[HIGH COURT OF AUSTRALIA.]

NELUNGALOO PROPRIETARY LIMITED . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH AND OTHERS . . RESPONDENTS.
DEFENDANTS,

Constitutional Law (Cth.)—National security—Wheat—Acquisition by Commonwealth—Wheat Board—Wheat pool—Compensation to grower—"Just terms"—Assessment of compensation—Method—Sole or alternative remedies—Election by grower—Basis—Market value—Export parity—Interest—Entitlement of grower—Deductions—Special tax imposed by statute—Validity—Acquisition by Commonwealth of all wheat grown—Absence of independent demand—Exercise of governmental authority—Effect—Conversion of wheat—Damages—Sale of wheat to Board—Price—Regulations—Order made thereunder—Validity—Severability of clauses—Retrospective operation of statute—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*xxxi.*), 55—*Flour Tax* (*Imports and Exports*) *Act* 1938 (*No.* 51 *of* 1938)—*Wheat Industry Assistance Act* 1938 (*No.* 53 *of* 1938)—*Wheat Industry* (*War-time Control*) *Act* 1939-1944 (*No.* 84 *of* 1939—*No.* 19 *of* 1944), *s.* 6—*Defence* (*Transitional Provisions*) *Act* 1946 (*No.* 77 *of* 1946)—*Wheat Tax Act* 1946 (*No.* 78 *of* 1946), *ss.* 4, 5, 6—*Wheat Export Charge Acts* 1946 (*No.* 25 *of* 1946—*No.* 79 *of* 1946)—*Wheat Industry Stabilization Act* (*No.* 2) 1946 (*No.* 80 *of* 1946), *s.* 11—*National Security* (*Wheat Acquisition*) *Regulations* (*S.R.* 1939 *No.* 96—1945 *No.* 9), *regs.* 14, 19.

H. C. OF A. 1947. SYDNEY, *June* 13, 17-20; *July* 2. WILLIAMS J. *Nov.* 18-21, 24-25. 1948. MELBOURNE, *May* 31. LATHAM C.J., RICH, STARKE, DIXON, MCTIERNAN AND WEBB JJ.

Regulation 14 of the *National Security* (*Wheat Acquisition*) *Regulations* provides, *inter alia*, that "the Minister may from time to time, by order published in the *Gazette*, make provision for the acquisition by the Commonwealth of any wheat described in the order . . . and the rights and interests of every person in that wheat . . . are hereby converted into claims for compensation." Regulation 19 provides, *inter alia*, that every such person may forward to the Board a claim in the prescribed form "and shall be entitled to be paid such amount of compensation as the Minister, on the recommendation of the Board, determines"; the basis of compensation to be recommended by the Board was to be "the rates per bushel arrived at by reference to the surplus proceeds from the disposal of wheat" subject to the power of the Minister to deduct *inter alia* (*a*) the price of corn sacks;

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(*b*) transport charges to the terminal port (sub-reg. (2A)); and (*c*) other dockages or deductions.

Held by *Latham* C.J., *McTiernan* and *Webb* JJ. (*Rich* and *Dixon* JJ. dissenting), that, whether reg. 19 provides the sole method of obtaining compensation or is merely an alternative to a right of action implied by reg. 14, a wheat grower who voluntarily delivers his wheat to the Board and accepts advances from the proceeds of sale received by the Board elects to adopt the method provided by reg. 19 and is bound by that election.

Held by *Starke* J. A pool constituted and administered in the manner provided by the *National Security* (*Wheat Acquisition*) *Regulations* contravenes the provisions of s. 51 (xxxi.) of the Constitution.

Section 11 of the *Wheat Industry Stabilization Act* (*No.* 2) 1946 provides that a certain order made under reg. 14 of the *National Security* (*Wheat Acquisition*) *Regulations* on 16th November 1939 "shall be deemed to be, and at all times to have been, fully authorized by that regulation, and shall have, and be deemed to have had, full force and effect according to its tenor in respect of wheat harvested in any wheat season up to and including the 1946-1947 season."

Held by *Latham* C.J., *Starke*, *Dixon*, *McTiernan* and *Webb* JJ. that, even if the order had not been valid when made, it was retrospectively validated by this section, and by *Dixon* J. that s. 11 is not a usurpation of the judicial power of the Commonwealth, and is within the defence power.

The tax imposed by s. 6 (1) of the *Wheat Tax Act* 1946 upon wheat acquired by the Commonwealth under the *National Security* (*Wheat Acquisition*) *Regulations* and levied upon wheat growers is invalid because it diminishes the compensation or the just terms to which wheat growers would otherwise be entitled pursuant to the regulations and required by s. 51 (xxxi.) of the Constitution.

So *held* by *Rich*, *Starke* and *Dixon* JJ.

The manner of ascertaining the compensation payable for wheat acquired, together with all other wheat, by the Commonwealth, particularly having regard to relevant legislative and administrative policies and acts, present and *in futuro*, satisfaction of local needs before exportation of the surplus, availability of transport facilities, and export parity, discussed.

Andrews v. *Howell*, (1941) 65 C.L.R. 255, and *Australian Apple and Pear Marketing Board* v. *Tonking*, (1942) 66 C.L.R. 77, referred to.

The Court being evenly divided on the question of allowing the appeal, the appeal was, pursuant to s. 23 (2) (*a*) of the *Judiciary Act* 1903-1947, dismissed.

APPEAL from *Williams* J.

In an action commenced by Nelungaloo Pty. Ltd. against the Commonwealth of Australia, the Attorney-General for the Commonwealth of Australia, William James Scully and the Australian

Wheat Board, the amended statement of claim was substantially as follows :—

2. The plaintiff is the proprietor of a farm at Nelungaloo in the County of Ashburnham, Parish of Nelungaloo in New South Wales and was the holder of a wheat grower's licence for the crop of wheat to be produced in 1945-1946.

3. The defendant William James Scully is the Minister of State for Commerce, and the defendant the Australian Wheat Board is a board constituted under the *National Security* (*Wheat Acquisition*) *Regulations*.

4. On or about 16th November 1939 the then Minister of State for Commerce in pursuance of powers under the *National Security* (*Wheat Acquisition*) *Regulations* made and caused to be published in the Commonwealth Government *Gazette* an order which was, so far as material, as follows :—

"Wheat Acquisition Regulations.

Order declaring certain wheat to be acquired by the Commonwealth.

I George McLeay, Minister of State for Commerce, in pursuance of the powers conferred by regulation 14 of the Wheat Acquisition Regulations, hereby declare that the following wheat is acquired by the Commonwealth, namely :—

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

(*b*) all wheat which is harvested in Australia on or after the date of the publication of this Order in the *Gazette*."

5. The defendants claim that at all material times the order was and is still of full force and effect.

6. 7. 8 and 9. These paragraphs of the statement of claim stated that certain quantities of the plaintiff's bagged and bulk wheat had been delivered to the agents of the defendants between the months of November 1945 and January 1946.

10. On and after the dates of delivery the defendants exercised exclusive control of the wheat and claimed to be the owners thereof.

13. Since the dates of delivery of the wheat the defendants have paid to the plaintiff the sum of £3,441 10s. 1d. and no more.

14. The plaintiff in respect of the wheat has claimed from the defendants other and additional moneys (including interest thereon from the dates of delivery of the wheat until payment) but the defendants neglected and refused and still neglect and refuse to pay any further moneys.

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The plaintiff claimed :—

(1) A declaration that the *National Security* (*Wheat Acquisition*) *Regulations* (as amended) were invalid.

(2) A declaration that reg. 19 of the *National Security* (*Wheat Acquisition*) *Regulations* (as amended) was invalid.

(3) A declaration that the Order dated 16th November 1939 and purporting to have been made under and pursuant to powers conferred by the *National Security* (*Wheat Acquisition*) *Regulations* (as amended) was invalid.

(4) Compensation for the acquisition by the Commonwealth of Australia of wheat from the 1945-1946 crop as follows :—

Wheat Delivered to Silos—3786.20/60 bushels @ 9s. 9d. per bushel	£1,845	16	9
Bagged Wheat—10,498 50/60 bushels @ 10s. per bushel	£5,249	8	4
	£7,095	5	1
Less rail and handling 9d. per bushel	535	13	9
	£6,559	11	4
Less compensation received	3,441	10	1
Balance claimed	£3,118	1	3

(5) Interest on £3,118 1s. 3d. from the dates of delivery of the wheat until payment.

(6) Alternatively to par. 4 the plaintiff claimed that the defendant The Australian Wheat Board its servants and agents converted the wheat of the plaintiff, whereby the plaintiff had suffered loss and damage and the plaintiff claimed £3,118 1s. 3d. as damages for such conversion, the detailed particulars being as set out in par. 4.

(7) Alternatively to par. 6 the plaintiff claimed that the plaintiff agreed to sell to the defendant The Australian Wheat Board and the defendant The Australian Wheat Board agreed to buy from the plaintiff certain wheat the property of the plaintiff at a price to be ascertained in accordance with the fair market value thereof and the defendants had refused to pay to the plaintiff the whole of the price and the plaintiff claims £3,118 1s. 3d. being the balance of the price remaining unpaid detailed particulars being as set out in par. 4.

By their amended statement of defence, the defendants admitted the facts and matters alleged in pars. 1 to 12 of the amended statement of claim. The remainder of the statement of defence was, so far as material, substantially as follows :—

2. In answer to par. 5 of the statement of claim the defendants say that the said order was and is a valid exercise of the powers of the Minister under the *National Security (Wheat Acquisition) Regulations*.

4. In answer to par. 13 of the statement of claim the defendants say that the plaintiff made a claim for compensation in respect of the wheat mentioned in pars. 6, 7, 8 and 9 of the statement of claim and that such claim was made in pursuance of reg. 19 of the *National Security (Wheat Acquisition) Regulations*. The defendants further say that at the time of institution of this suit no determination had been made by the Minister in pursuance of reg. 19 and that the sum of £3,441 10s. mentioned in par. 13 represents payments made on account of the plaintiff's claim for compensation in pursuance of reg. 19. The defendants further say that the said sum of £3,441 10s. was paid to and received and accepted by the plaintiff on account of its claim for compensation under reg. 19 and not otherwise and by reason of the foregoing facts and matters the defendants say that the plaintiff has elected and agreed to accept compensation determined in pursuance of reg. 19 and is precluded from claiming compensation on any other basis.

8. In further answer to the statement of claim the defendants say that since the institution of this suit the plaintiff has become liable to pay to the defendant the Commonwealth of Australia provisional tax under the *Wheat Tax Act* 1946 at the rate of 1s. $1\frac{1}{8}$d. per bushel in respect of the wheat mentioned in pars. 6, 7, 8, 9 and 10 of the statement of claim and that this provisional tax is a proper deduction or set off against any claim the plaintiff may have for compensation in respect of the wheat.

In its replication the plaintiff joined issue upon the defendants' amended statement of defence and submitted that the matters referred to in the amended statement of defence did not constitute a defence at law.

The wheat referred to in the statement of claim constituted deliveries by the plaintiff to the Board for the season 1945-1946. Some of the wheat was bagged and some was in bulk.

Apart from Government prices for wheat for consumption within Australia in time of war, the evidence disclosed that the price or value of Australian wheat has always depended upon export prices. At about the times when the plaintiff's wheat was delivered to the Board, the prices at which the Board was selling wheat for shipment f.o.b. Australian ports was between 9s. 3d. and 9s. 9d. per bushel for bulk wheat and between 9s. 6d. and 10s. per bushel for bagged wheat.

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The Board took the plaintiff's wheat of the 1945-1946 season, in common with the wheat of all other growers of that season, into a pool, the ninth it had formed since the war began. The Board had made the plaintiff certain payments called advances. The advances announced and distributed were four: the first 4s. 1d. per bushel for bulk or 4s. 4d. for bagged wheat; the second, 1s. less the deduction of 5.384d. for railage from the siding to the seaboard; the third, 6d.; and the fourth, 6d. per bushel. A further amount was to be distributed. The plaintiff refused the third and fourth advances.

Further material facts and relevant statutory provisions, regulations and orders appear in the judgments hereunder.

Barwick K.C. and *Macfarlan*, for the plaintiff.

Mason K.C., *A. R. Taylor* K.C., *P. D. Phillips* K.C. and *R. Else Mitchell*, for the defendants.

Cur. adv. vult.

July 2.

WILLIAMS J. delivered the following written judgment:—

The plaintiff is a company incorporated according to the laws of New South Wales which owns a farm at Nelungaloo in the county of Ashburnham in the State of New South Wales on which it grows wheat. It was the holder of a grower's licence under the *National Security* (*Wheat Industry Stabilization*) *Regulations* for the crop of wheat to be produced in the year 1945-1946. The defendant, the Australian Wheat Board, is a body which is incorporated by the *National Security* (*Wheat Acquisition*) *Regulations*. The crop grown by the plaintiff pursuant to the licence was delivered to the Australian Wheat Board in accordance with these regulations partly at Nelungaloo and partly at Gunningbland in the months of November and December 1945 and January 1946. It consisted of 3786.20 bushels of f.a.q. wheat delivered to the silos, and 10498.50 bushels of bagged f.a.q. wheat delivered to the sidings at these places.

The plaintiff claims the sum of £6,559 11s. 4d. being the sum of £7,095 5s. 1d. at the rate of nine shillings and nine pence per bushel for bulk wheat, and ten shillings per bushel for bagged wheat less rail and handling charges at nine pence per bushel, amounting to £539 13s. 9d., either as compensation for the acquisition of the wheat by the Commonwealth, or, if the wheat was not validly acquired, as damages for the conversion of the wheat by the Australian Wheat Board as the agents of the Commonwealth. The plaintiff admits the receipt of advances under reg. 28 of the *National*

Security (*Wheat Acquisition*) *Regulations* amounting to £3,441 10s. 1d., so that the balance claimed is £3,118 1s. 3d. The statement of claim contains a further count claiming the same sum from the Commonwealth as the fair market value of the wheat sold by the plaintiff to the Commonwealth, but no evidence was offered in support of this count and it was not pressed.

The Commonwealth purported to acquire the wheat pursuant to an order published on 16th November 1939 made by the then Minister of State for Commerce under the authority of reg. 14 of the Wheat Acquisition Regulations. The order, the full text of which appears in the statement of claim, related to wheat which had already been harvested and wheat to be harvested in the future. In this action I am only concerned with par. (*b*) of the order by which, with certain immaterial exceptions, the Commonwealth purported to acquire all wheat which is harvested in Australia on or after the date of the publication of the order in the *Gazette*. The plaintiff claims that the taking of its wheat of the 1945-1946 crop was tortious, because this paragraph of the order was not authorized by reg. 14. The plaintiff commenced its action on 24th July 1946. The statement of claim was filed on 9th September 1946. The Wheat Acquisition Regulations were made under the authority of the *National Security Act* 1939. The *National Security Act* 1946 provided for the termination of the principal Act on 31st December 1946, so that, apart from further legislation, the Wheat Acquisition Regulations would have expired on that date. But by the *Defence* (*Transitional Provisions*) *Act* 1946, these regulations were continued in force until 31 December 1947. Further, the *Wheat Industry Stabilization Act* 1946, assented to on 9th August 1946 (as amended by the *Wheat Industry Stabilization Act* (No. 2) 1946, assented to on 14th December 1946) provides in s. 11 that, subject to this Act, the *National Security* (*Wheat Acquisition*) *Regulations* shall, by force of this Act, insofar as they relate to wheat harvested in any season up to and inclusive of the 1946-1947 season, continue in force until such date as is fixed by proclamation, and shall, during such continuance, have the force of law. But s. 2 of the principal Act provides that the several sections of the Act shall commence on such dates as are respectively fixed by proclamation and I was not referred to any proclamation of this section. Section 2 however, of the amending Act provides that it shall come into operation on the day on which it receives the Royal Assent, and s. 11 of this Act provides that :—" The order made by the Minister of State for Commerce under regulation fourteen of the *National Security* (*Wheat Acquisition*) *Regulations* and published in the *Gazette* on the

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sixteenth day of November, One thousand nine hundred and thirty-nine, shall be deemed to be, and at all times to have been, fully authorized by that regulation, and shall have, and be deemed to have had, full force and effect according to its tenor in respect of wheat harvested in any wheat season up to and including the 1946-1947 season."

The plaintiff contends that the relevant portion of the order of 16th November 1939 was not authorized by reg. 14 of the Wheat Acquisition Regulations, and that, if the order was not so authorized, s. 11 of the *Wheat Industry Stabilization Act* (No. 2) 1946 was not effective to cure the defect. The plaintiff claims the same amount of damages for tort as it claims for compensation, but contends that it is necessary to decide whether the taking of the wheat was tortious or not because, if the acquisition was lawful, the plaintiff is liable to be taxed under the *Wheat Tax Act* 1946 (if valid), whereas if the taking was unlawful, the plaintiff would escape this tax (at least until such time as an equivalent tax was substituted for it).

I think that it is convenient to dispose of these contentions at this stage. In my opinion, they both fail. Regulation 14 of the Wheat Acquisition Regulations provides that :—" For securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth, for the efficient prosecution of the war, and for maintaining supplies and services essential to the life of the community, the Minister may, from time to time, by order published in the *Gazette*, make provision for the acquisition by the Commonwealth of any wheat described in the order, and that wheat shall, by force of and in accordance with the provisions of the order become the absolute property of the Commonwealth, freed from all mortgages, charges, liens, pledges, interests and trusts affecting that wheat, and the rights and interests of every person in that wheat (including any rights or interests arising in respect of any moneys advanced in respect of that wheat) are hereby converted into claims for compensation."

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

I agree with the submission that reg. 15 can only apply to wheat in existence at the date of the publication of an order of acquisition made under reg. 14. But I do not agree that, as a consequence, reg. 14 means that the Minister is only authorized to make orders

acquiring wheat already in existence. Wheat of any particular season is harvested in different parts of Australia in different months, so that, if this is the true meaning of reg. 14, the Minister in each season would have to make a number of successive orders or wait until the whole of the wheat had been harvested. Regulation 14 authorizes the Minister to make orders for acquisition from time to time so that he is authorized to make a number of orders. It also authorizes the Minister to acquire any wheat described in the order thus enabling him to acquire wheat by a general or specific description (*Victorian Chamber of Manufactures* v. *The Commonwealth* (1)). There is nothing in the regulation to limit the authority of the Minister to making orders acquiring wheat already in existence. In my opinion, the regulation is wide enough to authorize him to make an order acquiring all or any specific wheat already harvested, or all or any specific wheat to be harvested in the future. If the order relates to wheat of a future harvest, reg. 15 would not be applicable. But the quantity of wheat to be harvested in the future is no doubt capable of expert estimation, and the delivery to the Commonwealth of the wheat when actually harvested is amply safeguarded by the provisions of regs. 16, 17 and 18.

Assuming however that this construction of reg. 14 is wrong, I am of opinion that the original invalidity of the order was cured by s. 11 of the *Wheat Industry Stabilization Act* (No. 2) 1946. It was contended that this section infringes the judicial power because it does not amend the law prospectively but attempts to prescribe the construction to be placed upon an existing law by the court and the determination of the meaning of a statute is of the essence of the judicial power. The result of this contention, if sound, would be that the Commonwealth Parliament has no power to pass a declaratory statute which only has a retrospective operation. I cannot agree with this contention. It was within the ambit of the defence power for the Commonwealth Parliament, subject to complying with s. 51 (xxxi.) of the Constitution, to acquire all wheat harvested in Australia during hostilities or their aftermath as a means of prosecuting and winding up the war. The order of 16th November 1939 was made to give effect to this legislative purpose, and to authorize the Commonwealth lawfully to acquire the wheat of the 1939-1940 harvest and subsequent harvests. Later it was contended that reg. 14 was not wide enough to authorize the order under which the Commonwealth believed that it was authorized to act. It is trite law that the powers conferred upon the Commonwealth Parliament by s. 51 of the Constitution are plenary powers

(1) (1943) 67 C.L.R. 335.

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of legislation as large and of the same nature as those of the Imperial Parliament itself (*R.* v. *Burah* (1)).

The plenary nature of these powers includes the power to legislate retrospectively as well as prospectively (*Millner* v. *Raith* (2)). Some limitation is placed upon the power to legislate retrospectively by s. 48 of the *Acts Interpretation Act* 1901-1941 where the legislation is by regulation. But s. 11 of the *Wheat Industry Stabilization Act* (*No.* 2) 1946 is part of a statute of the Commonwealth Parliament and is therefore not subject to s. 48. Possibly it would have been preferable to have amended reg. 14 by inserting the necessary words to make it clear that the Minister was authorized *ab initio* to make the order of 16th November 1939. But this is in substance the effect of the first limb of the section, and in case this limb fails, the second limb gives the language of the order statutory force and effect and makes this force and effect retrospective to 16th November 1939.

It was also contended that the operation of s. 11 is to divest a wheat grower of a vested right of action in tort against the Commonwealth, and that the section is not a valid exercise of the defence power because legislation passed at the end of the year 1946 for the protection of the Commonwealth against rights of action which had already accrued could have no connection with the defence of the Commonwealth. But it was decided in *Werrin* v. *The Commonwealth* (3) that the Commonwealth Parliament can exercise legislative control over such causes of action. The only difference between *Werrin's Case* (3) and the present case is that the Commonwealth Parliament was there legislating under the taxation power, which is a power with a constant ambit, whereas the ambit of the defence power fluctuates between a very wide ambit during hostilities, and a comparatively narrow ambit in peacetime. Section 11 was enacted on 14th December 1946. In several recent judgments of this Court it has been pointed out that the contraction of the ambit of the defence power after hostilities is a gradual process. One of the most serious consequences of the recent hostilities is an acute shortage of food in many parts of the world. Wheat is the most important ingredient in bread, which is one of the staple foods, so that the ambit of the defence power in relation to the acquisition of wheat was still very wide at the end of 1946. But in any event, I think that the Commonwealth Parliament is authorized under the defence power at any future time to legislate retrospectively with respect to past occurrences

(1) (1878) 3 App. Cas. 889, at p. 904.
(2) (1942) 66 C.L.R. 1.
(3) (1938) 59 C.L.R. 150.

where the ambit of the power would have been wide enough at the time of such occurrences to enable similar legislation to have been then passed having a prospective operation. Otherwise the Commonwealth Parliament, after the cessation of hostilities, could not pass an ordinary Indemnity Act indemnifying its subjects against the consequences of bona-fide acts unlawfully done in the prosecution of the war.

