered more closely, the legislation takes as the criterion of its application a transaction occurring within the Commonwealth, namely, exportation of dried fruit, and bases all the obligations it imposes upon that fact. No support can be found for the contention that the effect of the Act

and the regulations combined exceeds the territorial jurisdiction of the Parliament and is not authorized by the commerce power.

The plaintiffs next relied, as a ground of invalidity, upon the legislative character of the power which the statute gives to the Governor-General. The considerations affecting this question were fully dealt with in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1). Since that case the principles upon which the plaintiffs rely have been again reviewed and applied by the Supreme Court of the United States in the important decisions given in *Panama Refining Co.* v. *Ryan* (2) and *Schechter* v. *United States* (3); but these decisions do not affect the position which this Court has adopted. The argument must fail upon the authority of *Dignan's Case* (4).

There remains an independent ground of attack upon the validity of the whole statute. Because of the composition of the board, it is said that sec. 99 of the Constitution has been infringed upon and an attempt made by a law or regulation of commerce to give preference to one State over another State. The supposed preference consists in the omission of the States of Queensland and Tasmania from the provision for the election to the board of representatives by the growers in the various States and in the presence on the board of two representatives elected by the growers in Victoria. There can be no doubt that in the election of members of the board a distinction is drawn based on State boundaries. If the distinction amounts to or involves preference within the meaning of sec. 99, the provision cannot be supported. It is true that an attempt was made on the part of the defendants to ascribe the erection of the board to some legislative power other than the trade and commerce power, and so to exclude it from the description "law or regulation of commerce." But that description appears to include every law which is made with respect to trade and commerce, and, if the establishment of the Dried Fruits Control Board is not justified under that head, it is difficult to find in sec. 51 (xxxix.) or elsewhere any other sufficient source of power.

The question is: Does such a distinction amount to preference?

(1) (1931) 46 C.L.R. 73.
(2) (1935) 293 U.S. 388; 79 Law. Ed. 446.
(3) (1935) 295 U.S. 495; 79 Law. Ed. 1570.
(4) (1931) 46 C.L.R. 73.

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In relation to trade and commerce, as distinguished from revenue, the preference referred to by sec. 99 is evidently some tangible advantage obtainable in the course of trading or commercial operations, or, at least, some material or sensible benefit of a commercial or trading character. It may consist in a greater tendency to promote trade, in furnishing some incentive or facility, or in relieving from some burden or impediment. In the present instance nothing is given but a voice in the choice of the personnel of a board which itself is governed by the law, a law which does not and could not enable it to give preference to a State or part of a State as such. The seeming inequality of the voice given arises, no doubt, from the fact that dried fruit is grown more largely in Victoria than in the other States and that little or none is grown in Queensland and Tasmania. But, however this may be, no tangible or material advantage, direct or indirect, is given to the trade and commerce of one State over another.

For these reasons the demurrer should be allowed.

EVATT AND MCTIERNAN JJ. This demurrer raises the question of law whether the *Dried Fruits Export Control Act* 1924-1935 and the *Dried Fruits Export Control* (*Licences*) *Regulations* made by Statutory Rules, No. 30 of 1935, are valid.

The argument for the plaintiffs requires a separate consideration of four points.

(1) The first question is whether sec. 13, which is one of the key sections of the legislation, is invalidated because of its extra-territorial operation. The section reads: "For the purpose of enabling the board effectively to control the export and the sale and distribution after export of Australian dried fruits, the Governor-General may by proclamation prohibit the export from the Commonwealth of any dried fruits except in accordance with a licence issued by the Minister subject to such conditions and restrictions as are prescribed after recommendation to the Minister by the board."

The plaintiffs emphasize, and correctly, that one of the openly asserted objects of the regulations intended to be made under sec. 13, is to enable the board to control not merely the actual export from Australia of dried fruits, but their sale and distribution in

countries oversea. Moreover, under sec. 15, any person who fails to comply with any term or condition of a licence to export is guilty of an offence. It is clear that an essential feature of the scheme set up by the legislation and the regulations is that all exporters of dried fruits shall be compelled to comply with the directions of the board in respect of the conduct of their business abroad as well as in Australia.