For these reasons I am of opinion that the acquisition of the plaintiff's wheat by the Commonwealth was lawful, and its only cause of action is a claim for compensation under the Wheat Acquisition Regulations. Regulation 14 provides that the property of the plaintiff in its wheat is converted into a claim for compensation. Regulation 19 provides a method of determining the amount of compensation. Regulations 14 and 19 give similar rights to compensation to those conferred by regs. 12 and 17 of the *National Security* (*Apple and Pear Acquisition*) *Regulations* which were construed by this Court in *Andrews* v. *Howell* (1) and *Australian Apple and Pear Marketing Board* v. *Tonking* (2). It was held in the latter case that regs. 12 and 17 provided two alternative means of assessing the compensation, the one by action in the courts under reg. 12, and the other by the administrative means provided by reg. 17. My own opinion of the legal effect of these regulations appears in the register (3). The present action is to enforce a right of compensation conferred upon the plaintiff by reg. 14 similar to the right of action conferred upon the plaintiff in *Tonking's Case* (2) by reg. 12. The Commonwealth is a defendant to the action so that this Court has original jurisdiction under s. 75 (iii.) of the Constitution. Section 51 (xxxi.) of the Constitution provides that the Commonwealth Parliament may make laws with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. This placitum does not of itself give a right of action for compensation. But it requires that when a law of the Commonwealth provides for the acquisition of property it must also provide for just compensation, otherwise the acquisition will be unlawful. The provisions of each law must be judged on their merits. The placitum does not mean that these provisions must necessarily comply in every respect with the principles of the common law relating to the assessment of compensation for the compulsory acquisition of property. But reg. 14 of the Wheat Acquisition Regulations simply converts the interest of the grower in the wheat into a claim for compensation. It does

(1) (1941) 65 C.L.R. 255.
(2) (1942) 66 C.L.R. 77.
(3) (1942) 66 C.L.R., at p. 89.

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not seek to alter the common law principles in any respect. These principles are therefore applicable to the present action.

The right to compensation arises at the moment of acquisition. If the property acquired is an ordinary commodity which is being bought and sold in the market: "The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market" (*Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (1)). Australian wheat is an ordinary commodity of trade and commerce which before the outbreak of war was being bought and sold in the market for local use and for export. The price obtainable was usually the same whether the wheat was bought for local use or for export, except where the export market was firm and rising, in which case the local merchants often had to pay up to a penny a bushel more than the export price. Since the outbreak of war the Commonwealth has acquired all the Australian wheat under the provisions of the Wheat Acquisition Regulations, and disposed of the whole crop through the Australian Wheat Board. The policy of the Board has been to sell locally that portion of each crop (usually about half) required for home consumption and to sell the balance for export through its London agents. In November and December 1945 and January 1946, therefore, when the plaintiff's wheat of the 1945-1946 season was acquired, there was no ordinary Australian market for the sale of wheat either for local use or for export. Certain records were produced on *subpoena duces tecum* from the New South Wales Department of Agriculture which purported to give the prices quoted on the English market at the selling centre in London for Australian wheat f.o.b. Australian ports for the period commencing on 2nd January 1942 and ending on 31st December 1946. The first and fifth columns of these records were admitted by agreement of the parties, subject to relevance, as evidence of their contents. At first I was under the impression that these were quotations of buyers in London of the prices at which they were prepared to purchase Australian wheat. But the Australian Wheat Board were the only sellers of Australian wheat for export during this period, and it later appeared that these figures were simply quotations of the prices at which the Board from time to time entered into contracts for the sale of Australian wheat. If they had been quotations of ordinary buyers, the question would have arisen whether they were evidence of the market value of Australian wheat.

(1) (1939) A.C. 302, at p. 312.

It has been held in this Court in the case of land that the only admissible evidence of collateral facts affecting value is that of concluded contracts (*McDonald* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (1)). But in England, in the case of *The Cygnus* reported in *Roscoe, The Measure of Damages in Actions of Maritime Collisions*, 3rd ed. (1929), p. 154, *Gorell Barnes* J. admitted and acted upon evidence of offers to purchase in a collision case. It would seem that evidence of offers is admitted in England. For instance, in *Waters* v. *Thorn* (2) Lord *Romilly* said :—" The test to which this Court looks with the greatest confidence, viz., the price actually bid at a sale by auction, or the offer of a person *bona fide* desirous to become a purchaser by private contract is wanting in this case." Further the Imperial *Assessment of Compensation Act* 1919, s. 2 (3), provides that any bona-fide offer for the purchase of land made before the passing of the Act which may be brought to the notice of the arbitrator shall be taken into consideration. In *Percival* v. *Peterborough Corporation* (3) the Earl of *Reading* C.J., said : " It " (an offer) " is, I suppose, some evidence of what was then thought to be the value of the land." But I need not pursue the point because I think that it is clear that there was not an ordinary market for the sale of Australian wheat, either for local use or for export, at the date of the acquisition of the plaintiff's wheat.

In the absence of a market, the value of the property taken must be ascertained by estimating the sum which a reasonably willing vendor would have been prepared to accept and a reasonably willing purchaser would have been prepared to pay for the property at the date of the acquisition. The value of the property is its value to the seller, so that it has been said that the most practical form in which the matter can be put is that the plaintiff is entitled to receive the sum which a prudent purchaser would have been willing to give for the property sooner than fail to obtain it (*Pastoral Finance Association Ltd.* v. *The Minister* (4)).

The plaintiff admits that the prices at which the Board sold the wheat of the 1945-1946 crop for export were the best prices that could be obtained, so that, in estimating this sum, the prices which the Board was obtaining at the relevant period f.o.b. Australian ports for the wheat which it was selling for export are evidence of what the value of Australian wheat would have been under the ordinary law of supply and demand in a free market at that

(1) (1915) 20 C.L.R. 231.
(2) (1856) 22 Beav. 547, at p. 557 [52 E.R. 1219, at p. 1223].
(3) (1921) 1 K.B. 414, at p. 421.
(4) (1914) A.C. 1083, at p. 1088.

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period. These prices indicate that, if there had been such a market at the date of acquisition, the plaintiff would have been able to sell its wheat at from 9s. 3d. to 9s. 9d. for bulk wheat and from 9s. 6d. to 10s. for bagged wheat. But I think that it is quite impossible to assume that if each harvest had not been acquired by the Commonwealth, the Commonwealth would have allowed the price of wheat for local use to rise to such an extent that the price of bread would have been affected or that the Commonwealth would have allowed any wheat to be sold for export except such wheat as was in excess of local requirements. As I have already said, about half the wheat of each crop was required for this purpose. I agree with Mr. *Barwick* that the amount of compensation should be the same whether the hypothetical purchaser should be considered to include all the possible purchasers who would have existed if there had been an ordinary market, or whether the circumstances were such that the Australian Wheat Board should be considered to be the only possible purchaser. I think that the proper approach to the problem is to assume that the Board, which was in possession of all the facilities for handling the wheat, was the only possible purchaser, but that the growers as reasonably willing vendors could only be expected voluntarily to sell their wheat to the Board at the same price as they would have obtained if there had been an ordinary market (*Vyricherla's Case* (1); *Geita Sebea* v. *Territory of Papua* (2)). But in estimating the price which the growers could reasonably expect to receive in such a market, all the probable circumstances must be taken into account.

In the first place, it is necessary to consider the legislation of the Parliaments of the Commonwealth and of the States passed to give effect to the conference referred to in the recitals to the Commonwealth *Wheat Industry Assistance Act* 1938. This legislation was summarized and explained in the judgments of this Court and of the Privy Council in *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (3) and it is unnecessary to cover the same ground again. The purpose of this legislation was to ensure to wheat growers a payable price for wheat, and at the same time, to prevent speculation in flour and stabilize the price of bread. It is apparent that a price for wheat f.o.r. Australian ports of 5s. 2d. per bushel for bagged wheat was considered to be a payable price, and to be a figure at which the price of flour and bread for local use could be fixed at a reasonable sum. To ensure to wheat growers a payable price for wheat when the export value of wheat f.o.r.

(1) (1939) A.C., at pp. 316, 317.
(2) (1941) 67 C.L.R. 544.
(3) (1939) 61 C.L.R. 735; (1940) A.C. 838; 63 C.L.R. 338.

Australian ports was below 5s. 2d., taxes were imposed upon wheat manufactured into flour and on stocks of flour in existence in Australia by the *Flour Tax Act* 1938; and the *Flour Tax (Stocks) Act* 1938; and upon flour imported into Australia by the *Flour Tax (Imports and Exports) Act* 1938. The formula for the tax was as follows: "The rate of tax, not in any case exceeding £7 10s. per ton of flour, shall be at such rate per ton of flour as the Minister, from time to time, and in accordance with a recommendation by the Committee, declares, by notice published in the *Gazette*, to be the amount by which the price per ton of flour based upon the price of wheat per bushel free on rails at Williamstown, in the State of Victoria at the time of the recommendation by the Committee, is less than what, in the opinion of the Committee, the price of flour would be if the price of wheat per bushel free on rails at Williamstown were 5s. 2d."

To meet the case when the value of wheat f.o.r. Australian ports rose above 5s. 2d. per bushel, provision was made by the *Wheat Tax Act* 1938 for a tax upon wheat grown in Australia, and, on and after a date to be fixed by proclamation, sold to a wheat merchant; and by the *Flour Tax (Imports and Exports) Act* 1938, s. 4 (*b*) for a tax upon all wheat exported from Australia, on or after a date to be fixed by proclamation, not being wheat upon which tax was imposed by the *Wheat Tax Act* 1938. The formula for these taxes was as follows:—"The rate of tax, not in any case exceeding one shilling per bushel of wheat shall be at such rate per bushel of wheat as the Minister, from time to time, and in accordance with a recommendation by the Committee, declares, by notice published in the *Gazette*, to be the amount which bears the same proportion to the excess of the price of a bushel of wheat free on rails at Williamstown in the State of Victoria, at the time of the recommendation by the Committee over five shillings and twopence as the quantity of wheat which, in the opinion of the Committee, will be consumed in Australia (whether as wheat or as products derived from wheat) during the twelve months following the preceding first day of October bears to the total crop which, in the opinion of the Committee, will be harvested during that period." The Act relating to the imposition assessment and collection of all these taxes was the *Flour Tax (Wheat Industry Assistance) Assessment Act* 1938. Section 12 (2) of this Act provided that the tax upon wheat exported from Australia on and after a date to be fixed by proclamation should be paid by the exporter of the wheat. Section 13 (2) provided that the tax imposed by the *Wheat Tax Act* 1938 should be paid by the wheat

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merchant to whom the wheat was sold. The *Wheat Industry Assistance Act* 1938 provided for the destination of the proceeds of these taxes. Section 5 provided for the opening of a fund to be known as the Wheat Industry Stabilization Fund, into which there should be paid all moneys from time to time collected under the *Flour Tax (Wheat Industry Assistance) Assessment Act* 1938. Section 6 (1) provided that, subject to this Act, the moneys standing to the credit of the fund should be applied in making payments to the States as grants of financial assistance. Section 6 (3) provided that there should be kept in the fund an account to be known as the Wheat Industry Special Account to which there should be credited out of the receipts of the fund in the first year the sum of £500,000, and in the following four years such amounts not exceeding this sum as the Minister determined. Section 6 (4) provided that there should be kept in the fund an account to be known as the Wheat Tax Account, to which should be credited out of the receipts of the fund all moneys collected under the *Flour Tax (Wheat Industry Assistance) Assessment Act* 1938 as a tax upon wheat exported from Australia or upon wheat produced and sold in Australia. Section 7 provided for the allocation from the Wheat Industry Special Account between the States of New South Wales, Victoria, South Australia and Western Australia. The amounts paid in the first year were to be applied in the provision of relief to distressed wheat growers and in the subsequent years towards meeting the cost of transferring wheat farmers from land unsuitable for the economic production of wheat, or to arranging for such land to be used for other purposes. Section 8 provided for payments from the Wheat Tax Account to the States by way of financial assistance upon condition that these amounts were distributed to the flour millers in these States in accordance with such methods of distribution as was decided by the Minister after advice from the State Minister. Section 10 provided that where the Governor-General was satisfied, *inter alia*, that (*b*) a State had not taken steps adequately to protect consumers of flour and other wheat products against excessive prices in respect of those commodities, the Governor-General might, by notice in the *Gazette*, suspend payments to that State under the Act during such periods as, in his opinion, (*d*) those consumers were not protected against such excessive prices. At the same time as this Commonwealth legislation, the States passed legislation for the purpose of fixing the minimum and maximum prices of flour and the prices of bread. This legislation took the form of authorizing the Governors of the States to make proclamations for this purpose. Pursuant to this

authority a number of proclamations were made in the various States.

It is clear from this legislation that in 1938 the Governments of the Commonwealth and the States took the broad view that while the export value of wheat was below 5s. 2d. per bushel f.o.r. Australian ports, the Australian public as consumers of bread should be taxed indirectly to provide a subsidy for wheat growers; but that, if and when the export value of wheat exceeded 5s. 2d., the price which the wheat growers would otherwise have received for their wheat should be reduced by the wheat merchant or exporter having to pay a tax not exceeding 1s. per bushel on the wheat which he purchased, and that the proceeds of this tax should be used as a subsidy to keep down the local price of flour.

On 21st October 1940 a declaration was made under the *Flour Tax Act* 1938 and the *Flour Tax (Imports and Exports) Act* 1938 by the Minister that the amount by which the price per ton of flour based upon the price of wheat per bushel free on rails at Williamstown in the State of Victoria on that date was less than what, in the opinion of the Committee, the price of flour would be if the price of wheat were five shillings and twopence, was two pounds eight shillings and tenpence. It is common ground that the price per bushel of bulk wheat is threepence less than the price per bushel of bagged wheat. As I understand the evidence, the declaration was made on the basis that the export value of wheat f.o.r. Australian ports was three shillings and elevenpence farthing per bushel for bulk wheat. No subsequent declaration was made under these Acts although there was a gradual rise in the export value of wheat. This was because all wheat was being delivered to and sold by the Australian Wheat Board in accordance with the Wheat Acquisition Regulations, and the Board adopted the policy of keeping the price of wheat sold for flour for local consumption pegged at the arbitrary price of three and elevenpence farthing on a bulk basis so that the flour tax would remain constant at £2 8s. 10d. per ton, despite the fact that during and after the first half of 1944, the export value of Australian wheat rose above 4s. 11d. per bushel f.o.r. Australian ports for bulk wheat. In consequence no proclamations were made bringing the *Wheat Tax Act* 1938 or the *Flour Tax (Imports and Exports) Act*, s. 4 (*b*), into operation. But provision was made by the *Wheat Industry (War-time Control) Act* 1939, as amended, to divert to the Board the payments of flour tax which would otherwise have been made to the States for distribution among the wheat growers, so that these moneys could be added to the funds available for the payment of compensation to the growers under reg. 19 of the Wheat Acquisition Regulations.

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At the date of the acquisition of the plaintiff's wheat of the 1945-1946 crop: (1) The export of flour without a licence had been prohibited by the *Export* (*Flour*) *Regulations* as from 3rd October 1940. (2) The price of bread was fixed in the various States by orders made under the *National Security* (*Prices*) *Regulations*, or proclamations made under the State legislation already mentioned, which would not allow flour millers to pay more than 3s. 11¼d. per bushel whilst the flour tax remained at £2 8s. 10d. per ton, or to pay more than 4s. 11d. per bushel for bulk wheat if there was no tax. (3) There was in force Prices Regulation Order No. 1015, known as the ceiling prices order, which fixed the price of all goods and services as those prevailing on 13th April 1943. (4) The export value of Australian wheat f.o.b. Australian ports was about 9s. 6d. per bushel for bulk wheat (the f.o.b. price is approximately one-third of a penny less than the f.o.r. price); so that if the price of wheat for local use was allowed to rise to this value, it was probable that the *Wheat Tax Act* and the *Flour Tax* (*Imports and Exports*) *Act*, s. 4 (*b*) would be proclaimed. The tax under these Acts, if half of the crop was exported, would reach the maximum rate of 1s. per bushel when the export price was 7s. 2d. (5) There was no prohibition of the export of wheat required for local use, but this was because no prohibition was necessary while the whole of the wheat was being disposed of by the Australian Wheat Board.

I agree with Mr. *Barwick* that the plaintiff should not be prejudiced by the artificial pegging of the price of wheat for manufacture into flour at 3s. 11¼d. so that the flour tax should remain constant at £2 8s. 10d. per ton, because the manifest intention of the *Flour Tax Act* was that this tax should disappear when the export value of wheat f.o.r. Williamstown reached 5s. 2d. per bushel. But I agree with Mr. *Mason* that in estimating the price which the plaintiff could reasonably have expected to receive for his wheat upon a voluntary sale, importance must be attached to the fact that the legislation of 1938 proceeded upon the basis that a price of 5s. 2d. per bushel f.o.r. Williamstown would give the wheat grower a fair return and allow flour to be manufactured and sold in Australia at a figure which would allow the price of bread to be fixed at a reasonable sum. I also agree with Mr. *Mason* that importance must be attached to the fact that at the date of acquisition there was a general system of price control operating under the *National Security* (*Prices*) *Regulations* to prevent the risk of inflation in Australia under war conditions, and that in particular it was essential to control the prices of such necessities of life as food, clothing, and shelter.

I must assess the compensation in as practical a manner as possible on such materials as are available to me. The whole potential value of a commodity like wheat to the owner lies in the price which he can reasonably expect to obtain on a sale soon after the crop has been harvested. The total harvest for 1945-1946 was 123 million bushels, and of that amount about one-half was required for local use. I think that it must be assumed that if this harvest had not been acquired by the Commonwealth, purchasers in an ordinary market could only have reasonably expected to be allowed to export half the wheat they purchased. I also think that it must be assumed that the maximum price fixed for wheat required for local consumption would not have been allowed to exceed 5s. 2d. per bushel for bagged wheat f.o.r. Australian ports. In April 1943, when the ceiling prices order came into force, the export value of bulk wheat f.o.b. Australian ports was about 4s. 3d. so that if there had been an ordinary market, the price of wheat for local use would have been about 4s. 3d. and this order would in the first instance, have pegged the price of wheat at this figure. My own view of the importance of price fixing in relation to the assessment of compensation is stated in *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1). Since the price of wheat was kept fixed at 3s. 11¼d. by the Australian Wheat Board for administrative reasons and not to prevent inflation, I think that I should assume for the purpose of compensation that the maximum price for wheat for local use in an ordinary market under war conditions in 1945-1946 would have been that contemplated by the 1938 legislation, that is to say, 5s. 2d. per bushel f.o.r. Australian ports for bagged wheat.

On these assumptions the greatest sum which the plaintiff could reasonably expect a prudent purchaser to pay for its wheat at the date of acquisition sooner than fail to obtain it would be as follows :—

5249	bushels	of	bagged	wheat	@	5s. 2d.	per	bushell	£1,356	0 0
5249	„	„	„	„	@	9s. 9d.	„	„	2,559	0 0
1893	„	„	bulk	„	@	4s. 11d.	„	„	465	7 0
1893	„	„	„	„	@	9s.6d.	„	„	899	0 0
									£5,279	7 0

I think that the estimate made by the plaintiff of 9d. per bushel for rail and handling charges amounting to £539 13s. 9d. may be slightly on the low side but that it can be accepted. Deducting this amount from the sum of £5,279 7s. leaves a balance of £4,740.

(1) (1943) 67 C.L.R. 314, at p. 334.

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But I have not so far deducted any sum for taxation and it is reasonable to assume that if the export value of bagged wheat had been 9s. 9d. per bushel, the *Flour Tax (Imports and Exports) Act*, s. 4 (*b*) would have been proclaimed, and that the purchaser of wheat for export would have had to lower his price for the 7,132 bushels of wheat he purchased for export by 1s. per bushel, amounting to £357, and if this sum is deducted, the balance is reduced to £4,383.

I was referred by Mr. *Mason* to certain matters which occurred in 1946 after the date of acquisition: (1) On 22nd May 1946 regulations were made under the *Customs Act* 1901-1936 prohibiting the export of flour and wheat until the intending exporter produced to the Collector of Customs a covering approval issued by the Department of Commerce and Agriculture. (2) The *Wheat Export Charge Act* came into operation on 9th August 1946. This Act was amended by the *Wheat Export Charge Act (No. 2)* 1946 which was assented to on 14th December 1946 but was deemed by s. 2 to have come into operation on 9th August 1946. Section 4 (1) (*aa*) provides that a charge should be imposed and levied and paid on all wheat harvested on or after 1st October 1945 and before 1st October 1947 and exported from the Commonwealth by any person other than the Australian Wheat Board on or after 1st December 1945. Section 4 (2) provides that subject to a lower rate being prescribed by the regulations the rate of the charge per bushel of wheat exported by any person other than the Board should be fifty per cent of the amount by which the price per bushel, at the date of export, for export of fair average quality bagged wheat free on rail at the port of export, as declared by the Board, or such lower rate as is prescribed . . . exceeds 5s. 2d. (3) The *Wheat Tax Act* 1946 was assented to on 14th December 1946, but s. 2 provides that the Act should be deemed to have come into operation on 9th August 1946. Section 3 defines wheat to mean wheat harvested on or after 1st October 1945 and before 1st October 1947. Section 4 provides that a tax should be imposed and levied and paid in respect of all wheat which has been acquired or is acquired by the Commonwealth, and that the tax shall be payable by the grower of the wheat. Section 5 (2) provides that the total amount of the tax to be levied in respect of wheat of a season shall be ascertained by multiplying an amount equal to fifty per cent or such lower percentage as is prescribed, of the amount by which the average price per bushel f.o.r. at the ports of export for f.a.q. bagged wheat of all the wheat of that season exported by the Board, or such lower price as is prescribed, exceeds 5s. 2d. by the total of the number of bushels of wheat of that season,

and of the wheat equivalent . . . of wheat products manufactured from wheat of that season, exported by the Board or sold by the Board for export or for manufacture into wheat products for export. Section 5 (3) provides that the rate of the tax in respect of wheat of a season shall be an amount per bushel of wheat arrived at by dividing the total amount of tax to be levied in respect of wheat of that season . . . by the total number of bushels of wheat of that season in respect of which the tax is imposed. Section 5 (5) provides for the Minister notifying in the *Gazette* a provisional rate of tax. Section 6 (1) provides that the Commonwealth or the Board may deduct any amount of tax payable by any grower from any moneys payable by the Commonwealth or the Board to that grower on any account whatsoever, and any amount so deducted shall be applied in payment, or part payment, of the tax so payable. By notification published in the Commonwealth of Australia *Gazette* on 17th January 1947, the Minister notified that the provisional rate of tax in respect of wheat of the season commencing on 1st October 1945 was one shilling one and one-eighth pence per bushel. (4) Section 18 of the *Wheat Industry Stabilization Act* 1946 which contemplates that a price of 5s. 2d. f.o.r. Australian ports for bagged wheat is a fair return to the wheat grower.

The question arises whether these subsequent matters should be taken into consideration in assessing the compensation under reg. 14. I venture to repeat what I said in *Minister for the Army* v. *Parbury Henty & Co. Pty. Ltd.* (1) :—" The right to compensation arises at the moment of acquisition . . . The amount of compensation, being a matter of assessment, can, like damages, be calculated in the light of any subsequent facts to the extent to which they throw light upon the items of value which can properly be taken into account in the calculation, having regard to the circumstances existing at the date of acquisition." In *Willis* v. *The Commonwealth* (2) *Dixon* J. has collected a number of recent cases showing the growing inclination of the courts to prefer subsequent facts to prophecies where such facts are available at the hearing. It may be that, speaking generally, Acts of Parliament passed subsequently to the date of acquisition would not be relevant, but in the present case the existing legislation so clearly indicated that a tax would be placed on the export of wheat when the price exceeded 5s. 2d. per bushel that in my opinion, it is permissible to take the *Wheat Export Charge Act* into account. Under this Act a purchaser of the plaintiff's wheat would have had to reduce his price by at least 2s., amounting to £714 on the 7,132 bushels he purchased for export thereby reducing the previous balance of £4,383 to £4,026.

(1) (1945) 70 C.L.R. 459, at p. 514. (2) (1946) 73 C.L.R. 105, at p. 116.

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The addition of the sums which the plaintiff has already been paid and will receive under reg. 19, apart from taxation, is £4,925 4s. From this sum the Board proposes to deduct £805 18s. 2d. for tax at the source under the *Wheat Tax Act* 1946 leaving a balance of £4,119 5s. 11d. Strictly speaking the question whether the Board is lawfully entitled to deduct this tax at the source, or whether, even if the tax cannot lawfully be deducted at the source, the plaintiff is nevertheless liable for the tax, does not affect its *quantum* (*Jordan* v. *Limmer & Trinidad Lake Asphalt Co. Ltd.* (1)). But I was asked by Mr. *Mason* to deal with the only contention raised against its validity, that is that the *Wheat Tax Act* 1946 is invalid because it infringes s. 55 of the Constitution. This section provides, so far as material, that laws imposing taxation shall deal only with the imposition of taxation, and that any provision therein dealing with any other matter shall be of no effect. It also provides that laws imposing taxation shall deal with one subject of taxation only. The *Wheat Tax Act* is a law imposing taxation, but it is in my opinion an Act which deals only with the imposition of one subject of taxation and with provisions incidental and ancillary to the assessment of the tax. It has recently been held by this Court in *Cadbury-Fry-Pascall Pty. Ltd.* v. *Federal Commissioner of Taxation* (2) that such provisions do not infringe s. 55. In my opinion the whole of the Act is valid. Even if the incidental provisions infringe s. 55, this would not invalidate the taxing provisions. But the *Wheat Tax Act* 1946 and the *Wheat Export Charge Act* 1946 provide for taxation in the two alternatives of a tax on wheat acquired and on wheat not acquired by the Commonwealth, in each case for export, so that in estimating the amount of compensation to which the plaintiff would be entitled under reg. 14 and comparing this amount with that which it will receive under reg. 19, I think that all questions of tax should perhaps be left out of account, and a comparison made between the two sums of £4,740 and £4,925. This comparison shows that the plaintiff will receive under reg. 19 a slightly larger sum than that to which it would be entitled upon an assessment under reg. 14, so that the action fails.

It is therefore unnecessary to consider the defence that, by accepting the first and second advances, the plaintiff must be taken to have elected to accept compensation under reg. 19 in lieu of exercising his right to sue for compensation under reg. 14.

But I think that I should add that the statement of claim contains a claim for interest. The Wheat Acquisition Regulations do not

(1) (1946) 175 L.T. 89. (2) (1944) 70 C.L.R. 362.

authorize the Court to award interest. Neither do they contain any provision purporting to prohibit the Court from awarding interest. The present views of the Court as a whole upon the question whether just terms require that the Court should have a discretion to award interest where there is no delay in payment of compensation are summarized by the Chief Justice in *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (1). It is apparent from this summary that the only view for which there is at present a majority is the view that the Court, in the absence of any provision in the regulations, can award interest where the contract would have been specifically enforceable if the property had been acquired not by compulsion but voluntarily, and the Court of Equity could have awarded interest on equitable principles. A voluntary contract for the sale of wheat would not be so enforceable so that I have no power to award interest in this action. However, even if I had the power, I do not think that this would be a proper case in which to award interest. The plaintiff is entitled to slightly less than 6s. per bushel for his wheat after deducting all expenses of realization and taxation, and of this amount it received an immediate advance of 4s. 1d. per bushel and either received or became entitled to but would not accept subsequent advances at reasonable intervals leaving about 1½d. per bushel still unpaid, and I am not satisfied that the plaintiff could have converted its wheat into money on an ordinary market more speedily than the Board has realized the whole crop and distributed the net proceeds.

As this case may go further, I think that I should also add that I accept all the witnesses as honest and reliable witnesses. In particular I was very impressed with the fair and frank manner in which Mr. Perrett, the General Manager of the Board, gave his evidence. But it is not a case in which there is any real conflict on the facts. The difficulty lies in their application.

For these reasons I give judgment for the defendants with costs.

From that decision the plaintiff appealed to the Full Court.

Barwick K.C. and *Macfarlan*, for the appellant.

Barwick K.C. There is no dispute that the amount of the railage and storage charges claimed by the appellant is correct. The subject wheat should be valued by assuming an open market and that on such market the appellant would have received export parity less the railage and storage charges. It is not conceded that

(1) (1946) 72 C.L.R. 269, at pp. 281, 282.

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legislation enacted in 1946 relating to the wheat industry and which, among other things, purported to validate an order made by the Minister in 1939, could affect the market. Regard must be had to the possibilities and probabilities of the market, and full effect must be given to the *Wheat Tax Act* 1938 and other relevant legislation passed in that year. The taking by the appellant of an advance under the order made under the *National Security* (*Wheat Acquisition*) *Regulations* was not an election finally to accept a determination by the Minister under reg. 19. A determination by the Minister would be void, or, alternatively, could be accepted or rejected by the grower. The whole scheme of the legislation of 1938 was to allow the market to operate quite freely and normally. The maximum amount of tax payable under the *Wheat Tax Act* 1938 was one shilling per bushel, so that the export parity prices of 9s. 9d. per bushel bulk and 10s. per bushel bagged would at most have been respectively reduced by one shilling. Those prices, according to the evidence, could not have made any very substantial impact upon the price of bread. There was no shipping difficulty, since buyers of wheat had freight, and more wheat could have been absorbed abroad than was in fact exported. The home consumption price followed export parity. Even if there is only one possible purchaser the same method of valuing must be applied (*Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (1)). It should be assumed that there is an open market and that the only possible purchaser is the Crown (*Geita Sebea* v. *Territory of Papua* (2)). " Free market " is a market free from Government acquisition and from Government control that is specifically directed towards controlling the value of the commodity. Export control, but not price-fixing, is assumed. The scheme of the 1938 legislation was not to reduce the price to the grower but to enable the grower to receive the full export price. Under that legislation the miller had to pay sufficient to have his wheat accord with the export price, subject to flour tax (*Deputy Federal Commissioner of Taxation* (*N.S.W.*) v. *W. R. Moran Pty. Ltd.* (3) ; on appeal *W. R. Moran Pty. Ltd.* v. *Deputy Federal Commissioner of Taxation* (*N.S.W.*) (4)). The grower's price is affected only by wheat tax and for him there was no division of the market into local and export. " Just terms " require payment at the price the grower would receive in an open market free from any Commonwealth legislative controls directed to reducing the value of his wheat.

(1) (1939) A.C. 302, at pp. 313, 316, 326.
(2) (1941) 67 C.L.R. 544, at pp. 554, 558.
(3) (1939) 61 C.L.R. 735, at pp. 752, 753, 774.
(4) (1940) A.C. 838, at pp. 850, 851 ; 63 C.L.R. 338, at pp. 342, 343.

"Just terms" cannot be obtained by taking the average between the local price and the export price. A possible ban on the export of flour or wheat subject to a license under the *Customs Act* would be irrelevant because, if there were an exportable surplus, export licenses would have to be granted. On the evidence any grower could have obtained the prices obtained by the Board. This case is governed by the word "compensation" in reg. 14 of the *National Security* (*Wheat Acquisition*) *Regulations*, not by s. 51 (xxxi.) of the Constitution. It may, perhaps, be that the *National Security* (*Wheat Acquisition*) *Regulations* are valid because they are indistinguishable from the *National Security* (*Apple and Pear Acquisition*) *Regulations* (*Australian Apple and Pear Marketing Board* v. *Tonking* (1)). The word "compensation" as used in reg. 14 implies a right of action, and, doubtless, jurisdiction in the Court under s. 75 (iii.) to assess it. It is assumed that although "just terms" may be less than common law compensation (*Grace Bros. Pty. Ltd.* v. *The Commonwealth* (2)) common law compensation would be "just terms." The value of wheat held by growers would be affected only by existing legislation. The price-fixing that existed does not really bear upon the problem of value (*Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (3)). Prices Regulation Order No. 1015 is not relevant for there is no evidence that wheat was "declared goods." Wheat does not come within the general declaration of goods as in *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (4) being "perishable primary produce" within the meaning of par. (*b*) of the general declaration. Only goods *in esse* and actually under the control of someone in Australia became declared goods. For the order to regulate the whole of the wheat available for sale it would be necessary to assume that all the growers were identical—a new grower would not fall within the first part of the order, not being a person who dealt with wheat on substantially identical terms and conditions on or before the prescribed date (*Fraser Henleins Pty. Ltd.* v. *Cody* (5)). "Cost" would provide no certain standard at all, and par. 4 of the order would be inoperative if not invalid so far as a new grower was concerned. The summation of the judge of first instance of 1938 legislation is inaccurate. The judge wrongly assumed that if the wheat had not been acquired only half could have been exported. The tax, since it does not touch value, should not have been deducted, but allow-

(1) (1942) 66 C.L.R. 77.
(2) (1946) 72 C.L.R. 269.
(3) (1943) 67 C.L.R. 314.
(4) (1943) 67 C.L.R. 335, at pp. 338, 339.
(5) (1945) 70 C.L.R. 100.

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ance made in the judgment by way of set-off. The order acquiring the wheat was invalid and was not validated. Under these regulations if the order was good the grower was automatically dispossessed; it was not a case of the property passing when he delivered it.

[McTIERNAN J. referred to *McClintock* v. *The Commonwealth* (1)].

The *Wheat Tax Act* 1946 only imposes a tax on acquired wheat, therefore if the subject wheat was not acquired wheat it would not be liable to tax. Regulation 15 makes it clear beyond question that reg. 14 refers only to wheat in existence at the date of the order: see also reg. 16. *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (2) shows that it was because the Prices Regulations did not require any description that the general declaration was permissible.

[McTIERNAN J. referred to *Peanut Board* v. *Rockhampton Harbour Board* (3)].

A reference to " all wheat which is harvested in Australia on or after the date of the publication of this order in the *Gazette* " does not describe anything. The area covered by the order must be shown therein. Section 11 of the *Wheat Industry Stabilization Act* (*No.* 2) 1946 is not an amendment of reg. 14 and does no more than purport to enforce a construction of the regulation which would make the order good. This is the essence of judicial power (*Cooley's Constitutional Limitations*, 8th ed. (1927), vol. 1, pp. 188-194) and is an attempt to prevent the Court from deciding the true meaning of reg. 14. It was not within the defence power in December 1946 to take away rights of action in tort that had accrued as far back as 1939. No question of power arose in *Werrin* v. *The Commonwealth* (4). Under the order the wheat is divested from the grower on harvesting. When he delivers the wheat he does not intend to pass the property therein but merely delivers the Board's wheat to the receiver as required. That distinguishes this case from *McClintock* v. *The Commonwealth* (1). Thus the taking may be tortious and the matter is outside the Tax Act. The *Wheat Tax Act* 1946 is invalid because it imposes taxation on wheat acquired because it was acquired. Compensation should be determined upon the basis that the appellant's wheat and his wheat only had been acquired. Payment of compensation having been delayed the appellant is entitled to interest. Views of the members of the Court as to interest are summarized in *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (5).

(1) (1947) 75 C.L.R. 1.
(2) (1943) 67 C.L.R., at p. 340.
(3) (1933) 48 C.L.R. 266.
(4) (1938) 59 C.L.R. 150.
(5) (1946) 72 C.L.R., at pp. 281-283.

Macfarlan. Section 6 of the *Wheat Tax Act* 1946 offends s. 55 of the Constitution since it deals with matters other than the imposition of taxation. Section 6 deals with the collection of tax and the detailed procedure necessary therefor and so does not deal with the imposition of taxation. The imposition is complete before s. 6 operates. *Cadbury-Fry-Pascall Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) decided only that the *Income Tax Assessment Act* 1936-1939 was not an Act imposing taxation. Sections 53 and 55 of the Constitution show that the framers of the Constitution had in mind the parliamentary system in the United Kingdom, that is, that the lower house should have control over the actual imposition of the taxation or the voting of money. If a law imposing taxation did correctly include matters relating to collection the Senate could not amend even a minor provision of an Assessment Act (*Federal Commissioner of Taxation* v. *Munro* (2)). The distinction between the position under the Constitution and the Finance Acts of the United Kingdom is shown in *Osborne* v. *The Commonwealth* (3).

Mason K.C. and *A. R. Taylor* K.C. (with them *R. Else Mitchell*), for the respondents.

Mason K.C. A free market can exist only in normal times. During war, limitations must be imposed upon the marketing of, *inter alia*, wheat. During the war shipping was very short and was conducted by governments and governmental bodies. A grower was, as a prudent person, compelled to put his wheat into the Government's wheat pool to obtain the best price. Under the *Customs Act* the Commonwealth could at any time forbid the exportation of wheat which was required for local consumption. The price of wheat on the local market was controlled by the price of bread which in its turn was fixed from time to time under statute. The mere fact that the acquisition was by the Government does not entitle the grower to a price higher than the price he would have obtained from an ordinary purchaser. A price fixed by law becomes the market price, and it is also a fair price. It may be different where the fixation of the price is *ad hoc* for the purpose of determining just terms. "Just terms" give the grower the market price. The question of price fixing was considered in *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (4). Decisions by courts of the United States of America, conveniently

(1) (1944) 70 C.L.R. 362.
(2) (1926) 38 C.L.R. 153, at p. 190.
(3) (1911) 12 C.L.R. 321, at p. 336.
(4) (1943) 67 C.L.R. 314.

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collected in the *Harvard Law Review*, (1946) vol. 60, p. 132, all turn on the distinction drawn in *Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1) between an ordinary article of commerce and an article that has certain special value to the owner himself. The export price obtained by the Board was the best obtainable. The appellant as to half of its wheat in the pool was credited with the export price actually realized which was higher than the price at the date of acquisition. According to *Australian Apple and Pear Marketing Board* v. *Tonking* (2) the appellant would only be entitled to the price realized on its wheat, that is, if it could be identified; but the appellant's wheat could not be identified after having been put into the pool. The appellant delivered its wheat to the Board in accordance with the regulations—it was a voluntary act (*McClintock* v. *The Commonwealth* (3)). But more significant still, the appellant then lodged its claim for compensation under reg. 19; it received advances which were payable as compensation under the regulations and now seeks to retreat from that position. If a grower lodges his claim for compensation under the regulations and if he accepts payment of an advance under the regulations he cannot afterwards change his mind and stand outside the regulations. Regulation 19 is valid *qua* acquisition. The onus of proving that the appellant got other than a fair price is upon the appellant. The fixing of the price of wheat and bread has nothing to do with the Commonwealth's acquiring anything, but was a war-time measure under the defence power for the feeding of the public. Prices Regulation Order No. 1015 was an omnibus price-fixing order to prevent increases in prices under war-time conditions. The arrangement by the Board that each grower would receive payment on the basis that at least fifty per cent of his wheat was exported was fair and reasonable. From 1st January 1942 the price of wheat for local consumption has consistently been 3s. 11¼d. per bushel, plus tax. The appellant has not at any time made any complaint with regard to handling charges or any other item of expenses. A convenient summary of the effect of the relevant 1938 legislation appears in *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (4); and, on appeal *W. R. Moran Pty. Ltd.* v. *Deputy Federal Commissioner of Taxation (N.S.W.)* (5). The scheme was to stabilize the price of wheat, irrespective of whether the wheat was for local consumption or export, at 5s. 2d. per bushel. The relevant legislation passed in 1946 provides for

(1) (1943) 67 C.L.R., at pp. 322, 323, 325, 327, 328, 330, 334.
(2) (1942) 66 C.L.R. 77.
(3) (1947) 75 C.L.R. 1.
(4) (1939) 61 C.L.R., at pp. 753-757.
(5) (1940) A.C., at p. 853; 63 C.L.R., at pp. 344, 345.

the stabilization of wheat prices over a period of years. The tax under the *Wheat Tax Act* 1946 is paid into the stabilization fund to ensure to the growers a guaranteed price. The tax is a tax on the growers but it is in respect of wheat acquired by the Board. It is not taxation on the compensation as such. The effect of the Act is to impose a tax only upon wheat exported, but the incidence of the charge is spread over all the growers. The effect of the decision in *Australian Apple and Pear Marketing Board* v. *Tonking* (1) is that growers of wheat have alternative claims under reg. 14 and reg. 19. A choice must be made at the inception and having made his choice a grower is bound thereby. Compensation under reg. 14, referred to on behalf of the appellant as common law compensation, is compensation on just terms. Even if the method of compensation under reg. 19 were exclusive and bad, reg. 14 would still be available. It is therefore immaterial whether reg. 19 is exclusive or alternative. The appellant was bound by the election that it made when it lodged its claim and received advances. Advances so made under reg. 19 are an integral part of the pooling scheme. Regulation 19 is not bad because it is not exclusive and is alternative to reg. 14. Under reg. 14 the grower is entitled to the cash value of his wheat as at the date of acquisition, but under reg. 19 there is an alternative method by which the grower takes the benefit of the realizations, that is to say the rise or fall in the market. The decisions in *Andrews* v. *Howell* (2) and *Australian Apple and Pear Marketing Board* v. *Tonking* (1) mean that compensation can be obtained under reg. 14, or a claimant may voluntarily accept his compensation under reg. 19, but that compensation cannot be obtained by a grower under both reg. 14 and reg. 19. The appellant has received compensation under reg. 19 and cannot, therefore, have compensation under reg. 14. It is immaterial for the purposes of Prices Regulation Order No. 1015 whether the wheat was or was not in existence at the date of the promulgation of that order. The order made in November 1939 has, since its promulgation, been consistently acted upon by all persons and bodies concerned. If a doubt as to construction subsequently arises it is competent for the Parliament to say, as it has done by s. 11 of the *Wheat Industry Stabilization Act* (*No.* 2) 1946, that that which everybody thought to be valid shall be valid. It has not been disputed that the Commonwealth did have power under the defence power to acquire wheat coming into existence, when it came into existence, and if the machinery to acquire was defective because the order made in

(1) (1942) 66 C.L.R. 77. (2) (1941) 65 C.L.R. 255.

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November 1939 did not properly describe the crop, then that defect was removed by s. 11 of the 1946 Act.

A. R. Taylor K.C. [He referred to and discussed at length the following Acts :—*Flour Tax (Wheat Industry Assistance) Assessment Act* 1938 ; *Flour Tax Act* 1938 ; *Flour Tax (Stocks) Act* 1938 ; *Flour Tax (Imports and Exports) Act* 1938 ; *Wheat Tax Act* 1938 ; *Wheat Industry Assistance Act* 1938 ; *Wheat Industry (War-time Control) Act* 1939 ; *Wheat Tax (War-time Assessment) Act* 1940 ; *Wheat Tax (War-time) Act* 1940 ; *Wheat Industry (War-time Control) Act* 1940 ; *Wheat Subsidy Act* 1944 ; *Wheat Tax (War-time) Repeal Act* 1944 ; *Wheat Industry (War-time Control) Act* 1944 ; *Wheat Industry Stabilization Act* 1946 ; *Wheat Export Charge Act* 1946 ; *Wheat Industry Assistance Act* 1946 ; *Wheat Tax Act* 1946 ; *Wheat Export Charge Act (No.* 2) 1946 ; and *Wheat Industry Stabilization Act (No.* 2) 1946.]

So far only s. 31 of the *Wheat Industry Stabilization Act* 1946 has been proclaimed. The *Wheat Tax Act* 1946 is not a law with respect to compensation, but is merely part of a plan to impose a tax on wheat which is exported by the Board or by any other person. It is purely a taxing Act. The tax levied under the *Wheat Export Charge Act* is not imposed in relation to compensation or in relation to the acquisition of property as part of the means of determining the price to be paid, but is merely part of a scheme for levying taxes in relation to the export of wheat where the price being paid is far in excess of the domestic price. The amount of compensation paid for the acquisition of property might be affected by other Commonwealth legislative powers and that would not affect the justness of the compensation.

Barwick K.C., in reply. The appellant does not support the view that *Australian Apple and Pear Marketing Board* v. *Tonking* (1) was well decided, but, of course, cannot in this Court re-open the matter. The decision was that reg. 14 was compulsory and binding on the Commonwealth, and that reg. 19 was voluntary. If a person has access to a court for the determination of compensation on common law principles, that person has just terms. Such compensation may even be greater than just terms. The particular scheme was not a pool such as might satisfy just terms. The 1938 legislation contemplated that the price of wheat would rise above 5s. 2d. per bushel. The *Wheat Tax Act* 1938 contemplated that the price of wheat might rise beyond 9s. per bushel. On the legislation,

(1) (1942) 66 C.L.R. 77.

if the price of wheat exceeded 9s. per bushel, a tax of one shilling per bushel would be the maximum contribution of the grower for the home economy. The tax is a tax on the purchaser, the wheat merchant, and is not a tax on the grower, and it goes to enhance the price that the miller would pay to the grower. The legislation was designed to stabilize the cost of wheat to the miller at 5s. 2d. per bushel and to enable the miller to compete with the shipper in the open market.

[DIXON J. referred to *Pointe Gourde Quarrying and Transport Co. Ltd.* v. *Sub-Intendent of Crown Lands* (1)].

A somewhat similar case is *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (2). The chance in war-time of Commonwealth acquisition could never have diminished the value of wheat because of s. 51 (xxxi.) of the Constitution. "Compensation" is the pecuniary equivalent of that which is taken, as and when taken.

[DIXON J. referred to *Fraser* v. *City of Fraserville* (3)].

Dealing with land, *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (4) holds that the value is what a willing purchaser would pay and not what a purchaser would pay under compulsion. What has been referred to as "election" is really accord and satisfaction, and the parties never entered the path of accord and satisfaction. The wheat was not delivered voluntarily by the appellant because the regulations were presumed to be good and the Board could not have been misled by the fact that the appellant was, in a sense, consenting to some activity of the Minister in relation to the wheat. The moneys paid to the appellant are advances of compensation, not dividends (*Australian Apple and Pear Marketing Board* v. *Tonking* (5)).

Cur. adv. vult.