All this being conceded, it does not follow that the Act and the regulations are invalid. The principles of law determining the question of invalidity of legislation upon extra-territorial grounds in relation to those self-governing Dominions where sec. 3 of the *Statute of Westminster* has not been applied "as part of the law" were recently analysed and restated by *Evatt* J. in *Trustees, Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1). In particular, the decision of the Privy Council in *Croft* v. *Dunphy* (2) was applied to the powers of the Commonwealth Parliament.

In the present case the application of these principles requires the conclusion that the objection of extra-territorial operation is not tenable. The mere presence of non-Australian elements in Australian legislation is not fatal to its validity. Further, the legislation, including sec. 13, bears a substantial relation to matters and things within the territory of the Commonwealth and may well be regarded as of vital importance to the people of the Commonwealth. It is clearly legislation for the peace, order and good government of the Commonwealth.

It is also necessary that sec. 13 should be relevant to some power committed to the Commonwealth Parliament by the Constitution, and the question is whether the Act is a law "with respect to trade and commerce with other countries"—part of the subject matter specified in sec. 51 (i.). This sub-section treats the subject of trade and commerce between Australia and other countries as sufficiently analogous to the subject of trade and commerce among the States of Australia to warrant the two subject matters being grouped together as suitable for Commonwealth legislation. The recent decision of this Court in *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (3)

(1) (1933) 49 C.L.R. 220. (2) (1933) A.C. 156.
(3) (1934) 51 C.L.R. 108.

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provides a convenient illustration of the fact that, in reference to inter-State trade and commerce, where goods are produced in one State for sale within another State, their first sale within the State of export constitutes a very typical part of inter-State trade. Similarly, in relation to trade between Australia and countries overseas to which goods are exported, the sale and marketing of the goods abroad constitutes a typical and essential part of such trade.

The legislation, and in particular sec. 13, is therefore clearly in respect to trade and commerce with other countries.

(2) The second contention of the plaintiffs is that sec. 13 of the *Dried Fruits Export Control Act* confers too extensive a law-making power upon agencies other than the Commonwealth Parliament itself.

An analysis of the section shows that Parliament has by no means surrendered its law making authority over the subject matter committed to it by sec. 51 (I.) of the Constitution. The Act confers very wide powers upon the Dried Fruits Control Board which is constituted by the Act. But this is done, not so much for the purpose of setting up a regulation or law making body in substitution for Parliament as for the purpose of giving the board full and complete executive control in a business sense over every detail of the export trade in one particular commodity produced in Australia for export. The regulation making powers of the Governor-General are intended to be exercised, not as legislative or quasi-legislative directions in relation to trade and commerce generally but as aids to the setting up of a machine for the marketing abroad of these Australian fruits.

Hence sec. 13 cannot be regarded as a law with respect only to the legislative power over trade and commerce with other countries. The principles applied in *Roche* v. *Kronheimer* (1), and elaborated in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2) negative the argument that in the present scheme of legislation the Commonwealth Parliament has parted with so much of its legislative authority over the subject matter mentioned in sec. 51 (I.) of the Constitution that the scheme is not a law with respect to such subject matter.

(3) The third contention on behalf of the plaintiffs is that the regulations made in Statutory Rules, No. 30 of 1935, extend beyond

(1) (1921) 29 C.L.R. 329.

(2) (1931) 46 C.L.R., at pp. 117-123.

the authority committed to the Governor-General by secs. 13 and 29 of the Act. Again, there is no doubt that, by the regulations, there has been given to the board by the Governor-General an almost absolute control over the overseas sales of dried fruits. including the making of contracts in relation thereto, the prices at which such sales shall be permitted, the methods of shipment for the purposes of such sales and many related matters, such as brokerage, discount and insurance. In addition, by reg. 7 (17) licensees must comply with such other conditions as are from time to time prescribed.

The answer to this third objection is contained in sec. 13. That section, read with sec. 29, not only enables the Governor-General to make regulations but insists that the purpose of the regulations shall be that of enabling the board " effectively to control the export and the sale and distribution after export " of dried fruits. In other words, the almost absolute control granted to the board by the regulations is not inconsistent with, but strictly in accordance with, the very purpose stated in sec. 13. Indeed, it is plain that, if the regulations gave control to any authority other than the board, they could be attacked as inconsistent with sec. 13.