May 31.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal in an action which raises the question of the rights of wheat growers whose wheat was acquired by the Commonwealth under the *National Security* (*Wheat Acquisition*) *Regulations* and was dealt with by the Australian Wheat Board under the regulations in what is described in the relevant documents as Wheat Pool No. 9. The regulations provide for the payment of compensation for wheat acquired. The Board has paid certain dividends or advances to the plaintiff company in respect of

(1) (1947) A.C. 565.
(2) (1914) A.C. 569.
(3) (1917) A.C. 187, at p. 194.
(4) (1939) A.C., at p. 316.
(5) (1942) 66 C.L.R., at pp. 102, 105.

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wheat acquired from the company and is willing to make further payments. The plaintiff contends that the amounts so paid or payable do not constitute fair compensation and claims a further sum. The learned trial judge, *Williams* J., dismissed the action and the plaintiff has appealed.

The Wheat Acquisition Regulations, made under the *National Security Act* 1939, and continued in operation under the *Defence (Transitional Provisions) Act* 1946, came into operation after the adoption of a wheat industry stabilization scheme in 1938. The *Wheat Industry Assistance Act* 1938, No. 53, provided for financial assistance to the wheat industry by the Commonwealth through the States. It provided for the payment of moneys to the States (s. 6) to be applied by the States in financial assistance of wheat growers (ss. 6 and 7). The moneys were to be raised by taxes on flour and wheat under Acts Nos. 48, 49, 50, 51 and 52 of 1938. The rates of tax depended upon the price of wheat. It was a condition of the scheme, which depended upon State as well as Federal legislation, that consumers of wheat products, e.g. bread, should be protected against excessive prices (Act No. 53, s. 10). The object of this legislation was to provide a payable price for wheat. The price of 5s 2d. per bushel (for bagged wheat) and 4s. 11d. (for bulk wheat) free on rails at the port of Williamstown, Victoria, was adopted by the legislation as a payable price and the rates and incidence of the taxes were to be adjusted accordingly. As long as the export price of bagged wheat was less than 5s. 2d. f.o.r. Williamstown the flour tax would have been in force: Acts Nos. 49, 50. If the price exceeded 5s. 2d. the *Flour Tax (Imports and Exports) Act* 1938, No. 51 would have been brought into operation by proclamation and a tax would then have been payable upon wheat exported from Australia. The proceeds of the tax would have been available to keep down the cost of wheat used locally. The effect of this legislation is stated in *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (1). *Williams* J. in the present case summarized the legislation in the following words :—" It is clear from this legislation that in 1938 the Governments of the Commonwealth and the States took the broad view that, while the export value of wheat was below 5s. 2d. per bushel f.o.r. Australian ports, the Australian public as consumers of bread should be taxed indirectly to provide a subsidy for wheat growers, but that, if and when the export value of wheat exceeded 5s. 2d., the price which the wheat growers would otherwise have received for their wheat should be reduced by the wheat merchant or exporter

(1) (1939) 61 C.L.R. 735; (1940) A.C. 838; 63 C.L.R. 338.

having to pay a tax not exceeding 1s. per bushel on the wheat which he purchased, and that the proceeds of this tax should be used as a subsidy to keep down the local price of flour." (1)

When the war broke out the Wheat Acquisition Regulations were made—first under the *Defence Act* and later under the *National Security Act*. Certain features of the existing stabilization scheme were preserved, but others were varied. The regulations provided for the compulsory acquisition of wheat by the Commonwealth and for the establishment of the Australian Wheat Board to dispose of the wheat. The flour tax was fixed at £2 8s. 10d. per ton. This rate of tax was appropriate to a price f.o.r. Williamstown of 3s. 11¼d. per bushel. The tax was not varied notwithstanding changes in the value of wheat for export, because the Wheat Board was in control of all wheat and the sale of wheat locally at 3s. 11¼d. per bushel or thereabouts, with a flour tax of £2 8s. 10d. per ton, made it possible for the millers to supply the bakers with flour at prices which enabled the bakers to sell bread at the prices fixed. The proceeds of the flour tax were, under the *Wheat Industry (War-time Control) Act* 1939, paid to the Commonwealth Bank (not to the States) in repayment of the advances made by the Bank to the Board by means of which the Board had been enabled to pay the wheat growers for their wheat. The tax on wheat exported was not imposed, the Minister abstaining from making the declaration necessary to bring the Tax Act into operation, the Board being the only exporter.

An order was made by the Minister under the regulations on 16th November 1939 declaring that, with certain exceptions (seed wheat &c.), all wheat harvested on or before 8th October 1939 which was then in Australia, and all wheat harvested in Australia on or after that date, was acquired by the Commonwealth.

The wheat which was acquired was sold by the Wheat Board either on the local market to millers and others, or to the British Ministry of Food. The proceeds of the wheat, less expenses, were paid to the wheat growers. Up to and including 1945-1946 there were nine wheat pools. The plaintiff company (or Mr. H. K. Nock, who previously owned the farm upon which the plaintiff company grew wheat) put its wheat into every pool except Pool No. 8, when it had no wheat because of a drought. Up to 1945-1946 the export price for wheat was less than 5s. 2d. The pools received the benefit of the flour tax and of sums amounting to more than £12,000,000 in subsidies from the Commonwealth Government. The 1945-1946 crop delivered to the Board amounted to about

(1) *Ante*, at p. 511.

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123,000,000 bushels. About 59,000,000 bushels were disposed of locally and the remainder was sold for export. In 1945-1946 the export price rose. The plaintiff company has been paid, or is admittedly entitled to receive as dividends from the pool, about 6s. 11d. per bushel for its crop and some further final payments, but it claims to be paid on a basis of export parity as at dates of delivery of its wheat to the defendant Board, that is about 9s. 6d. per bushel for bulk wheat and 9s. 9d. per bushel for bagged wheat—taking the figures adopted by the learned trial judge.

The regulations, as they applied to the 1945-1946 crop, included the following provisions :—" 14. For securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth, for the efficient prosecution of the war, and for maintaining supplies and services essential to the life of the community, the Minister may, from time to time, by order published in the *Gazette*, make provision for the acquisition by the Commonwealth of any wheat described in the order, and that wheat shall, by force of and in accordance with the provisions of the order become the absolute property of the Commonwealth, freed from all mortgages, charges, liens, pledges, interests and trusts affecting that wheat, and the rights and interests of every person in that wheat (including any rights or interests arising in respect of any moneys advanced in respect of that wheat) are hereby converted into claims for compensation." " 19. (1) Upon delivery or consignment of any wheat in accordance with regulation 16 of these Regulations (or, in the case of wheat acquired by the Commonwealth to which sub-regulation (2) of regulation 16 of these Regulations applies, after the date of the commencement of that sub-regulation), every person having any right or interest in that wheat may forward to the Board a claim for compensation in accordance with Form B in the Schedule to these Regulations and shall be entitled to be paid such amount of compensation as the Minister, on the recommendation of the Board, determines. (2) It shall not be necessary for the Minister to make a determination in pursuance of sub-regulation (1) of this regulation until, in his opinion, a sufficient quantity of any wheat acquired by the Commonwealth has been disposed of to enable the Board to make a just recommendation, but the Minister may, in his absolute discretion, make any payment on account of any claim notwithstanding that no determination in respect of that claim has been made. (2A.) The basis of the compensation to be recommended by the Board shall be the rate or rates per bushel arrived at by reference to the surplus proceeds from the disposal of wheat, but from the compensation determined by the Minister

the Board may make deductions on account of any or all of the following:—(*a*) the price or value of corn sacks (including freight thereon) supplied to the wheat grower or which, in the opinion of the Board, form a proper charge against the proceeds of the wheat; (*b*) transport charges to the terminal port from the place at which the wheat is delivered to a licensed receiver; and (*c*) dockages or deductions as fixed by the Board on account of the quality or condition of the wheat or corn sacks. . . . (2B.) If the Board is satisfied that, because of the special quality of any particular parcel or parcels of wheat, an addition should be made to the relevant rate as determined by the Minister for f.a.q. wheat, the Board may, subject to any direction of the Minister, add such amount by way of premium as it thinks fit."

Regulation 14 provides that compensation shall be paid. Regulation 19 provides a particular method of assessing compensation. For reasons which I state hereafter, it does not appear to me to be important in this case to decide whether reg. 19 was, on the true construction of all the regulations, intended to be the only method of assessing compensation, or whether it was intended to provide only for an optional non-litigious means of assessing compensation, of which owners of wheat could (but need not) take advantage if they chose. In *Andrews* v. *Howell* (1) the validity of reg. 12 of the *National Security* (*Apple and Pear Acquisition*) *Regulations* was upheld by the Court. The regulation was in terms substantially the same as those of reg. 14 of the Wheat Acquisition Regulations. All the members of the Court held that reg. 12 was not invalid as not providing just terms of acquisition. A regulation (reg. 17) providing for the determination of compensation by the Minister after recommendation by a Board, but not in terms requiring the whole of the net proceeds to be distributed by way of compensation, was held by *Starke* J. (2) not to be an exclusive method of enforcing the right to compensation. In *Australian Apple and Pear Marketing Board* v. *Tonking* (3), this view was adopted and applied by *Williams* J. (4), *Rich* J. (5), and myself (6). Since the decision in *Tonking's Case* ( ) the Apple and Pear and Wheat Acquisition Regulations have been re-enacted by Parliament itself in the *Defence* (*Transitional Provisions*) *Act* 1946. No amendments were made for the purpose of altering the law as declared in *Tonking's Case* (3). When the legislature uses words which have received judicial interpretation, then, in the absence of any indications to the contrary, it should be

(1) (1941) 65 C.L.R. 255.
(2) (1941) 65 C.L.R., at p. 270.
(3) (1942) 66 C.L.R. 77.
(4) (1942) 66 C.L.R., at pp. 81, 82, 89.
(5) (1942) 66 C.L.R., at p. 105.
(6) (1942) 66 C.L.R., at p. 101.

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assumed that the words are used in the sense in which they have been judicially interpreted (*Jay* v. *Johnstone* (1); *Avery* v. *Wood* (2)). *Andrews* v. *Howell* (3) and *Tonking's Case* (4) were not challenged or questioned by either plaintiff or defendants. But, as I have already said, there are, in my opinion, reasons (which I state hereafter) which make it unnecessary to decide in this case whether reg. 19 is intended to be the only method of obtaining compensation.

The plaintiff brought this action against the Commonwealth of Australia, the Attorney-General for the Commonwealth, the Minister for Commerce and the Australian Wheat Board. The plaintiff made several claims :—

(1) A declaration that the *National Security* (*Wheat Acquisition*) *Regulations* as amended are invalid.

This claim was abandoned upon the appeal. It is obvious that if it had succeeded the plaintiff would have been unable to claim compensation under the regulations. Legislation for the control and acquisition of foodstuffs in time of war and for some time afterwards is clearly within the defence power of the Commonwealth. Therefore the Parliament can make laws for the acquisition of foodstuffs for purposes of defence, provided that such laws provide for just terms of acquisition : Commonwealth Constitution, s. 51 (xxxi.). Regulation 14 provides for " compensation " for wheat acquired. Compensation must be fair and adequate compensation. Regulation 14 is valid : see *Andrews* v. *Howell* (3).

(2) The plaintiff next claimed a declaration that reg. 19 of the regulations was invalid.

Upon the appeal the plaintiff most explicitly abandoned any claim that any of the regulations were invalid. Commonwealth laws providing for the acquisition of property must observe the constitutional requirement of just terms : Commonwealth Constitution, s. 51 (xxxi.) (*Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (5)). But in this case no question arises as to just terms. The regulations provide for compensation, which means fair and adequate compensation, and such terms of acquisition cannot be held to be unjust. Regulation 19 does not provide for the payment of export parity but, on the other hand, provides only dividends from a pool. These dividends have been diminished by the fact that wheat was disposed of by the Board for local consumption at prices below export parity. No question

(1) (1893) 1 Q.B. 25.
(2) (1891) 3 Ch. 115.
(3) (1941) 65 C.L.R. 255.
(4) (1942) 66 C.L.R. 77.
(5) (1943) 67 C.L.R. 314.

of the validity of reg. 19 arises, but it will be necessary to consider whether the payment of dividends in accordance with reg. 19 does or does not give the plaintiff fair and adequate compensation. It is contended for the defendants that reg. 19 does provide for proper compensation.

(3) The plaintiff claimed a declaration that the order dated 16th November 1939 made under the regulations for the acquisition of wheat was invalid.

The plaintiff attacked the validity of the order for two reasons—first, to support a contention that there was a tortious taking of the wheat, and, secondly, in order to avoid, if possible, the deduction in the estimate of compensation of a wheat tax which, it was argued for the defendants, would have become payable under the *Wheat Tax Act* 1946 upon wheat acquired by the Commonwealth if wheat was in law so acquired. When the order was made the power of the Minister was a power by order published in the *Gazette* to declare that "any wheat described in the order" was acquired by the Commonwealth. The objection made to the order was that under it the wheat acquired included wheat harvested after a certain date, and it was said that this was not a true description of any wheat. If it were held that the order acquiring the plaintiff's wheat was invalid, then the plaintiff would have no claim for compensation as for wheat acquired, and its claim for compensation would fail. But I agree with *Williams* J., for the reasons given by him, that there is no ground for objecting to the validity of the order under the regulations. A description of wheat as wheat harvested after a given date is as fully a description of wheat as is a description of wheat as harvested before a certain date: see *Peanut Board* v. *Rockhampton Harbour Board* (1), where it was held that an order purporting to acquire future goods was not invalid for that reason; and cf. *Andrews* v. *Howell* (2), where the validity of a similar order (see the report for the terms of the order (3)) made under a regulation identical in its relevant terms with reg. 14 was not questioned on that ground. Further, I agree that if there were doubt as to the validity of the order, that doubt has been removed by the *Wheat Industry Stabilization Act* (*No.* 2) 1946, s. 11, which expressly gives full force and effect to this particular order.

(4) The plaintiff claimed compensation for the acquisition of its wheat.

(1) (1933) 48 C.L.R. 266.
(2) (1941) 65 C.L.R. 255.
(3) (1941) 65 C.L.R., at p. 266.

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This is the substantial claim of the plaintiff.

(5) The plaintiff claimed interest.

(6) Alternatively, the plaintiff claimed that the defendant Board converted the wheat of the plaintiff and claimed damages for conversion.

This claim was based, not upon an alleged invalidity of any regulation, but upon the alleged invalidity of the order already mentioned in relation to claim No. 3. As I have said, in my opinion that order was valid. But there is a further answer to the allegation of conversion. The statement of claim contains an allegation that the plaintiff itself delivered the wheat to the agents of the defendants, and this fact was proved by the evidence. None of the defendants seized the wheat against the will of the plaintiff; the Wheat Board dealt with the wheat in accordance with the intention of the plaintiff in delivering the wheat; there is no evidence whatever that the Board dealt with the wheat in a manner inconsistent with any rights of the plaintiff; everything that the Board did in relation to the wheat was authorized by the plaintiff. The claim for conversion accordingly must in my opinion fail.

(7) The plaintiff also claimed that the plaintiff agreed to sell the wheat to the Wheat Board and sued for the price.

The price claimed is export parity. This claim was not argued. There is no evidence to support it, and it may be ignored.

The claim for compensation is made under reg. 14 upon the basis that the Commonwealth acquired the plaintiff's wheat of the 1945-1946 crop. The plaintiff's claim is stated as follows:—

"Wheat Delivered to Silos—3,786.20/60 bush.

@ 9/9 bush.	£1,845 16 9
Bagged Wheat—10,498.50/60 bush. @ 10s. bush.	5,249 8 4
	£7,095 5 1
Less rail and handling 9d. bush. ..	535 13 9
	£6,559 11 4
Less compensation received	3,441 10 1
Balance claimed	£3,118 1 3"

The defendants contend that the plaintiff company accepted advances to the extent mentioned and elected to agree to accept compensation determined in pursuance of reg. 19 of the regulations and that it is precluded from claiming compensation on any other basis. The defendants also contend that the plaintiff has not

(upon any view) shown any right to be paid any sum of money in excess of the sum of £3,441 10s. 1d.

About half of the 1945-1946 crop was exported. His Honour took the view that if there had been a free market for the plaintiff's wheat there would nevertheless have been some control which would have prevented the price of wheat sold locally from exceeding 5s. 2d. for bagged wheat f.o.r. Williamstown. He therefore assumed that one-half of the plaintiff's wheat, if it had been available for sale, would have been sold at no more than 5s. 2d. for bagged wheat and that the other half only would have been sold at export prices which were stated by the learned judge at 9s. 6d. (bulk) and 9s. 9d. (bagged). It was conceded that transport and handling charges should be deducted to bring these seaboard prices back to siding prices. His Honour made a further deduction for probable taxes upon exported wheat under the *Flour Tax (Imports and Exports) Act* 1938 and the *Wheat Export Charge Acts* 1946 (Nos. 25 and 79). The payments made by the Board to the plaintiff in respect of its wheat exceeded the value of the wheat as ascertained in this manner, and his Honour accordingly dismissed the action.

When the wheat was delivered to the agents of the Wheat Board Mr. H. K. Nock, the governing director of the company, filled in and signed certain forms. In the case of wheat delivered to a silo, the document which was signed was headed "Australian Wheat Board—*National Security Act* 1939-1940—Wheat Acquisition Regulations—No. 9 Pool." In it Mr. Nock declared that the company had delivered wheat grown under a specified licence to the Government silo in accordance with the particulars set out, and that the company claimed compensation in accordance with the Wheat Acquisition Regulations. He nominated a particular company as licensed receiver for payment of compensation, which was to be paid through the Commercial Banking Co. of Sydney at its Parkes Branch. In the case of bagged wheat the documents were headed in the same way—"No. 9 Pool" &c., and contained corresponding particulars.

The Wheat Board received and dealt with the wheat. The wheat was dealt with as part of the 1945-1946 crop, and it lost its identity as soon as it was delivered to the Board. It was not possible in this case to adduce evidence such as was given in *Tonking's Case* (1), showing the proceeds of the specific goods acquired from the plaintiff. It may be added that in the present case evidence was given as to facts and circumstances which were relevant to the establishment of what was described by all the parties as a "pool"

(1) (1942) 66 C.L.R. 77.

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as a means of disposing of primary products. No such evidence was given in *Tonking's Case* (see the report (1)), and the "pool" in that case was different from the pool in the present case. The Apple and Pear Acquisition Regulations did not contain provisions corresponding to pars. (2A) and (2B) of reg. 19 of the Wheat Acquisition Regulations.

The Wheat Board disposed of the crop by local sales and by sales for export. The purchasers in local sales were millers, produce merchants and breakfast food manufacturers. Maximum and minimum prices for flour had been fixed under State, and later under Commonwealth, legislation. The maximum price of bread had been fixed under State legislation and National Security regulations at about 6d. per 2 lb. loaf. This fixation of the price of bread placed a limit upon the price which a baker could pay to a miller for flour, and therefore imposed a limit upon the price which a miller could pay to the Wheat Board or to any person for wheat. Accordingly, as long as the price of bread was fixed at 6d., it was impossible for the local price of wheat to rise and remain above a certain figure. The flour tax, however, had made it possible to pay the farmer a price higher than the price which would otherwise have been obtainable by him. The Board sold wheat of the 1945-1946 season to the millers at 3s. 11¼d. per bushel, to produce merchants at 4s. 3d. per bushel, and to breakfast food manufacturers at 3s. 11¼d. per bushel: evidence of C. J. Perrett, General Manager of the Board. With the price of bread fixed at 6d. per 2 lb. loaf, a miller, with the flour tax at £2 8s. 10d. per ton, could not pay more for wheat than about 3s. 11¼d. per bushel.

In normal non-crisis times unaffected by war or post-war conditions the price of wheat for local consumption bore a close relation to export price. A farmer would not sell his wheat for local consumption at a price lower than that which he could obtain from an exporter. Thus, as Mr. Nock said in evidence:—"There was always an export value for wheat except there was some world crisis. If the miller in Sydney, Adelaide or Melbourne acquired wheat he always had to give as much as the shipper would, sometimes more. When there was a temporary lack of offerings he had to give as much as a penny more. . . . Export parity was practically always the lowest price and the millers' price was frequently above, as also was the speculators' price." (The learned judge accepted as true all the evidence of all the witnesses. There was no conflict of testimony.) In 1945-1946 there was a strong market for wheat and the export price rose. The plaintiff claims

(1) (1942) 66 C.L.R., at p. 81.

that it is entitled as compensation to the fair pecuniary equivalent of its wheat at the time and place of acquisition. That equivalent, it is argued, is to be determined on the basis of export parity, so that the plaintiff should not suffer by reason of the policies to which effect was given by the provisions which provided wheat for local consumption at a lower price than export parity. The defendant, on the other hand, says that so-called "export parity" was, in the conditions which prevailed at the time when the plaintiff's wheat was acquired, not a true measure of the value of the wheat and that the plaintiff will get full and fair compensation on the pooling basis.

The plaintiff company (or Mr. Nock before he formed the company) had always put its wheat into the pools and had accepted dividends from the pools in the form of advances and, when pools were wound up, of final payments. The plaintiff put its wheat into No. 9 pool in the manner stated, and allowed its wheat to be dealt with as part of the pooled wheat, together with the rest of the wheat, making up 123,000,000 bushels. The plaintiff received from the Board certificates or warrants for its wheat, with coupons for advances attached. These warrants were assignable to other persons. The plaintiff accepted first and second advances on various quantities, amounting in all to £3,441 10s. 1d., but in June 1946 the plaintiff instructed its bank not to accept any further advances. The defendant is willing to pay the further advances as dividends from the pool. The plaintiff, however, refuses to receive them. The amounts received amount to about 6s. 11d. per bushel, or about 5s. 9d. after the deduction which the defendants claim and have made for wheat tax.

The plaintiff now claims compensation upon a basis which ignores the pool. The plaintiff contends that it was entitled to inform the Wheat Board that it was putting its wheat into the pool and to allow the Board to assume that the plaintiff was content that its wheat should be dealt with in the same manner as the wheat belonging to thousands of other farmers, but that if it turned out that the market price on the day of delivery to the Board was higher than the ultimate pool dividend, the plaintiff could then disclaim any relation to the pool and insist upon payment of the market price. In my opinion the plaintiff definitely and unambiguously delivered the wheat as wheat to go into No. 9 pool. The documents which the plaintiff signed contained an express statement to that effect. It was the intention of the plaintiff and of the Board that the wheat should be dealt with as put into the pool, that the Board should not be under any separate special liability in relation to the plaintiff's

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wheat, but that the liability of the Board should be that which is involved in the existence of a pool, namely proper disposition of the product, deduction of proper expenses, and distribution, in advances and final dividends, of the net proceeds. The plaintiff invited the Board to deal with its wheat upon this basis and the Board acted accordingly. The plaintiff contends, however, that any farmer was entitled to act as the plaintiff did, by putting his wheat into the pool but keeping a claim for compensation on an export parity basis up his sleeve.

Regulation 19 may be regarded either as *the* means, and the *only* means, of determining compensation under reg. 14, or as *a* means of obtaining compensation if the owner of the goods is prepared to accept that particular method of assessment (see *Tonking's Case* (1)). Upon the former view all persons whose wheat was acquired are bound to accept the payments made in accordance with reg. 19 as representing full compensation. Upon the latter view, if they in fact accept the method of reg. 19 and invite the Board to deal with the wheat as pooled wheat, they cannot, in my opinion, subsequently change their ground and claim that they have had a separate transaction with the Board altogether outside the pool, and that the Board is bound to pay them what happens to be the market price for their parcels of wheat on the days of delivery of their wheat to the Board. To admit such a contention would allow the owner to approbate and reprobate. The Board would never know what its relation was to any owner. The evidence shows that such a position was not within the contemplation of either the plaintiff or the Board when deliveries were made and advances were paid. In my opinion the plaintiff delivered its wheat to the Board upon the terms that it was to be dealt with in No. 9 pool. The Board, upon the invitation of the plaintiff, so dealt with the wheat, and the plaintiff is not now at liberty to seek to change the whole basis of its dealings with the Board. Upon this ground in my opinion the action of the plaintiff should fail.

If reg. 19 is held to be compulsory in character, the plaintiff is bound by it. If it provides only an alternative optional means of obtaining compensation, the plaintiff has adopted it. Thus, in my opinion, the action of the plaintiff should fail, whether reg. 19 is construed as in *Tonking's Case* (1) or otherwise.

But I am also of opinion that, even if, as the plaintiff claims should be the case, the question of fair compensation is approached upon the basis that the plaintiff is entitled to disregard the pool, the amount payable to the plaintiff under the pooling provisions

(1) (1942) 66 C.L.R. 77.

has not been shown to be less than the amount of compensation properly payable.

If compensation is payable upon a basis which disregards the pool, it should be determined by inquiring what could have been obtained by the plaintiff company for its wheat if the wheat had not been compulsorily acquired. Plaintiff's counsel expressed this principle by saying that it should be assumed that there was " a free market " for wheat at the time when the wheat was acquired and argued that this meant an hypothesis not only that no powers of compulsorily acquiring the plaintiff's wheat had been created, but also that there were no powers of compulsorily acquiring any wheat from any other persons. I agree with the former proposition but, upon the view which I take of the effect of the evidence, it is unnecessary for me to express an opinion upon the latter proposition, which cannot be said to be as clearly established as the former proposition. Reference was made to *Cedars Rapids Manufacturing & Power Co.* v. *Lacoste* (1) and *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (2), which were land compensation cases. In the former case the claimant sought to have the value of his land assessed upon the basis that it would form a valuable part of the enterprise to be established by the acquiring authority. It was held, however, that the price which was payable as compensation was to be tested by " the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers " (of compulsory acquisition) (3). Accordingly, the question to be investigated was for what the land would have been sold if " put up to auction without the appellant company (the acquiring authority) being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers." Similarly, in the *Vyricherla Case* (4) it was said that the compensation for land compulsorily acquired must be determined by reference to " the price which a willing vendor might reasonably expect to obtain from a willing purchaser. . . . Neither must be considered as acting under compulsion." It was said that: " The valuation must always be made as though no such powers " (that is, of acquisition) " had been acquired, and the only use that can be made of the scheme " (that is, the enterprise for which the property acquired was to be used) " is as evidence that the acquiring authority can properly be regarded as possible purchasers " (5).

(1) (1914) A.C. 569.
(2) (1939) A.C. 302.
(3) (1914) A.C., at p. 576.
(4) (1939) A.C., at p. 312.
(5) (1939) A.C., at pp. 319, 320.

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These principles have been applied for the purpose of preventing the owner of land which has been compulsorily acquired from obtaining by way of compensation something like a bonus or premium by reason of the adoption or development of the scheme which the acquisition is designed to serve. For example, a small allotment is essential to the establishment of a large power plant on a large area. The owner is not entitled to compensation upon the basis that the allotment is essential to the large enterprise. He is entitled to the value to him of the allotment but not to a payment representing value to the taker, enhanced or created by the scheme under which the acquisition is made. This is the reason why it is said, in land compensation cases, that value is to be assessed as if the acquiring authority had no powers of compulsory acquisition. Similar reasoning would prevent the amount of compensation being diminished by the result of the acquisition of a claimant's property.

The plaintiff submitted two alternative hypotheses as representing the proper basis for assessing compensation, it being assumed in each case that there were no powers of compulsory acquisition: first, that the Board did not exist, and secondly, that the Board existed and was the sole available buyer of wheat, but (as stated) that the Board had no powers of compulsory acquisition.

In the wheat season 1945-1946 the war had just ended and conditions of trade and of transport were still very disturbed. Wheat could be sold for export only if it could be transported overseas. Shipping was still under control, which gave priority to Government requirements. A witness for the plaintiff said that an individual with wheat in 1945-1946 would not have been able to sell upon the overseas market, and the evidence for the defence showed that all exported wheat went to buyers who had an allocation from the International Emergency Food Council in Washington, and that wheat was exported in accordance with allocations made by the Council. The purchases for export were actually made by the United Kingdom Ministry of Food, and the wheat was sent to India, Ceylon, Malay Archipelago and Hong Kong. Shipping was provided by the Ministry of War Transport or the Ministry of Transport in England, and there was difficulty in obtaining shipping for what the Board exported in 1946. All this evidence was accepted by the learned trial judge. There was no evidence that an individual with 14,000 bushels of wheat to sell (or even a larger quantity) would have obtained an allocation from Washington or that the British Ministry of Food would have dealt with such an individual.

The export prices upon which the plaintiff relies as fixing the value of its wheat were in fact the prices at which the Board sold

wheat for export, there being no other sellers. The plaintiff claims on the basis of these prices for all its wheat. There is no evidence as to whether the plaintiff's wheat was in fact sold for export or for local consumption, but this fact is immaterial. There would not be two prices for identical wheat in the same market.

I consider the question of compensation upon the hypothesis first submitted—that no wheat whatever was compulsorily acquired, and that the Wheat Board did not exist.

In my opinion it is mere gratuitous assumption to say that in the circumstances stated there would have been export prices of 9s. 6d. and 9s. 9d. Those prices existed because the Australian Wheat Board existed, and because the disposition of wheat had been organized by the Board in co-operation with overseas authorities. The Board had obtained bags and, indeed, owned all the wheat bags in Australia at a time when it was very difficult to buy bags. It had the services of all the skilled wheat merchants. The evidence shows, and it is common knowledge, that trade, and especially export trade, in all commodities was gravely upset and disturbed by the war. It is impossible to say whether, if there had been no system of national control of disposition of wheat, including the provision of bags and shipping to take away exported wheat, it would have been possible to dispose of wheat at any particular price. Only 59,000,000 bushels or thereabouts out of the 123,000,000 bushel crop were required for home consumption. In the absence of some form of control, and particularly of governmental assistance for the purpose of obtaining shipping, it is quite probable that there would have been a glut of wheat in Australia with very low prices, or no prices at all, and that it would have been impossible to sell wheat for export. If in the disturbed conditions of 1945-1946 the wheat industry had been left to itself without any control it can only be a matter of speculation as to what the position of the wheat market in Australia would have been. A condition of complete chaos would have been as likely a result as any other. The plaintiff has received or is entitled to receive 6s. 11d. per bushel for its wheat if compensation is determined under reg. 19. The onus is on the plaintiff to show that the amount is not in all the circumstances fair compensation. The plaintiff has not in my opinion shown that, upon the hypothesis mentioned, it would have been possible to obtain as much as 6s. 11d. a bushel for the wheat. On this basis the claim of the plaintiff fails because it is not shown that the plaintiff has not already received adequate compensation.

The second hypothesis submitted for the plaintiff as an alternative is that the existence of the Board might be assumed, the Board

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being regarded as a possible purchaser, but without any power of compulsory acquisition. What has been said with respect to the first hypothesis applies equally to this suggestion. The Board would merely become a possible purchaser, but all the circumstances referred to in discussing the first hypothesis would still exist, with the same complete uncertainty of effect upon the marketability of wheat. If the Board is to be supposed to be conducting a voluntary pool (there being no power of compulsory acquisition) then it is unlikely that the Board would concern itself with persons who refused to come into the pool.

In order to exhaust the possible alternatives, consideration may be given to the probable position if it is assumed that the regulations existed and that the Board had powers of compulsory acquisition and had acquired all the wheat with the exception of the plaintiff's wheat. What in those circumstances would the plaintiff have been able to get for its wheat? Millers would have paid no more than the price at which they could have bought from the Board (3s. 11¼d. per bushel). Similarly, the produce merchants would not have paid more than 4s. 3d. per bushel, and breakfast food manufacturers would have paid no more than 3s. 11¼d. No reason has been suggested which would lead the Board itself (regarded as a willing purchaser) to give to a person who had refused to come into the pool terms more favourable than those given to growers who had brought their wheat into the pool. As far as export wheat was concerned, the Board in fact controlled all export of wheat, and it is difficult to see that a private seller with a few thousand bushels would have been able to dispose of his wheat at all. The onus is on the plaintiff to show that upon this hypothesis it would have obtained more for its wheat than is available under the terms of reg. 19, and the plaintiff has failed to show that this is the case.

In my opinion the hypothesis of "a free market" should, in its application to questions of compensation, be taken to mean only that the assessing tribunal should endeavour to ascertain the price which a willing purchaser would give to a not unwilling vendor of the property in question, neither being under any compulsion, the price to be assessed at the value to the owner. This does not mean that the assessing tribunal is to assume a legislative void. It is one thing to assume that an acquiring authority does not exist, or that it exists, but without power of compulsory acquisition, so that it can be regarded as a potential purchaser. It is quite a different thing to assess value upon an hypothesis that there are no laws which affect that value, or that some of such laws do not exist.

Such an assumption imagines a market which could never have existed. It is not upon a basis so unreal that " true value " is to be assessed. Neither a duty to provide just terms for the acquisition of property nor an obligation to pay fair compensation involves a complete exclusion of all consideration of the interests of the community, or, more particularly, of the laws which protect such interests. Justice and fairness to the community are not precise standards ; but laws directed to those objectives, if their terms are clear, are not open to such criticism. The necessity of paying compensation under the law and of giving just terms to persons whose property is acquired under the law does not in my opinion compel the community to submit to the exaction of the uttermost farthing upon the basis that laws protecting the community against excessive prices are to be disregarded when compensation is being assessed.

In considering the various hypotheses which may be taken as a basis for compensation I have hitherto excluded the fact that the price of bread was fixed under Federal and State laws. The validity of these laws was not challenged. It cannot be contended, since *Farey* v. *Burvett* (1) that the defence power does not enable the Commonwealth Parliament to fix the price of bread. Neither can it be argued that State Parliaments cannot effectively legislate with respect to internal prices of goods (*James* v. *The Commonwealth* (2)).

It has been held by the highest authority that laws which directly apply to the subject matter of acquisition may properly be taken into account in determining compensation. For example, in the case of land, legislative restrictions upon its use are relevant to a determination of the value of the land (*Corrie* v. *MacDermott* (3)). So also the commercial value of goods may be affected by limitations upon their sale or by provisions with respect to taxation, as in the case of intoxicating liquors. *A fortiori*, it is proper to take into account laws which do not directly apply to the subject matter of acquisition (in this case, wheat), but which, applying to other goods (bread) either necessarily or probably affect the value of that which is acquired. In the present case the value of wheat for local consumption was effectively controlled by the fact that the price of bread was fixed under legislative provisions at about 6d. per 2 lb. loaf, in some cases under Federal authority, in other cases under State authority. This fact imposed a limit upon the price which could be paid by bakers for flour and by millers for wheat. It

(1) (1916) 21 C.L.R. 433.
(2) (1936) A.C. 578, at p. 620 ; 55 C.L.R. 1, at p. 49.
(3) (1914) A.C. 1056 ; 18 C.L.R. 511 ; 17 C.L.R. 223.

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brought about the reduction of prices for home consumption which the plaintiff endeavours to ignore. In my opinion there is no justification for assessing compensation for the plaintiff upon the basis that no price was validly fixed for bread.

The result, therefore, is that there is nothing to show that the Wheat Board did not obtain what under the relevant circumstances was the best price which was practically obtainable for wheat which was locally consumed as well as for wheat which was exported. It is true that the price of bread might have been increased or that the Government might have paid larger subsidies to the pool, but neither of these things happened, and the possibility of them happening cannot reasonably be regarded as a matter which would have affected the price which any purchaser would have been willing to pay for the plaintiff's wheat in the season 1945-1946.

In my opinion the appeal should be dismissed.

The Court is equally divided in opinion and, therefore, the decision of *Williams* J. is affirmed—*Judiciary Act* 1903-1947, s. 23 (2) (*a*).

RICH J. The claim made in this case against the Commonwealth raises some very difficult questions, but in my opinion the ultimate question to be determined relates to the compensation to which the plaintiff is entitled. This question does not admit of an easy answer.

I will state briefly some of the salient facts as found by the learned trial judge. The action was concerned with the acquisition by the Australian Wheat Board of the 1945-1946 wheat crop, which in round figures amounted to 123,000,000 bushels. Approximately one half of this yield was made available for local consumption and the balance for export. The price of the wheat allocated for export was determined by the learned trial judge at 9s 6d. per bushel for bulk wheat and 9s. 9d. per bushel for bagged wheat.

The plaintiff claims that the wheat of which it was deprived by the defendant should be valued at its export price and that this price is the proper measure of the compensation it should receive. One other matter must be mentioned. While I do not think it necessary to narrate the history during recent years of the legislation relating to the Australian wheat industry there is no dispute that the effect of the legislation so far as material to these proceedings was that 5s. 2d. was fixed upon as a price which would give the wheat grower a reasonable return, and at the same time keep within bounds the price of flour and bread to the Australian consumer. Machinery was also provided whereby the price of 5s. 2d.

a bushel should remain a standard price by means of regulatory taxing provisions whereby a tax could be imposed in favour of the wheat grower as against the Australian consumer when the export price was below 5s. 2d. and imposed in favour of the consumer as against the wheat grower when the export price exceeded 5s. 2d.

In the course of the trial regs. 14 and 15 of the *National Security* (*Wheat Acquisition*) *Regulations* were challenged, but I entirely agree with the learned trial judge's conclusion that these regulations should be regarded as valid.

In my opinion reg. 14 is a material element in this case. The effect of this regulation is that when wheat has been acquired by the Commonwealth from a wheat grower, the rights and interests of every person in that wheat become converted into claims for compensation.

Now, while provision is made by the regulations to compensate the wheat grower for the wheat taken from him by what appears to be a pooling system, the wheat grower is not restricted to the means so provided for obtaining compensation for his wheat.

In *Australian Apple and Pear Marketing Board* v. *Tonking* (1) this Court considered the *National Security* (*Apple and Pear Acquisition*) *Regulations* and I can see no material difference between those regulations and the relevant Wheat Acquisition Regulations.

In my opinion, what I said in *Tonking's Case* (2) applies with equal force to the relevant Wheat Acquisition Regulations. After due consideration I adhere to the opinion which I arrived at in *Tonking's Case* (3) as to the right of an owner of property taken by the Commonwealth to compensation on the basis of just terms, and to the further conclusion that an owner of property compulsorily acquired by the Commonwealth is entitled to seek from a court of law just compensation and is not bound to accept such compensation as is provided in pursuance of statutory provisions made for this purpose.

There is nothing in the language of reg. 14 or of reg. 19 to support the view that they present the wheat grower with an election. In the instant case the company did nothing but send in a claim and receive two advances and in any case the Minister made no determination.

The problem of election arises " where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered. ' Quod semel placuit in electionibus, amplius displicere

(1) (1942) 66 C.L.R. 77.
(2) (1942) 66 C.L.R., at pp. 103-110.
(3) (1942) 66 C.L.R., at pp. 106 et seq.

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non potest.' That is Coke upon Littleton " (*Scarf* v. *Jardine* (1)). But as I have pointed out neither by the regulations nor by the evidence is an election demanded.

In the result, as I have already indicated, the crucial question in this case is what is the compensation to which the plaintiff is entitled and in determining this question just terms must be considered as the basis of this compensation.

In considering this question which as I have suggested does not admit of an easy answer, I think that the export price claimed by the plaintiff cannot be considered as the determining factor. Many other considerations must be taken into account. A great part of the wheat yield must obviously be retained for local consumption and I can see no reasonable ground for denying the right of the Commonwealth Government to determine the conditions, including a condition as to price, under which portion of the wheat yield must be retained in Australia for the benefit of local consumers.

Having regard to these considerations I am in substantial agreement with the conclusions arrived at by the learned trial judge. He found, and I can see no objection to his finding that, leaving aside any question as to deduction for tax, the plaintiff was entitled, by way of compensation for the wheat of which it had been deprived, to the sum of £4,740 as compensation.

I now consider the further question which was raised and that is whether in computing the amount of compensation payable to the plaintiff there should be some deduction for tax.

The defendant by its defence claimed that there should be a further deduction because the plaintiff had become liable to pay to it the provisional tax under the *Wheat Tax Act* 1946 at the rate of 1s. $1\frac{1}{8}$d. per bushel. I find some difficulty in accepting this claim. I will assume that this tax is valid under s. 55 of the Constitution. It appears to me however that if £X is a fair measure of the value of property taken from an owner by the Commonwealth, it is inconsistent with the idea of just terms that this sum should be reduced by a tax. I think therefore that the deduction on account of tax claimed by the defendant ought not to be allowed.

In the result I come to the following conclusions. The plaintiff is entitled by way of compensation for the wheat taken from it to £4,740. As, however, the plaintiff has already received £3,441 10s. 1d., it is therefore entitled to judgment for the difference namely £1,298 9s. 11d. While I recognize, as the trial judge found, that the addition of the sums which the plaintiff has already received and will receive under reg. 19, apart from taxation, is £4,925 4s.,

(1) (1882) 7 App. Cas. 345, at p. 360.

the formal result of these proceedings must however depend on the pleadings.

I would therefore allow this appeal with costs and in lieu of the judgment for the defendant give judgment for the plaintiff for £1,298 9s. 11d. with costs.

STARKE J. Appeal from a judgment of this Court in its original jurisdiction entering judgment for the defendants in the action, the respondents here.

The claim of the plaintiff, the appellant here, was for compensation in respect of some 14,284 bushels of wheat, 1945-1946 season, of which 3,786 bushels were in bulk and 10,498 bushels were bagged, which it was alleged the defendants had compulsorily acquired pursuant to the *National Security* (*Wheat Acquisition*) *Regulations* or had been purchased by them under an agreement for sale and purchase or which they had converted to their own use. The claim, after crediting certain receipts, involves some £3,000 but it was said at the Bar that the judgment in this case would govern the claims of other wheat growers in the same position as the appellant, involving a very large sum, possibly some millions of pounds.

The claim based upon an agreement for sale and purchase was not pressed before this Court and that based upon conversion is untenable if the wheat was lawfully acquired, as I think it was, pursuant to the *National Security* (*Wheat Acquisition*) *Regulations*.

These regulations provided that the Minister might from time to time by order published in the *Gazette* provide for the acquisition by the Commonwealth of any wheat described in the order and that the wheat should by force of and in accordance with the provisions of the order become the absolute property of the Commonwealth, freed from all interests affecting the wheat, which were converted into claims for compensation.

In November 1939 the Minister, purporting to act under this regulation, declared that all wheat harvested in Australia on or after the publication of the order in the *Gazette* was acquired by the Commonwealth and in the same month published the order in the *Gazette*.

Objection was taken to the validity of this order but the objection cannot be sustained in view of the decisions of this Court in the cases of *Victorian Chamber of Manufactures* v. *The Commonwealth* (1), *Andrews* v. *Howell* (2), *Australian Apple and Pear Marketing Board* v. *Tonking* (3) and the provisions of the *Defence* (*Transitional*

(1) (1943) 67 C.L.R. 335; (1943) 67 C.L.R. 347; (1943) 67 C.L.R. 413.

(2) (1941) 65 C.L.R. 255.

(3) (1942) 66 C.L.R. 77.

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Provisions) *Act* 1946 and the *Wheat Industry Stabilization Act* (*No.* 2) 1946, s. 11.

The main question argued upon this appeal was the amount of compensation payable to the appellant pursuant to the regulations. Export parity has invariably governed the value or price of wheat in Australia. That parity was the basis of prices for home consumption. Those prices followed the export parity but were often a little above it. It is well settled in this Court that the appellant is entitled to the market value of its wheat, if a market value be established, and otherwise to the pecuniary equivalent of the wheat at the time of acquisition ascertained upon a consideration of all relevant facts affecting value in the ordinary way of business. The Judicial Committee has said that the most practical form in which the matter can be put is that the appellant would be entitled to receive the sum which a prudent purchaser would have been willing to give for the property sooner than fail to obtain it (*Pastoral Finance Association Ltd.* v. *The Minister* (1)). But that is not very enlightening. It assumes, I take it, that the relevant facts affecting value are known to the hypothetical purchaser or as was said in *Standard Oil Co. of New Jersey* v. *Southern Pacific Co.* (2) : " the ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

The respondents submitted that reg. 19 prescribes the method of ascertaining the compensation payable under the regulations. That contention is contrary, it is contended, to the decisions of this Court in *Andrews* v. *Howell* (3) and *Tonking's Case* (4). But I do not think that those cases control the construction of the *National Security* (*Wheat Acquisition*) *Regulations*. The *National Security* (*Apple and Pear Acquisition*) *Regulations* under which those cases were determined gave the parties whose apples and pears were acquired an absolute right to compensation the amount of which might be recommended to the Minister by the Apple and Pear Marketing Board. Such a provision it was held did not oust the jurisdiction of competent courts to determine the amount of the compensation but merely provided, if valid, another procedure for determining the amount of that compensation. In the case, however, of the *National Security* (*Wheat Acquisition*) *Regulations*, though the claims of the persons whose wheat is acquired are

(1) (1914) A.C. 1083, at p. 1088.
(2) (1925) 268 U.S. 146, at p. 156 [69 Law. Ed. 890, at p. 895].
(3) (1941) 65 C.L.R. 255.
(4) (1942) 66 C.L.R. 77.

converted into claims for compensation and the amount of compensation is that which the Minister on the recommendation of the Australian Wheat Board determines, still reg. 19 (2A) provides that the basis of the compensation recommended by the Board shall be the rate or rates per bushel arrived at by reference to the surplus proceeds from the disposal of wheat subject to various deductions mentioned in the regulation. This regulation unlike the *National Security* (*Apple and Pear Acquisition*) *Regulations* envisages pooling the wheat acquired and distributing the proceeds amongst the persons from whom the wheat was acquired. I do not call in question the power of the Commonwealth to provide "just terms" of compensation by means of a pool. But the validity of the provision in the *National Security* (*Wheat Acquisition*) *Regulations* depends upon the character of the pool provided. By those regulations (reg. 26) authority is conferred upon the Board, on behalf of the Commonwealth, to sell or dispose of any wheat acquired by the Commonwealth. In each season the Board pooled the proceeds of sale, e.g., it constituted pools numbered 5, 6, 7, 8 and 9. Substantially, that numbered 9 was for the season 1945-1946 and is the pool relevant to this case. And reg. 19 prescribes, as already mentioned, that the basis of compensation to wheat owners shall be arrived at by reference to the surplus proceeds from the disposal of wheat recommended by the Board to the Minister. Even then the compensation payable depends upon the determination of the Minister and the recommendation of the Board.