(4) The plaintiff also contended that the *Dried Fruits Export Control Act* 1924-1930 is invalid because by sec. 4 (2) (*b*) it gives preference to Victoria over the other several States, and to Victoria, New South Wales, South Australia and Western Australia, over Queensland and Tasmania.

Sec. 4 (2) (*b*) provides that the board shall consist of two representatives elected by growers in the State of Victoria and one representative elected by growers in each of the States of New South Wales, South Australia and Western Australia. The board also consists of three other members, namely, one appointed by the Governor-General as representative of the Commonwealth Government, and two other members with commercial experience, also appointed by the Governor-General. (See sec. 4 (1), (2) (*a*) and (*b*).)

A suggested reply to this contention is that the board had been constituted by Parliament in exercise of the power referred to in sec. 51 (xxxix.) of the Constitution, and not in exercise of the power contained in sec. 51 (i.).

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In our view this contention is unsound. The subject matter of sec. 51 (XXXIX.), so far as is relevant, comprises matters which are incidental, not to the subject matters mentioned elsewhere in sec. 51, but incidental to Parliament's carrying out any of its constitutional powers. Parliament carries out its constitutional powers by proposing, debating and passing legislation. Matters incidentally arising in the course of such exercise of its powers, Parliament may also legislate upon as a special subject matter by reason of sec. 51 (XXXIX.). But legislation setting up the Dried Fruits Board to control overseas trade in Australian dried fruits does not relate to the subject matter of sec. 51 (XXXIX.) but has to be and is justified by reference to sec. 51 (I.), which gives the Commonwealth Parliament complete power over the subject matter of overseas trade and commerce (see *Le Mesurier* v. *Connor* (1)). The setting up of a business or administrative board for the purpose of controlling trade is a well-understood device of modern trade legislation and sec. 4 of the Act, in creating a board which is elsewhere impressed with the character of a trade controller, and in providing for its peculiar scheme of representation of interests, is undoubtedly a law of trade and commerce within the meaning of sec. 99 of the Constitution.

But sec. 4 (2) (*b*) does not give any preference to the products of any one State over any other State. The mere inequality in the number of representatives of the growers in each State is not sufficient to support the conclusion that a preference forbidden by sec. 99 of the Constitution has been given to the State whose growers have the largest representation on the board or to any State which has a larger representation than another. There is nothing to warrant the view that the allocation of representation has been made in order to effect any discrimination between the States. The reference to the States may fairly be treated as defining groups of growers in Australia according to localities for the purpose of giving the growers representation, proportionate to their numbers or production, on the board which is put in control of their products. It is also clear from the whole section relating to the constitution of the board that the representation given to any group of growers does not enable them to control the board. Sec. 4 neither puts any State in

(1) (1929) 42 C.L.R. 481, at p. 497.

possession of trading advantages over another State nor gives it the power to obtain any such advantages. In our opinion, it is not obnoxious to sec. 99 of the Constitution.

In our opinion the demurrer should be allowed.

Demurrer allowed. Action dismissed with costs.

Solicitors for the plaintiffs, *Edmunds, Jessop, Ward & Ohlstrom.*

Solicitor for the defendants, *W. H. Sharwood*, Crown Solicitor for the Commonwealth, by *Fisher, Powers, Jeffries & Brebner.*

C. C. B.

[HIGH COURT OF AUSTRALIA.]

GLACKEN . . . . . APPELLANT;
PLAINTIFF,

AND

TOOTH AND COMPANY LIMITED . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Landlord and Tenant—Lease—Rent—Covenant by lessee not to make claim for reduction—"Present legislation State or Federal"—Subsequent legislation—Application thereunder by lessee—Contracting out of benefit conferred by statute—Reduction of Rents Act 1931 (*N.S.W.*) (*No.* 45 *of* 1931), *secs.* 5, 6—*Landlord and Tenant* (*Amendment*) *Act* 1932-1935 (*N.S.W.*) (*No.* 67 *of* 1932—*No.* 33 *of* 1935), *secs.* 14, 16.

For the purpose of settling a dispute as to the amount of rent payable under a lease expiring in December 1937, the parties thereto, by indenture made on 4th April 1932, agreed upon a sum payable in respect of arrears, and the lessee covenanted that it would pay in full and without any diminution on the dates provided in the lease the sums therein provided to be paid by way of rent and would not "make any claim for the reduction of the same nor take