The disposal of the wheat was wholly in the power and discretion of the Board and those from whom the wheat was acquired had no voice in the matter through representatives or otherwise and their interests were unprotected (*Johnston Fear & Kingham & The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1)). And it will be found, in this case, that the disposal of the wheat for home consumption was governed by political and economic considerations rather than the true and real value of the wheat. A pool so constituted and administered contravenes, I think, the constitutional limitation contained in s. 51 (xxxi.) of the Constitution.

But I see no reason for denying validity to the provision converting the rights of every person whose wheat was acquired into claims for compensation. That provision is, I think, severable (cf. *Acts Interpretation Act* 1901-1937, s. 46).

Consequently, in my opinion, the appellant is entitled to the market value of its wheat at the time of acquisition or if no market value be established then to the pecuniary equivalent of its wheat

(1) (1943) 67 C.L.R. 314.

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ascertained by a consideration of all relevant facts affecting that value. The appellant did not, I think, establish a market price for wheat but the Australian Wheat Board fixed its selling prices for wheat. And it had regard, I think, in fixing the prices of wheat for export to the prices obtained for Canadian and other wheat in London. Exhibit 10 discloses those selling prices.

Shortly, the export basis during the months of November and December 1945 and January 1946 for f.a.q. wheat was 9s. 6d. per bushel bulk free on board ports of Australia. It is agreed that 3d. more per bushel should be added for bagged wheat.

Flour for export was adjusted to the basic price.

And the price of wheat sold by the Board for home consumption was, for flour, 3s. 11¼d. per bushel bulk basis at ports; stock feed 3s. 3¾d. to November 28th then 4s. 3d. to 13th December and then 4s. 11d. bulk basis at ports; other local uses 3s. 11¼d. to 3rd January and then 4s. 11d. bulk basis at ports.

The price of 3s. 11¼d. was fixed by the Board about 1941-1942 when it conformed to export parity but thereafter it was pegged and retained irrespective of foreign movements in prices. The other prices were fixed under ministerial direction.

These home consumption prices are connected with the scheme contained in the *Wheat Industry Assistance Act* 1938 (No. 53 of 1938) and the related Acts and to a government subsidy in respect of stock feed. This scheme was considered in *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (1). All that need be said about it at present is that the scheme was to secure to wheat growers a payable price for wheat and to raise the necessary sum by imposing a tax upon flour sold in Australia for home consumption.

The sum of 5s. 2d. per bushel bagged free on rail Williamstown was the basic price adopted by the scheme.

As already stated the price of 3s. 11¼d. for wheat for home consumption conformed to export parity when it was originally fixed in 1941-1942 but with the addition of the flour tax under the scheme at the rate of £2 8s. 10d. per ton, equivalent to 1s. 2¾d. per bushel, an effective return was obtained of 5s. 2d. per bushel bagged basis and 4s. 11d. bulk basis. But when the export parity rose the Board did not alter the home consumption prices. Thus the rate of tax upon flour for home consumption was stabilized at £2 8s. 10d. per ton for the convenience of millers in computing the tax and for administrative convenience.

(1) (1939) 61 C.L.R. 735; (1940) 63 C.L.R. 338; (1940) A.C. 838.

The selling price for stock feed was fixed in November 1945 at 4s. 3d. per bushel bulk but a subsidy of 8d. per bushel provided by the government gave an effective return of 4s. 11d. per bushel bulk basis.

The wheat acquired by the Commonwealth for 1945-1946 season from wheat growers was not kept separately but mixed together. About one half of that wheat was exported and the other half used for home consumption. In round figures 123 million bushels were marketed, of which 59 million bushels were disposed of for home consumption.

A realization statement prepared by the Board (Exhibit 8) shows an average return (including tax and subsidy) from wheat marketed for home consumption of 4s. 7.524d. calculated on bulk basis free on rail main shipping ports and an overall average from all wheat marketed calculated on the same basis of 7s. 8.190d. and a net realization of 6s. 11.389d.

And there is a realization statement in Exhibit 18 which is calculated on the same basis as Exhibit 8 but, adjusting expenses, gives an overall average based upon deliveries by the appellant to No. 9 pool, season 1945-1946, of 6s. 10.746d. per bushel.

And this latter sum, or perhaps a little less for further expenses, is, as I understood the argument for the respondents, the proper measure of the compensation payable to the appellant in respect of the wheat acquired from it.

All parties are content that compensation should be measured in respect of wheat exported by the Board's export selling price of 9s. 6d. per bushel bulk basis free on board main shipping ports and the primary judge has found that no greater price could reasonably have been obtained for wheat acquired in November and December 1945 and January 1946.

But the appellant is not content with the prices fixed by the Board for home consumption wheat, including taxes and subsidies, as a measure of compensation for about half the quantity of wheat acquired from the appellant pursuant to the regulations.

It claims that it is entitled to the true and real pecuniary equivalent of its wheat at the time of its acquisition and contends that the Board pegged the price of wheat for home consumption irrespective of value for the purpose of stabilizing the flour tax and administrative convenience and in consequence of ministerial directions.

In my opinion, the facts already related establish this contention on the part of the appellant.

Standing alone the prices so pegged by the Board are not a proper measure of the compensation payable to the appellant in respect of wheat retained for home consumption.

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The respondents contend, however, that conditions were abnormal and that the export value of wheat was not a true measure of the value of wheat for home consumption.

This contention must be examined.

In 1945 and 1946 a state of war existed though by September 1945 hostilities had ceased between the belligerent nations. Wheat was in short supply and in great demand in a starving world. A price temporarily abnormal is not necessarily an equivalent of value but regard must be had to the special circumstances arising from war, especially the persistent and even abnormal increase in the exchange value of any commodity.

In the present case the export parity represented real exchange value which was persistent and rising and not merely temporary.

Indeed the export parity for wheat has greatly advanced since 1945-1946.

Then it was said that shipping was controlled and in short supply. But I cannot accept the view that difficulty in connection with transport had much, if anything, to do with the value of wheat retained by the Wheat Board for home consumption. Transport might have been delayed but the fact remains that the Wheat Board exported the equivalent of 64 million bushels and retained for home consumption the equivalent of 59 million bushels. There is little doubt, I think, that the demand for wheat was so strong that shipping could and would have been obtained if the Wheat Board had been willing to export. The Government and the Wheat Board were not willing to export because the wheat was required for home consumption. The value of the wheat was not thereby affected: it was simply made available for home consumption just as it would have been available in normal times when prices conformed to export parity.

It was suggested, however, that the appellant itself would have been unable to obtain transport for its wheat. But that argument is fallacious. The value of the wheat acquired by the respondents was that which might have been obtained for it regardless of its compulsory acquisition.

It was also said that the export of wheat and other commodities might have been prohibited under powers contained in the *Customs Act* 1901-1936, ss. 52, 112, and that the export of wheat was in fact prohibited by the Statutory Rule 1946 No. 90, unless with consent, on the ground that it would be harmful to the Commonwealth. But placing an embargo upon export secures supplies for home consumption and rather affirms export parity as a true measure of value in the case of wheat than as a restriction upon its value

to the growers. And it is not established nor can it be assumed, in the absence of price control regulations, that embargoes of this description restrict or lessen the value of commodities.

Indeed, the constitutional validity of such restrictions might be obnoxious, I should think, to the provisions of s. 51 (xxxi.) of the Constitution if " just terms " were thereby denied to persons whose property was compulsorily acquired.

Further, it was said that the *Wheat Industry Assistance Act* 1938, No. 53, and its related Acts, the *Flour Tax Acts* 1938, numbered 48, 49, 50 and 51, *Wheat Tax Act* 1938, No. 52, controlled or affected the value of wheat for home consumption. It is unnecessary to examine these Acts in detail. The scheme of the Acts was to ensure wheat growers a payable price, as it was called, for their wheat. Accordingly, Acts were passed to raise money by taxing flour and flour products so as to provide a fund available for payment of moneys to farmers of wheat. The tax was fixed upon the basis that 5s. 2d. per bushel of wheat free on rail at Williamstown was a remunerative price and the Acts were framed so as to secure to wheat farmers a payment upon the basis of 5s. 2d. per bushel free on rail at Williamstown. If the price of wheat rose above that amount a tax was to be imposed on wheat grown in Australia and sold to a wheat merchant so as to form a fund out of which moneys could be paid to millers but the rate of tax was not to exceed in any case one shilling per bushel (see *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (1)).

These Acts secured to wheat growers a minimum of 5s. 2d. per bushel free on rail Williamstown for their wheat but, in themselves, did not lessen or depress the value of their wheat except in so far as the wheat tax not exceeding one shilling per bushel would affect their returns.

Later Acts were also passed relating to financial arrangements necessary for carrying out a scheme for the regulating and control of wheat during the war, 1939 No. 84, 1940 No. 70, 1944 No. 19 and, providing for wheat subsidies, 1944 No. 17, but these Acts did not affect the basic scheme though some alterations were made in detail.

The *Wheat Industry Assistance Act* 1938 No. 53 recited that the Premiers of the States undertook that legislation would be passed by the States providing for the fixing of such prices for flour sold for home consumption in Australia as would provide for wheat growers a payable average price on all wheat produced by them and that legislation had been passed by the States providing for the fixing of prices of flour sold for home consumption.

(1) (1939) 61 C.L.R. 735; (1940) 63 C.L.R. 338; (1940) A.C. 838.

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The *Wheat Products Prices Act* 1938 of Victoria illustrates these Acts. It recites that the Commonwealth had agreed to co-operate with the States in making legislative provision for a scheme for securing a home consumption price for wheat products and that for the purpose of the scheme it was desirable that provision should be made for fixing the price of wheat products, that is flour, bran, pollard, bread and such other substances produced by gristing, crushing, grinding, milling, cutting or otherwise processing wheat as are declared by proclamation to be wheat products.

Authority was accordingly conferred upon the Governor in Council by the Act to fix such prices. And for the scheme to operate I gather that it was necessary or at least desirable to relate such prices to the basic price adopted by the scheme for wheat per bushel free on rail Williamstown. At all events a series of Acts, regulations and orders were passed by the Commonwealth and the States fixing prices for wheat and wheat products. And in addition there was a Commonwealth Ceiling Price Order No. 1015 dated 13th April 1943 made pursuant to the *National Security* (*Prices*) *Regulations*. That order fixed and declared the price or rate at which any person might sell or supply goods to be that at which that person sold substantially identical goods on the ceiling date, namely, 12th April 1943 (see *Fraser Henleins Pty. Ltd.* v. *Cody* (1)).

In my opinion, this order cannot be applied to wheat having regard to the *Wheat Industry Assistance Act* and its related Acts and the terms of the order itself. Perishable primary products are excluded from the operation of the order which may well, therefore, exclude wheat, though I express no final opinion upon this point. However wheat of one season is not and cannot be treated as substantially identical with wheat of any other season. Crops of wheat vary in volume and in quality. A commercial determination is made for each season separately of the fair average quality of the crop.

But a number of other price-fixing orders were passed by the Commonwealth and the States, as I have said, pursuant to and for the purpose of implementing the scheme. They do not apply, it should be observed, to export sales. All these orders are referred to in Exhibit 15.

Prices, regulations or governmental restriction of prices influence and often control the value of commodities in the market. Export parity, however, as already stated, governed the value or price of wheat in Australia. And in this case the prices regulations formed part of a scheme designed to secure growers a payable price for their

(1) (1945) 70 C.L.R. 100.

wheat. The *National Security* (*Wheat Acquisition*) *Regulations* and *National Security* (*Wheat Industry Stabilization*) *Regulations* were operated in support of the scheme. And the fact that the Commonwealth retained for home consumption part of the wheat which it acquired and that it and the States regulated the disposal and the price of that wheat and its products does not establish the pecuniary value of the wheat to the growers at the time of acquisition from them or the true measure of the compensation payable to them. The prices so fixed were artificial prices adopted for political and economic reasons. That the home consumption prices fixed by the Government or the Wheat Board were artificial is demonstrated by the admitted fact that normally home consumption prices were governed by and followed the export parity.

Lastly reliance was placed upon the *Wheat Tax Act* 1946, No. 78, the *Wheat Export Charge Acts* 1946, Nos. 25 and 79 and the *Wheat Industry Stabilization Acts* 1946 Nos. 24 and 80.

The *Wheat Export Charge Acts* relate to the export of wheat and wheat products and do not concern this case.

Various provisions of the *Wheat Industry Stabilization Acts* commence on dates fixed by proclamation and so far, I understand, only s. 31 dealing with the Wheat Prices Stabilization Fund has been proclaimed.

The *Wheat Tax Act* 1946 imposes a tax in respect of all wheat which has been acquired or is acquired by the Commonwealth.

The tax is payable by the grower.

The rate of tax is ascertained according to a method prescribed in s. 5 but it cannot be finally determined until the end of the wheat season. A " provisional rate," however, may be notified under the Act and the Minister in fact notified " the provisional rate " in respect of the wheat season commencing on the 1st October 1945 to be one shilling and one and one eighth-pence per bushel.

And s. 6 provides that the Commonwealth or the Board may deduct any amount of the tax payable by any grower from any moneys payable by the Commonwealth or the Wheat Board to that grower on any account whatsoever, and any amount so deducted shall be applied in payment, or part payment, of the tax so payable.

Further, until the provisional rate of the tax in respect of wheat of a season has been ascertained, the Commonwealth or the Board may withhold payment of such part of any moneys payable to any grower of wheat of that season as appears to the Treasurer or the Board to be necessary to provide for the payment of the tax, and the Board may pay to the Treasurer, out of moneys so withheld by the Board, such instalments on account of the tax as he thinks fit.

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The respondents claim that they are entitled to set off or counterclaim the tax so payable against the appellant's claim.

The appellant, however, challenges the validity of the *Wheat Tax Act* 1946 on two grounds. One, that the Act is a law imposing taxation which deals with matters other than the imposition of taxation contrary to the provisions of s. 55 of the Constitution. It appears to me that this contention is untenable (see *Federal Commissioner of Taxation* v. *Munro* (1)). The other, that the Act is obnoxious to the constitutional power to make laws with respect to the acquisition of property on just terms. The Commonwealth, as already appears, acquired the appellant's wheat in accordance with the provisions of the *National Security* (*Wheat Acquisition*) *Regulations* which, as a just term, converted the appellant's rights into a claim for compensation. Now the *Wheat Tax Act* 1946 imposes a tax upon wheat acquired by the Commonwealth and levies it upon the grower of the wheat. And it enables the Commonwealth to deduct the tax from any moneys, including compensation, payable by the Commonwealth or the Board. It takes away from the plaintiff or diminishes the compensation or the just term to which he would otherwise be entitled pursuant to the regulations and required by the provision of the Constitution.

In my judgment, the tax is therefore invalid.

Consequently, this appeal should be allowed and judgment entered for the appellant for £2,225 calculated in round figures in the manner adopted by my brother *Williams*, as follows:

5249 bushels bagged wheat @ 9s. 9d. ..		£2,559
5249 ,, ,, ,, @ 9s. 9d. ..		2,559
1893 ,, bulk ,, @ 9s. 6d. ..		899
1893 ,, ,, ,, @ 9s. 6d. ..		899
		£6,916

Less

Handling Charges 14,284 bushels @ 9d.	£535 13 0	
Flour Tax (Imports and Exports) Act s. 4 (*b*)	714 0 0	
Credit given by appellant for compensation received	3,441 10 4	
	£4,691	
BALANCE ..	£2,225	

(1) (1926) 38 C.L.R. 153, at pp. 215, 216.

Interest is also claimed on the balance payable to the appellant but the authorities do not support the claim (see *Swift & Co.* v. *Board of Trade* (1); *Newport Corporation* v. *Monmouthshire Corporation* (2); *The Commonwealth* v. *Huon Transport Pty. Ltd.* (3) and cf. *Marine Board of Launceston* v. *Minister for the Navy* (4)).

The constitutional validity of the *National Security* (*Wheat Acquisition*) *Regulations*, I should add, was not challenged in this case on the ground that the terms of the acquisition were unjust because no provision was made for interest.

DIXON J. The relief for which at the trial of the action and upon this appeal the plaintiffs asked is the award of a money sum representing the value of the plaintiffs' wheat delivered to the licensed receivers of the Australian Wheat Board in December 1945 and January 1946.

The sum was claimed in the first place as compensation for the compulsory acquisition of the wheat. In the alternative it was claimed as damages for a tortious taking of the wheat, presumably conversion, on the footing that the attempt to take it compulsorily was void. As a further alternative, an alternative which it was said was not abandoned but was not pressed, the same sum was claimed as the price payable upon a supposed sale of the wheat by the plaintiffs to the Australian Wheat Board on behalf of the Commonwealth.

The plaintiffs are a company of wheat growers and the wheat in question constitutes their deliveries to the Board for the season 1945-1946, that is for the Board's cereal season beginning 1st December 1945 and ending 30th November 1946 or, as would be more generally said, into the Board's ninth pool. Some of the wheat was bagged and some bulk. Under whichever of the three legal heads the claim is put, the basal contention by which it is supported is that the value of the wheat should be taken to be 9s. 9d. a bushel for bulk and threepence more, that is 10s. a bushel, for bagged wheat free on rails at the seaboard, and that the plaintiffs should receive this value, diminished by the deduction of the proper charges to obtain the value at the sidings where they delivered it to the Board's receivers, and perhaps by the further deduction of an amount of 1s. a bushel in respect of the wheat tax that might have been imposed, by a proclamation and declaration under the *Wheat Tax Act* 1938, had it been thought proper.

(1) (1925) A.C. 520.
(2) (1947) A.C. 520.
(3) (1945) 70 C.L.R. 293.
(4) (1945) 70 C.L.R. 518.

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Putting aside government prices for domestic consumption in time of war, the price or value of Australian wheat has always depended upon export prices. At about the times when the plaintiffs' wheat was delivered to the Board, the prices at which the Board was selling wheat for shipment f.o.b. Australian ports stood between 9s. 3d. and 9s. 9d. a bushel for bulk wheat and between 9s. 6d. and 10s. a bushel for bagged wheat. These prices, according to the plaintiffs, give the standard by reference to which their wheat should be valued.

The Australian Wheat Board took the plaintiffs' wheat of the 1945-1946 season, in common with the wheat of all other growers of that season, into a pool, the ninth it had formed since the war began. The Board had made to the plaintiffs certain payments called advances, but really dividends in the pool. The advances or dividends announced and distributed were four, the first 4s. 1d. a bushel for bulk or 4s. 4d. for bagged wheat; the second, 1s. less the deduction of 5.384 pence for railage from the siding to the seaboard; the third, 6d.; and the fourth, 6d. a bushel. A further amount will be distributed. However, the plaintiffs refused the third and fourth advances, their purpose being to avoid prejudicing their present claim. The defendants' case is that the distributions the plaintiffs have received and will receive, and those they might have received but for their refusal, together amount to a sufficient compensation. That means upon the figures that the value of the bulk wheat does not exceed about 6s. $5\frac{3}{8}$d. a bushel and of the bagged wheat 6s. $8\frac{3}{4}$d. a bushel. *Williams* J. so found and entered judgment for the defendants.

It is not clear why technically the plaintiffs were not entitled, on his Honour's view of the case, to judgment for the residue of the compensation not yet actually paid to them, but no point was made of this. His Honour proceeded upon the view that the plaintiffs' wheat had passed to the Commonwealth under a valid compulsory acquisition in respect of which the plaintiffs were entitled to compensation to be assessed or determined according to the principles which govern the ascertainment of compensation for a deprival of property and without any qualification of those principles. In applying those principles the learned judge cast no doubt upon the f.o.b. prices upon which the plaintiffs relied. But his Honour's reasons show that he thought it impossible to suppose that, even had there been no compulsory acquisition of wheat during the war, the Government would have permitted the price of wheat for domestic consumption to rise to anything like a parity with the value disclosed by the sales for export.

A variety of considerations existed which were relied upon as fortifying such an opinion. The considerations themselves grew out of the situation it epitomized. But without going into these at this point it is enough to say that substantially because, in the cereal year 1945-1946, not much less than half the quantity of wheat harvested in Australia in the relevant season had been consumed domestically as flour and breakfast foods and as food for pigs and poultry and other live stock, his Honour assessed the value of the plaintiffs' wheat upon the hypothesis that half would have brought domestic prices and half export prices. He assessed the domestic prices at 5s. 2d. a bushel for bagged wheat and 4s. 11d. a bushel for bulk, and the export prices at 9s. 9d. and 9s. 6d. a bushel respectively.

This, of course, is only another way of saying that the value of Australian f.a.q. wheat of that season would consist of the average of the two prices, computed on the supposition that fifty per cent would gain the export price and fifty per cent would gain only the supposedly controlled domestic price. I say supposedly controlled domestic price because it is a domestic price assessed by ascribing a policy as a matter of probability or conjecture to the Commonwealth which would not allow it to rise to export parity or to any level higher than that stated. This average of the two prices, after a diminution of 9d. a bushel for rail and handling charges, was less than the advances made together with the final anticipated payment.

In adopting a double price standard, export and domestic, for the purpose of estimating the value of the wheat, the learned judge necessarily proceeded upon the footing that if the Commonwealth had not resorted to compulsory acquisition of the wheat as the means chosen of controlling that commodity during the war and of meeting the varying difficulties which would or might arise in the course of a long war in connection with the production, holding, realization, distribution and consumption of wheat, then other governmental measures, legislative and administrative, would have been taken. Implicit in this, moreover, is a further step, namely, that although the buying and selling of wheat is assumed to go on, yet the hypothetical government measures would have affected the value of the commodity. It may be said, however, that the means chosen to effect, among other purposes, the very purpose of keeping down the domestic price of wheat was compulsorily to acquire the wheat and pay the owners the value it would otherwise possess.

If as owner of the wheat the Commonwealth could dispose of it for the needs of its own civil population in relatively large quantities

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and at relatively low prices as expediency might dictate, that might be said to be a contemplated result, if not an essential purpose, of compulsorily acquiring the commodity and paying the value to the growers as compensation. In this view it becomes a question whether it is consistent with the general principles governing compensation to allow the value to be depressed or diminished by the governmental purposes which necessitate or impel the compulsory acquisition. In other words, is it legitimate to assess compensation on the basis that, if there had not been an acquisition, then by some other exercises of governmental authority to effect the same object the value of the commodity would have been depressed or diminished in a like way ?

I suppose that at the root of the general principles governing compensation is the notion that the public purpose for which the thing taken is to be used should be carried out at the expense of the whole community of which the owner or owners are members, they in their capacity of owners being placed in the same pecuniary position as if the public purpose had not involved their property and necessitated its taking.

If, as has been assumed, the case is one to which the general principles of compensation apply, it appears to me that the chief, or at all events initial, question is one, not of fact, but of law ; and that question is, how far is it an admissible hypothesis, upon which the value of the wheat is to be fixed, that government policy in any case would have resulted in an artificial reduction of price, if compulsory acquisition had not been used as a means of giving effect to that policy.

I have said that it has been assumed that the case is one to which the general principles of compensation apply. It has been so assumed because of the interpretation which in *Australian Apple and Pear Marketing Board* v. *Tonking* (1), the Court placed upon the *National Security* (*Apple and Pear Acquisition*) *Regulations*, and because those regulations are considered to be indistinguishable in any material respect from the Wheat Acquisition Regulations which govern the present case.

According to that interpretation, the regulations enable the formation of a " pool " and the payment to the growers out of the pool of advances and compensation, but nevertheless entitle every grower, unless he choose to accept such payments in satisfaction, to recover in a court of law compensation assessed upon ordinary principles in respect of the compulsory acquisition of his wheat or fruit, as the case might be.

(1) (1942) 66 C.L.R. 77.

Whatever may be the meaning of the Apple and Pear Acquisition Regulations, for myself I cannot agree that this is the meaning of the Wheat Acquisition Regulations.

I think that the meaning of the Wheat Acquisition Regulations is that every wheat grower should be compensated for the acquisition of his wheat by payment of his distributive share in a pool and not otherwise. This view of the meaning of the regulations entails difficulties of its own, difficulties having their source in the Constitution. It is a view which is not consistent with the plaintiffs' case, but, whether because they felt unable to distinguish *Tonking's Case* (1) or because of the inconvenience of encountering such difficulties, counsel for the Commonwealth did not controvert before us the interpretation of the regulations which the plaintiffs' case assumed. For reasons I shall afterwards give, I have reached the conclusion that if that interpretation be accepted the plaintiffs are right in contending that the assessment of the compensation to which they are entitled must proceed by adopting the prices for export as the value for their wheat at the seaboard f.o.b. or f.o.r. and the compensation must be reckoned by bringing the f.o.b. or f.o.r. price back to the value at the siding and making whatever other deductions would be necessary and, in particular, a deduction of wheat tax. As this would mean a higher rate of compensation which, if applied generally, would involve the Commonwealth in a great sum of money, it is apparent that my decision must in the end be governed by my answer to the question whether I should or should not give effect to my own opinion of the meaning of the Wheat Acquisition Regulations or, on the contrary, adopting the common assumption made by counsel, I ought to give them the interpretation which *Tonking's Case* (1) placed upon the Apple and Pear Acquisition Regulations.

Before resolving this embarrassing question I shall examine the Wheat Acquisition Regulations and explain the effect which I would myself give to them, if I were unfettered. It perhaps should be noticed at the outset that the word " acquisition " forms a prominent part of the title of the regulations, a circumstance which may be thought to tend against the view I take and to emphasize expropriation as a purpose rather than control and the establishment of pools. But it appears to be a matter of small significance, particularly when it is remembered that in setting up all commodity controls our draftsmen have sought to exorcise the uncertain but threatening form of s. 92 by praying compulsory acquisition in aid of their task. What is more important is that for the control and management of

(1) (1942) 66 C.L.R. 77.

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the purchase, handling, storage and disposal of wheat a representative Board was established as a body corporate. The regulations are by no means well conceived or framed, and instead of formulating the plan upon which it was intended to undertake the control of the collection, storage, handling, realization and disposal of wheat, they rather concern themselves with the specific powers that would or might be needed and with the specific directions and authorities that it was thought necessary or expedient to give. Many of these powers are made subject to the directions of the Minister, a matter which may be of some importance.

As at first constituted the Australian Wheat Board consisted of a chairman representing the Government and of two wheat growers, three wheat merchants, two representatives of certain voluntary wheat pools and one person representing bulk handling authorities. But frequent changes in its composition were made, until in October 1942 it came to consist of the chairman, seven growers and one miller. The point in this that is material is that it is impossible to regard the decisions and recommendations of the Board (as distinguished from the Minister) as those of the Commonwealth acting in opposition to the maxim *nemo debet esse iudex in propria sua causa*.

After erecting and constituting the Board and dealing with its procedure and officers and with the establishment of committees for each State, the regulations turn to the authorization of persons to receive wheat on behalf of the Commonwealth, that is from the growers, and to the appointment of agents abroad. Then by reg. 14, the side note of which is " expropriation of wheat," they take up the question of compulsory acquisition. Regulation 14 begins with a statement of purpose. It is a combination of familiar formulas. " For securing the public safety of the Commonwealth and the Territories, for the efficient prosecution of the war and for maintaining supplies and services essential to the life of the community." The source of the words can be seen in s. 5 (1) of the *National Security Act*, coupled with reg. 32 (1) of the General Regulations. They seem to be invoked rather to justify than to explain what follows.

Next comes the grant of power. As it stood in November 1939, when the acquisition order with which we are concerned was made, the text ran " the Minister may from time to time by order published in the *Gazette* declare that any wheat described in the order is acquired by the Commonwealth." Regulation 14 then proceeds, " and that wheat shall thereupon become the absolute property of the Commonwealth freed from all mortgages, charges, liens, pledges,

interests and trusts affecting that wheat, and the rights and interests of every person in that wheat (including any rights or interests arising in respect of any moneys advanced in respect of that wheat) are hereby converted into claims for compensation." It is upon the final words of this provision that the claim depends to have compensation assessed by the Court upon the ordinary principles of compensation law. Statistics show that at the time when the regulations were promulgated there were over 50,000 farms of not less than 20 acres in Australia growing wheat. It seems incredible that it was intended to give to each of the farmers a right to compensation according to no defined measure, but separately to be assessed, if need be, by courts of law; to be assessed, moreover, according to a standard of value which must in any event vary in amount from week to week and about the nature of which there is likely to be much dispute and uncertainty.

The real purpose of the latter part of reg. 14 can be seen in what it says. The purpose is to give to the Commonwealth the absolute property in the wheat, and to that end to destroy all the various encumbrances and other proprietary rights and interests and to transform them into money claims. All the various possible interests described by reg. 14 would naturally become interests in the compensation consisting of the money equivalent of the wheat. Common sense tells us that the question how the money equivalent was to be got at must necessarily have formed a major part of the plan to which the regulations were meant to give legal authority.

The words with which reg. 14 concludes are not apt to throw open the whole measure of compensation, and every consideration of substance is against the supposition that it was intended to leave in the air, not only the basis of the wheat grower's return for his wheat, but also the imposition upon the Commonwealth Treasury of a liability in excess of the surplus proceeds of the wheat, undefined and possibly huge in amount.

Against the side-note "compensation" there will be found in reg. 19 a somewhat sketchily drawn but a sufficient statement of the intended means of ascertaining compensation. In my opinion the regulations mean to confer no alternative or other right upon the wheat grower to a return for his wheat, whether by way of compensation or otherwise. Interposed between reg. 14 and reg. 19 are provisions dealing with the wheat grower's obligation to furnish to the Board a return showing what wheat acquired by the Commonwealth he holds or has in transit, if bagged, and if bulk, is represented by his wheat warrants, with the wheat grower's obligation to deliver the wheat to a licensed receiver and in the meantime not to part

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with it, and with the obligation of the receiver to hold the wheat he receives. These provisions, which work out the acquisition, follow reg. 14 in a natural sequence. Thus reg. 19 takes up the question of compensation in logical order.

As reg. 19 was originally drawn the indications that a commodity pool was intended were faint indeed. But very soon the process, apparently inseparable from legislation by regulation, of amendment, addition and agglutination began, and in the form in which we now have the regulations, particularly reg. 19, the intention to create a pool and treat the distributive share of the grower in the net proceeds of the wheat as his compensation appears clearly. Moreover, that intention has statutory recognition. Sub-regulation (1) of reg. 19 provides that after delivery of any wheat in accordance with the preceding regulations every person having any right or interest in that wheat may forward to the Board a claim for compensation in a form provided in the schedule. The sub-regulation proceeds to say that he shall be entitled to be paid such amount of compensation as the Minister, on the recommendation of the Board, determines. This form of words appears to me to make it necessary that any determination of the Minister should accord with the recommendation of the Board. Independently of the language of the sub-regulation, the probability that it was so intended is increased by other sub-regulations. But there is nothing in the language to compel the Minister to accept any given recommendation of the Board. If there is an adequate reason he may reject the Board's recommendation and so make for the time being no determination. But, if he makes a determination, it must conform with the Board's recommendation. Sub-regulation (2) is expressed apparently on the assumption that a duty rests on the Minister of making a determination, and that in the absence of some other provision it would be a duty to make a determination at once. On this footing the sub-regulation expressly provides that it shall not be necessary for the Minister to make a determination until in his opinion a sufficient quantity of any wheat acquired by the Commonwealth has been disposed of to enable the Board to make a just recommendation. With the background of governmental commodity pools in Australia and of the wheat pools of the war of 1914-1918 it is easy to see in this statement an assumption that the compensation will be arrived at by pooling. The same sub-regulation goes on to empower the Minister in his absolute discretion to make any payment on account of any claim, notwithstanding that no determination in respect of the claim has been made. The so-called advances

are payments made under this power. Sub-regulation (2A), however, provides in terms that the basis of the compensation to be recommended shall be the rate or rates per bushel arrived at by reference to the surplus proceeds from the disposal of wheat.

This brief statement prescribes pooling. It does not, however, define the pools contemplated. Consistently with it the Board might have established a pool extending beyond one season or covering part only of a season or limited to the wheat of a particular State or geographical area, and, indeed, some of these things were done apparently in the first, second and third pools. But however the Board planned the pools, pooling must be the basis of compensation expressed in the Board's recommendation. The sub-regulations proceed to authorize the deductions characteristic of wheat pools, viz., for corn sacks, transport charges from the siding to the terminal and dockages on account of condition or quality, deductions which, broadly speaking, may be said to be aimed at an equalization. Sub-regulation (2B), which was introduced in 1940 at the same time as sub-reg. (2A), deals with the special problem of premium wheat and does so by allowing an addition of the premium to the pool rate. This is to be done according to the Board's decision, though "subject to any direction of the Minister." Sub-regulation (2AB) provides, although somewhat indirectly, for a separate pool or pools of wheat harvested for grain by an unlicensed wheat grower or from an unlicensed farm where the Wheat Industry Stabilization Regulations required licences.

The provisions governing the finances of the Board conform with the conception of pooling. Regulation 27 directs the Board to maintain a bank account and pay into it all money received in respect of wheat or wheat products or otherwise, any moneys appropriated by the Parliament and any moneys borrowed for the use of the Board, and out of the money standing to the credit of the account to defray administrative costs and make all payments in respect of compensation and any other payments authorized by the regulations. Then reg. 28 authorizes the Minister to arrange for advances of the money for the use of the Board and to guarantee repayment. It might be expected that payments to the grower on account of compensation, the so-called advances, would be made before the wheat was realized and therefore out of Bank or Treasury advances. In any case the appropriation of moneys by the Parliament, whether in payment for wheat or flour taken over for military supplies or by way of subsidy, was sufficiently probable to cause the draftsman to include such moneys in the fund he described.

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All the foregoing considerations point, and in my opinion point unmistakably, to the conclusion that the regulations were designed to give effect to a plan for the establishment of wheat pools and the distribution of the surplus moneys produced by the wheat (amplified perhaps by subventions from the Treasury) among the wheat growers by way of " compensation." During the course of the war the Legislature more than once had occasion to deal with the wheat industry, and in the statutes passed there are several provisions which not only recognize the system of pooling, but also proceed upon the view that only through the pools did the moneys forming a return for his wheat reach the farmer. To begin with, by s. 6 of the *Wheat Industry (War-time Control) Act* 1939, which was assented to on 15th December 1939, the proceeds of the flour tax were diverted to the Board's bank account in repayment of advances made pursuant to reg. 28. Now the flour tax forms part of the plan adopted in 1938 for equalizing the price of wheat by imposing a levy upon flour when wheat is below the legislative standard price and distributing it through the States to the growers by way of bounty upon the quantities of wheat the growers have respectively sold or delivered during the year. Contingently upon wheat rising above the appointed standard, a corresponding bounty to the miller upon his flour is to be raised by a wheat tax, but that is beside the point in hand. It seems to be clear enough that to divert the bounty upon wheat to the Board's account could mean only that by adding the total of the bounty to the distributable surplus of the proceeds of the wheat you ensured that the wheat grower obtained his share of what before had been distributed through the States to the wheat growers in proportion to the quantity of wheat sold or delivered for sale by each wheat grower during the year in respect of which the payment was made. I shall not here describe the rather complicated provisions which produce this result. It is enough to say that it will be found to be the effect of Acts No. 53 of 1938, s. 6 (1), (5), (6) and (7) ; No. 48 of 1938, ss. 10, 13 ; No. 49 of 1938, ss. 4, 5 ; Act No. 52 of 1938, ss. 4, 5 ; and Act No. 84 of 1939, ss. 4, 5, 6, and of s. 7 as amended by s. 6 of No. 70 of 1940. Again, in the course of legislating for a wheat price stabilizing plan adopted in 1940 but never put into effect, the Parliament used language of some significance with reference to the compensation payable under the Wheat Acquisition Regulations. The provision in which the expressions occur was concerned with the application of a fund to be established for the purpose of subsidizing wheat when the return was less than a specified standard. Section 7A of the *Wheat Industry (War-time Control) Act* 1939-1940, since repealed

by No. 19 of 1944, is the provision in question. The material words are these: "The moneys standing to the credit of the stabilization Fund shall be applied . . . for the purpose of enabling the Commonwealth to pay to any person from whom it acquires wheat in pursuance of the Wheat Acquisition Regulations the amount by which the minimum amount of compensation payable in accordance with those Regulations exceeds the amount which the Minister, having regard to the market value of wheat at the time when it is delivered to the Commonwealth, determines would have been a just amount of compensation if no minimum amount had been prescribed." The last words read as if some regulation prescribing an amount were in contemplation, and this is said in fact to have been the case. But none was in fact made and I doubt if authority to make one existed or was ever conferred. What is important, however, is that a contrast is drawn between the market value of the wheat and the amount of compensation. I take the minimum amount contemplated to be a distributable rate per bushel without premium or other addition. The *Wheat Subsidy Act* 1944, s. 5 (1), uses the expression "to ensure to each wheat grower a standard minimum aggregate return." Again, in this Act the payments of the subsidy go through the Board, s. 6. The assumption underlying this enactment pretty plainly is that compensation for wheat is the result of distribution from a pool.

In my opinion reg. 14 was not intended to give any independent right to compensation, and when it speaks of the conversion of rights and interests into claims to compensation it is referring to claims to the compensation given by reg. 19. I cannot believe that it was the intention of the regulations to confer upon the growers a right to claim compensation as an independent alternative to accepting by way of satisfaction a share in the payments made from the pool by way of advance and final dividend. Such an hypothesis would mean that while all the wheat would go into the pool, nevertheless at some stage many growers whose wheat had gone to swell the fund constituting the pool would receive compensation according to some other undefined standard and presumably from the public Treasury. What would become of the dividends of a grower who stood out? Does the Commonwealth take them by something analogous to subrogation? Suppose, as in this case, the assessment of compensation results in a less amount than the total dividends in the pool. Does the pool take the excess for the benefit of those who stood in to the end or does the Crown? This question really arose in this action. To enter judgment for the defendants may have cut the Gordian knot and satisfied the Commonwealth, but it

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was hardly a technical answer and it did not remove the question from consideration as a test of the interpretation of the regulations.

Again, at what stage, if at all, can the grower elect ? May he take all the dividends as advances up to the final payment and then turn back to compensation on general principles ? Or can he invoke *Day* v. *McLea* (1) and accept even the final payment on account and not in satisfaction ? I cannot find any answer to these questions in the regulations.

For the reasons I have given, I think that as a matter of meaning the Wheat Acquisition Regulations intend that the compensation payable in respect of any delivery of wheat shall be the appropriate distributable amount payable from the pool, and that the rights and interests in the wheat should be transmuted into rights and interests in that sum, and that the regulations do not intend that compensation in some other form and according to some other measure should be recoverable.

But meaning is one thing and operation may be another. The constitutional power of the Commonwealth to legislate for the acquisition of property is qualified by the requirement that the acquisition shall be on just terms. Do the Wheat Acquisition Regulations comply with this requirement ? Does a right to participate in a pool the formation and administration of which is governed by the provisions I have described afford just terms ? Two main considerations may be advanced in support of a negative answer to the question. One at least of these considerations played an important part in leading the Court to adopt the interpretation of the Apple and Pear Acquisition Regulations placed upon them in *Tonking's Case* (2), an interpretation which of course avoided any possible conflict with the constitutional limitation. I refer to the consideration that the determination of the compensation rests upon the authority of the Minister, although he can act only on the recommendation of the Board. Does the apparent dependence of the grower's right to compensation upon the exercise of the Minister's authority take the intended operation of the regulations outside constitutional power ?

The question relates to just terms, not to any question of judicial power. For if a commodity pool be in other respects an admissible method of providing compensation for the acquisition of the commodity, an acquisition that must be incidental to the formation of a pool, then I cannot think that for the computation of the dividends the judicial power of the Commonwealth must be invoked.

(1) (1899) 22 Q.B.D. 610. (2) (1942) 66 C.L.R. 77.

In dealing with the objection that the terms are not just, it is convenient now to refer to the second consideration that may be used in support of such an attack upon them. It is that consistently with the regulations the administration of the pool may be directed to other purposes than the realization of the wheat for the benefit of the growers who contributed the commodity to form the pool. This objection is strengthened by the fact that important powers of the Board, which from its composition might be considered substantially to represent the interests of the growers, or at all events to stand indifferent between them and the Commonwealth, are expressly made "subject to any directions of the Minister." Further, the real source of the complaint which the plaintiffs make against the sufficiency of the compensation available to them is to be found in the fact that in the actual administration of the ninth pool wheat was sold for domestic consumption at prices that are said to have been fixed in the interests of the consumers, and not in the interests of the wheat growers. This fact raises another question which cannot be ignored in considering whether the plan for which the regulations intend to give legal authority provides just terms. That question is what remedy have the growers, supposing their interests to be prejudiced in a manner not authorized by law by the prices at which wheat was sold for home consumption? These are all matters deserving of very full discussion, but in the present appeal there are so many points to which the parties devoted themselves that upon these questions which they treated as no longer the concern of this Court, it is better that I should do no more than indicate briefly the opinion which, upon independent reflection, I have formed.

I think that if it were correct that otherwise the operation of the regulations would be to leave the payment of any compensation consisting of a dividend or dividends in the pool to the mere discretion of the Minister or would be to authorize the Minister or the Board to dispose of wheat upon terms which were unfair or unjust to the growers without any indemnification to the pool and leaving the growers without remedy, in that event there would be a conflict with the constitutional necessity that an acquisition of property should be upon just terms.

The result then would be that the regulations would be void as beyond the legislative power of the Commonwealth, and growers would be in a position to recover from the Commonwealth upon whatever basis of contract or of tort might be discovered in the circumstances of the surrender or taking of their parcels of wheat. But before the conclusion that such would be the operation of the

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regulations, they must be interpreted in the light of reason, all proper implications being made, and, what is perhaps more important, in the light of and according to the directions of s. 46 (*b*) of the *Acts Interpretation Act*.

The effect of such a provision as s. 46 (*b*) in restricting the operation of a statutory instrument to lawful bounds has often been discussed and explained, and on this occasion it is enough for me to refer to the collection of authority that appears in *Fraser Henleins Pty. Ltd.* v. *Cody* (1), adding *Shrimpton* v. *The Commonwealth* (2) and *Dawson* v. *The Commonwealth* (3).

It is logically, or perhaps I should say formally, possible to use s. 46 (*b*) to sever reg. 19 from reg. 14, giving to reg. 14 an independent and therefore, as I think, a new operation. But that course would in my opinion be wrong, first because the intention is clear that the regulations should be interdependent, and secondly because it would give to reg. 14, not a more limited or qualified operation or effect, but an entirely different one, indeed an effect that would transform the whole of the Wheat Acquisition Regulations, if I have correctly apprehended their purpose and policy.

An alternative is open which has much to support it in the contents of the regulations and the implications which on ordinary principles might properly be made to eke out their intention. It involves two steps. The first is to place upon the expression occurring in reg. 19 (1) " as the Minister, on the recommendation of the Board determines " an interpretation which (subject to sub-reg. (2)) makes it the Board's duty to recommend and the Minister's duty to consider the recommendation and which limits the ground on which his discretion to reject or defer the recommendation may be exercised to matters going to its soundness and sufficiency in working out sub-reg. (2A). The second step relates to the duties of the Board with respect to the realization of the wheat. Once the conclusion is reached that compensation was intended to take the form of a distributable share in the surplus proceeds of the wheat, it would seem to be a necessary consequence that the power conferred on the Board by reg. 26 to sell or dispose of wheat, or of flour gristed from the wheat, cannot be exercised in the interests of the consumers to the exclusion of the interest of the growers in the fund. The Board is, however, an administrative organization, and is not established for the sole benefit of the growers. It would be an error to treat the Board as if its powers were of a fiduciary nature to be exercised wholly for the greatest advantage of the growers as beneficiaries.

(1) (1945) 70 C.L.R., at p. 127.
(2) (1945) 69 C.L.R. 613, at p. 629.
(3) (1946) 73 C.L.R. 157, at pp. 181, 182.

Its duties in exercising its powers are suggested by the situation contemplated by the regulations, but the constitutional requirement by which the legislative power is conditioned goes further than suggesting them. Unless, contrary to s. 46 (*b*), invalidity is to ensue, the Board's duties to the growers in exercising the power of disposal and sale on behalf of the Commonwealth are determined by the constitutional limitation.

The measure of the duties is therefore to be looked for rather in the nature of the restriction on power. It rests on the somewhat general and indefinite conception of just terms, which appears to refer to what is fair and just between the community and the owner of the thing taken. Importing this conception into the purposes of the Board's powers, the result seems to me to be that the disposal of the wheat, whether for the uses of the Commonwealth or for domestic consumption, must be in return for a recompense to the pool which is honestly fixed or estimated as a fair and reasonable value. The difficulties of such a judgment in war time are great and the criticisms which may be made at any time of such a test are only too manifest. But the standards of duty supplied by the law as a result of general considerations can never be precise. When the question is one of fairness in any community the standard must depend upon the life and experience of that community, rather than upon the changing fortunes of other countries and the exigencies which beset them. Unlike "compensation," which connotes full money equivalence, "just terms" are concerned with fairness.

Accordingly, the Board's duty might perhaps be fulfilled by accepting a recompense to or reimbursement of the pool based on the conceptions formed in Australia of a sufficiently profitable return for wheat. Such a conception appears to have been accepted in 1938 when the legislation fixed 5s. 2d. a bushel as the dividing line between a situation calling for a subsidy to the grower of wheat raised from the consumer of flour and a situation justifying a bounty to the manufacturer of flour raised from a levy on wheat exported.

However, I am only concerned to state why I think that the regulations are not to be condemned as void because they make compensation depend on a pooling administered under the powers they confer. I have said enough to indicate in a general way why invalidity is not necessarily the result of the meaning which I have given them.

The foregoing represents the effect which I should be disposed to give to the regulations if I were free to act upon my personal views. It would mean that the plaintiff's action would be dismissed. For it is framed to recover, not a share in the pool, not to complain of

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any breach of duty on the part of the Board or of the Minister in the administration of the pool for which the Commonwealth might be responsible, but to recover the value of the wheat assessed independently and awarded either as damages for conversion, as compensation at large or as a *quantum valebat*.

The question whether I should decide this question according to my own personal views has caused me unusual difficulty.

The Apple and Pear Acquisition Regulations, upon which *Tonking's Case* (1) was decided, closely resembled in many material respects what I may call the primitive form, that is to say the first form, of the Wheat Acquisition Regulations, in which the indications of an intention to establish a pool or pools were very faint. The two regulations were made on the same day, 21st September 1939. The Wheat Acquisition Regulations have, in my opinion, grown since into a much more definite form and one in which unmistakable evidence of the intention to proceed by pooling may be seen. It is therefore possible to say that *Tonking's Case* (1) was decided on other regulations providing a different context, and that those now in question must be interpreted independently. Indeed, even in their original forms there are material points of difference between the respective regulations, arising in the main from the widely different characters of the commodities and the trades in them, f.a.q. wheat being uniform and the fruit exhibiting much variety of kind and quality.

But the parallels between reg. 14 and reg. 19 (1) and the corresponding provisions of the Apple and Pear Acquisition Regulations, viz. regs. 12 and 17, are close, and in *Tonking's Case* (1) the majority of the Court decided quite definitely that reg. 12 gave an independent claim to compensation assessed on general principles. They did so for reasons that included the ground that otherwise the regulations would be void. As the Commonwealth had no use for the apples and pears and acquired them only as part of the plan to relieve the disorganization in the trade caused by the loss of the overseas markets, it would seem that this interpretation imputed a use of the powers of the *National Security Act* merely to grant a subsidy or bounty.

It was substantially on this ground that *Starke* J. considered the regulations bad for excess of power in *Andrews* v. *Howell* (2), a conclusion to which the subsequent decision appears to me to give much support in logic.

It cannot be said that the Commonwealth had no use for the wheat, and contraband control and economic warfare would, in the

(1) (1942) 66 C.L.R. 77.

(2) (1941) 65 C.L.R., at p. 273.

case of wheat, call for complete command of the commodity. But the Court felt no difficulty about the defence power and was concerned only with the conflict the Court saw between reg. 17 of the Apple and Pear Acquisition Regulations and just terms. Although I cannot help feeling that if the first regulations for the Court to consider had been the Wheat Acquisition Regulations and not the Apple and Pear Acquisition Regulations the result might have been different, I am conscious that the view I take of the former is basally at variance with that taken of the latter by the Court in *Tonking's Case* (1). The counsel for the Commonwealth made no attempt to avail themselves of the not unimportant considerations which exist in the Wheat Acquisition Regulations and are absent from the Apple and Pear Acquisition Regulations. As I have said, the assumption made by counsel was that, so far as the High Court is concerned, we were to take it that compensation was to be assessed on ordinary principles. In these circumstances I think that I should be guided by the position which other members of the Court adopt, and therefore I shall act on the view that I ought not to give effect to my own personal view of the matter, but should accept the common assumption made by counsel and proceed accordingly to decide the appeal on the basis that the plaintiffs are entitled to compensation at large.

Now " compensation " is a very well understood expression. It is true that its meaning has been developed in relation to the compulsory acquisition of land. But the purpose of compensation is the same, whether the property taken is real or personal. It is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived.

Compensation prima facie means recompense for loss, and when an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him. As the object is to find the money equivalent for the loss or, in other words, the pecuniary value to the owner contained in the asset, it cannot be less than the money value into which he might have converted his property had the law not deprived him of it. You do not give him any enhanced value that may attach to his property because it has been compulsorily acquired by the governmental authority for its purposes (*Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* (2)). Equally you exclude any diminution of value arising from the same cause. The hypothesis upon which the inquiry into value must proceed is that the owner had not been deprived by the exercise of compulsory powers of his

(1) (1942) 66 C.L.R. 77.

(2) (1939) A.C. 302, at p. 318.

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ownership and of his consequent rights of disposition existing under the general law at the time of acquisition.

In the present case we are concerned with an acquisition by which, if it be valid, with negligible specified exceptions, all the wheat in Australia passed to the Commonwealth as and when the wheat was harvested. The purposes are stated in the power and include maintaining supplies and services essential to the life of the community. The effect of the interpretation I have accepted is to give to reg. 14 the office of effectuating these purposes by authorizing the taking of the wheat and compensating the owners with the money equivalent of the wheat independently of the uses to which it might be put by the Government or of the prices for which it might be realized by the Board.

In these circumstances it is a critical question, whether, as the Commonwealth contends and the learned judge has decided, the compensation which the grower is to receive is to be estimated upon the footing that if there had not been a resort to compulsory acquisition there would have been some other exercise of governmental power to effect the same purposes, or some of them, and that from that exercise of power a diminution of the money equivalent of his wheat would have resulted.

In considering this question I think that it is necessary to distinguish between two very different cases. On the one hand, there are statutory provisions which form part of the law and were actually in force or were intended to come into operation in the very events or circumstances now found to govern the price or value of the wheat. For example, the *Wheat Tax Act* 1938 was passed for the purpose of levying a tax on wheat sold to merchants if the f.o.r. value of wheat exceeded 5s. 2d. a bushel so that the proceeds could be applied as a bounty on flour. As the f.o.r. value for export did exceed 5s. 2d. in 1945-1946, it is right to assume the law was proclaimed, as doubtless it would have been had not the Board fixed its prices for domestic consumption lower than 5s. 2d. That is one case.

On the other hand there are measures which have not already taken form, whether as statute, regulation or statutory order, but which might be considered appropriate to the situation which would exist had there been no compulsory acquisition of wheat under the Wheat Acquisition Regulations and no control by that means. That is another case. It depends on the adoption of a policy, a substitute for the policy embodied in the Wheat Acquisition Regulations, and on the carrying of it into effect by legal means. It is illustrated by the assumption, that if the Board as owners of the wheat, had not been in a position to sell for home consumption at the lower

domestic prices the board fixed the Government would have taken some other measure to see that the wheat was sold for domestic consumption at some such price level. This question ought not perhaps to be dealt with in the abstract, but the facts which may be thought to affect it should be stated. Whether wheat was bought for export or for home consumption had never been a matter to affect the price for which the grower sold it, nor his return from a pool, if he delivered it to a pool, either during the war of 1914-1918 or subsequently. Except in times of drought, the exportable surplus of Australian wheat is very large. It cannot be expressed as a proportion of the average crop because the production of wheat varies so immensely from season to season. Relatively there are not very great variations in the annual domestic consumption of wheat in the form of flour and of breakfast foods and food for poultry and stock and (what in effect was not covered by the order of acquisition) for seed wheat. What remains of the crop is the exportable surplus and its proportionate relation to domestic consumption depends on the season's production. In the decade of the nineteen twenties until towards its close, the prices of wheat, though of course by no means constant, stood at an average considerably exceeding 5s. 2d. Then a collapse in prices occurred from which the recovery was slow and unsteady. In 1937, however, the price was about 5s., when another decline set in. By the end of November in that year the price was about half a crown. It was in these circumstances that Parliament passed the Wheat Industry Assistance legislation, the assent to which was given on 2nd December 1938. Its purpose and effect is well summarized as follows in the Commonwealth Year Book for 1938 (No. 31, p. 966) :—

" This legislation supplements legislation of a uniform type passed by all the State Parliaments and is designed to enable the operation of a home consumption price scheme for the wheat industry on a Commonwealth basis. The legislation is based on a home consumption price of 5s. 2d. a bushel, free on rail, Williamstown, equivalent to 4s. 8d. at country sidings. When the price of wheat falls below that level the returns of growers will be supplemented by payments from a fund established from the proceeds of a flour tax which varies inversely with the price of wheat. When the export price rises above that level provision is made for a tax on wheat sold, the proceeds of which are to be applied to ensure that the cost of wheat gristed for home consumption shall not exceed 5s. 2d. per bushel. Out of the general fund a sum not exceeding £500,000 per year will be reserved for special purposes including

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the transfer of producers growing wheat on marginal lands to other areas where they will be able to engage in mixed farming or to enable them to increase the size of their holdings to make wheat growing worth while. A Wheat Stabilization Advisory Committee has been established to determine the appropriate times for a variation in the rate of tax which will be fixed on the basis of a rigid formula. The State legislation undertakes to ensure that prices charged to consumers are reasonable and the Commonwealth legislation contains provision that no State shall be entitled to receive payments where that undertaking is not carried out."

In October 1946 a declaration was made resulting in a flour tax of £2 8s. 10d. and this has been maintained notwithstanding the rise in the export prices of wheat to so much more than the 5s. 2d.

The Board has kept its selling price of wheat for milling into flour for local consumption at 3s. 11¼d. and the Board has received as part of the pool the proceeds of the flour tax (after the deduction of the amount, now increased by Act No. 71 of 1946 to £843,000, credited to the special account for use in reference to so called marginal lands). This has not brought the Board's return from wheat for flour for home consumption up to more than 4s. 5d. For stock feed the Board sold wheat at still lower prices until the end of November 1945, when the price was increased to 4s. 3d. and a government subsidy of 8d. a bushel was granted to bring up the return to 4s. 11d. The return from wheat sold for breakfast foods in the 1945-1946 season was also 4s. 11d. Meanwhile bread and flour prices were fixed from time to time under State legislation for various areas. But as the Commonwealth Prices Commissioner fixed prices for bread in the metropolitan areas, Perth so far as appears excepted, and many other urban areas in Australia, the State orders do not appear to have much significance except in Western Australia. The prices fixed varied with locality and conditions between 5¼d. and 6½d. a 2 lb. loaf. With wheat prices of 3s. 11¼d. plus flour tax, millers were, it appears, in a position to supply bakers with flour at prices enabling bakers to sell bread at the fixed maximum prices.

The power which the Executive possesses under s. 52 of the *Customs Act* of prohibiting export without licence was exercised in relation to wheat shortly after the period with which we are concerned, viz., on 22nd May 1946 (Statutory Rules 1946 No. 90). But clearly enough the purpose was not to conserve supplies of wheat for Australian consumption but to strengthen the Board's control, perhaps in view of rising prices abroad. I do not think that this exercise of the power has any bearing upon the question

what assumption should be made as to the controlling effect of export prices upon the value of wheat to the grower.

It is quite clear that without the intervention of government authority the value would depend upon those prices as much in the season 1945-1946 as before the beginning of the war in 1939. It appears to me to be equally clear that, whatever might have been done in lieu of acquisition by or through the Wheat Board, the amount of the actual payments to the grower in respect of his wheat could not have been made to vary according to the fate of his wheat, that is whether it was exported or used for home consumption.

The prices or values payable from time to time for f.a.q. wheat could not but be uniform without any distinction based on the purpose of the purchase, unless some public authority were established to control the distribution of the wheat and to equalize the return to the grower. If the wheat was not acquired or pooled, it would, at all events, be necessary to pool the money, if differential prices to the purchasers were established. It is impossible to imagine a system of sales by growers at two prices at the same time, depending on purpose, and I know of no legal mechanism by which the Commonwealth could enforce it. Of course many devices can be imagined for maintaining a lower home consumption cost to millers without compulsory acquisition of the wheat. The most obvious course is to pay a bounty or subsidy on flour for home consumption. As has been already stated to provide such a bounty is the purpose of the *Wheat Tax Act* 1938, when the price of wheat exceeds 5s. 2d. As the price of wheat in 1945-1946 exceeded that figure, it is legitimate to assess the price or value to the grower of his wheat as if, by the prescribed method of proclamation and declaration, the tax had been put in operation, because that would fulfil the already expressed intention of the legislature. But the intention so expressed includes a definite limit upon the amount of the tax to 1s. a bushel.

Is it for a court of law to examine the question whether the legislature would or would not have removed or enlarged this limitation and, upon the hypothetical result of that examination, to determine how much of the f.o.b. parity a grower would have been permitted to receive ? Whether, if a subsidy or bounty were paid upon the production of the flour in order to keep down the price of bread, it should be charged upon general revenue or raised wholly or in part by an increased or new wheat tax is wholly a question of policy, quite outside the consideration of a court attempting to find what monetary prejudice the course actually taken by

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or under statute inflicted upon the subject as owner of the commodity. It means the notional substitution of another prejudice for that for which the legislature has decreed that the owner must be compensated. It involves a process of thought which, if pursued with complete logic, requires the Court to say whether, one way or another, the grower would, or ought to, have suffered enough interference to reduce his return to what is considered commensurate with the deserts of wheat growers when compared with consumers of bread and with poultry and pig farmers.

I think that the truth is that, once the view is accepted that full compensation is to be awarded to growers for being deprived of their wheat, no further assumptions are made except that the plan involving the acquisition of the wheat had not been adopted. It is on that basis compensation is assessed. The Court does not proceed on the additional supposition that the legislature or the Executive, either as a subordinate legislature or exercising other statutory powers, would in that event adopt some other plan to effect the same ends or some of them and so produce an answerable reduction in the money value of the same commodity. Other such plans might, of course, have been adopted. A limitation of export and fixing of maximum domestic prices for wheat can be imagined. But, as I have said, that course would in practice require some organization to equalize the return to the grower, in other words, some thing like a pool of the proceeds of the wheat.

An increase in the maximum price of bread has not been unknown and that might have been allowed as one part of a plan which with subsidies, wheat tax at 1s. and perhaps some other economies would make it unnecessary to seek to establish a home consumption price for wheat lower than export parity. Of one thing there can be some certainty and that is that not without strong political resistance from the growers would further measures have been taken to reduce the price of their wheat below export parity. But these matters are all speculations to be excluded on the ground that the Court should adopt no hypothesis beyond that involved in supposing that growers have not been deprived of their wheat under the plan in fact embodied in the regulations. I, therefore, see no reason, if otherwise the wheat could have been sold at a parity with export prices, why it should be assumed for the purpose of assessing compensation that the prices would have been reduced in the interests of the home consumer to any greater extent than the 1s. wheat tax already authorized by statute.

The Commonwealth, however, suggests reasons, in part of fact and in part of law, independently altogether of the foregoing con-

siderations for saying that the plaintiffs' wheat could not have been sold at a parity with export prices, if there had been no expropriation of the plaintiffs. First, it is said that by the well-known Prices Regulation Order No. 1015 of 13th April 1943, the validity of which was sustained by this Court in *Fraser Henleins Pty. Ltd.* v. *Cody* (1), wheat is included in the general restriction of prices to prices which the seller charged on or last prior to 12th April 1943 for substantially identical goods sold on substantially identical terms and conditions or, if he had not before sold substantially identical goods, then to the cost of the goods to him. Accordingly, so it was argued, the prices could not have gone beyond the price of wheat sold by the plaintiffs before 12th April 1943, or beyond the cost of production, as the case might be. I think that this order was never intended to include wheat and does not do so. For commercial purposes f.a.q. wheat of one season has not been considered the same thing as f.a.q. wheat of another season. "Cost of the goods to the seller" would be ridiculous as a definition of maximum price if applied to the agricultural production of wheat delivered to the siding. At the time when the order was made the sale of wheat was a government function carried on by the Board, except seed wheat, and that was not beyond the control of the Board. It is evident that the order did not contemplate the commodity. Moreover, the exclusion of perishable products is in itself enough to put wheat outside its operation. Perishable product is not an exact expression, but I notice that the Oxford English Dictionary gives the word "perishable" as meaning especially, naturally subject to speedy decay, as organic substances, minerals which rapidly weaken or become decomposed, and the like. Unprotected wheat would qualify under this definition. It is noteworthy that some authorities give as the reason why at common law wheat was not liable to distress that it is of a perishable nature, although others put it on the ground that like money wheat is not identifiable. The latter reason, however, could not apply to a sack of corn, just as it did not apply to a bag of money.

Secondly, it is said that, in assessing the compensation, it is to be assumed that the plaintiffs' wheat was not compulsorily acquired and that all other wheat in Australia was acquired by the Board. The witnesses who were called agreed that on this hypothesis the plaintiffs would have great difficulty in disposing of their wheat at higher prices than the Board sold at locally. The hypothesis would make it difficult for the plaintiffs to obtain bags, bulk storage, transportation by railway and handling facilities. Under the

(1) (1945) 70 C.L.R. 100.

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assumed conditions to find a purchaser for export of so small a quantity would be impossible during a period when the United Kingdom Ministry of Food was the agency by or under whose authority all purchases were made and when the Ministry of Shipping directed sea carrying.

In my opinion the argument is fundamentally wrong. You do not assume against each grower in turn that the whole plan embodied in the regulations was carried out except that he was excluded from it, so that he was obliged to dispose of his wheat when all means of doing so had been taken over by the Board and when he stood helpless except for some exercise of their mercy. The Acquisition Order relates to all wheat and you judge the value of wheat on the supposition that the order had not been made or that it was not operating at the time when the plaintiffs' wheat in fact passed to the Board. On that footing the Australian wheat crop would need to be sold and it cannot be imagined that there would be any greater difficulties in moving it to the seaboard than confronted the Australian Wheat Board itself. To suppose that the Ministry of Food would have failed to purchase the wheat from or through the merchants and the ordinary agencies appears to me an unreasonable hypothesis. I can see no ground for thinking that in such a case shipping would not have been directed here to lift the wheat.

The standard of reference for the valuation of the plaintiffs' wheat for the purpose of assessing compensation at large appears, therefore, to me to be parity with export prices of wheat at the time of its acquisition.

The Commonwealth, however, relies upon a contention that the plaintiffs are precluded from claiming compensation at large under reg. 14, because, it is said, they have chosen to come into the pool and claim and participate under reg. 19.

This contention must begin with some construction of reg. 19 which provides the expropriated grower with a choice by his exercise of which he is excluded from the right which otherwise reg. 14 is understood to give him. All the plaintiffs have in fact done is in respect of each delivery of wheat to sign a form of claim for compensation and accept the first two payments described as advances.

As I read the relevant passages in the judgments in *Tonking's Case* (1) the decision was that under reg. 12 of the Apple and Pear Acquisition Regulations (corresponding to reg. 14 of the Wheat Regulations) the grower obtained a right to compensation which might be satisfied by his acceptance of the amount upon which the

(1) (1942) 66 C.L.R., at pp. 89, 99, 102, 105, 110.

Minister determined under reg. 17 (corresponding to reg. 19 of the Wheat Regulations), that is if the grower accepted the amount in satisfaction. It does not appear to me that until there was a determination by the Minister and a payment thereunder, the principle of the decision could be brought into play. I cannot see any room in the language of the regulations for the view that the grower is presented with an initial election between alternate remedies or claims ; and I do not understand any member of the Court so to have read the regulations. It is not without significance that Tonking received advances, though it is true that he had not lodged a formal claim for compensation.

In my opinion this point taken by the Commonwealth fails.

So far I have dealt with the case on the footing that the Acquisition Order of 16th November 1939 is valid or must be so considered. If it is void, compensation would not be the basis of the claim made by the plaintiffs, who suggest that they could, in that event, recover in tort, or failing that in contract.

I am inclined to think that, when the order was made, the form in which reg. 14 stood did not authorize so much of the order as purported to acquire future wheat. The wheat of the plaintiffs of the 1945-1946 season was, of course, at that time future wheat. But s. 11 of the *Wheat Industry Stabilization Act (No. 2)* 1946 (No. 80) provides that the order " shall be deemed to be, and at all times to have been, fully authorized by " reg. 14 " and shall have and be deemed to have had, full force and effect according to its tenor in respect of wheat harvested in any wheat season up to and including the 1946-47 season."

The validity of this section is impugned by the plaintiffs on the ground that it amounts to a usurpation of judicial power.

The theory is that it undertakes the decision of a question of validity or an issue in the present litigation as to the description and source of the plaintiffs' rights or as to the legal basis or consequence of the Commonwealth's administrative acts. This action was pending when the statute was passed.

In my opinion that is an erroneous complexion to place upon the enactment. It is simply a retrospective validation of an administrative act and should be treated in the same way as if it said that the rights and duties of the growers and of the Commonwealth should be the same as they would be, if the order was valid. If such an enactment is a law with respect to the subject of defence, I can see no objection to its validity (see *Werrin* v. *The Commonwealth* (1)). I do not understand why a law to validate an order

(1) (1938) 59 C.L.R. 150, at pp. 165-168.

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bona fide made and acted upon in the administration of a matter clearly falling within defence and arising in the course of the prosecution of the war should be considered to be beyond the defence power.

It remains to reduce to figures the consequences of the views I have expressed concerning the valuation of the plaintiffs' wheat for the purpose of determining " compensation " at large under reg. 14, as it has been construed.

Williams J. said in the course of his judgment that the prices at which the Board sold wheat of the 1945-1946 crop for export indicated that, if there had been a free market at the date of the acquisition, the plaintiffs would have been able to sell their wheat from 9s. 3d. to 9s. 9d. for bulk wheat and from 9s. 6d. to 10s. for bagged wheat. At a later part of his reasons his Honour fixed the price of bulk wheat more precisely by saying that the export value of Australian wheat f.o.b. Australian ports was about 9s. 6d. a bushel. This view is supported by the evidence and I take 9s. 6d. a bushel f.o.b. as the proper starting point. From that there would be deducted the railage and handling charges to obtain the price at the siding. His Honour said : " I think that the estimate made by the plaintiff of 9d. per bushel for rail and handling charges amounting to £539 13s. 9d. may be slightly on the low side but it can be accepted " (1). That would reduce the value of bulk wheat to 8s. 9d. From that 1s. for the wheat tax must be deducted, leaving 7s. 9d. bulk. Bagged wheat would be 8s. a bushel.

But there is yet another possible deduction to consider and that is the tax imposed by the *Wheat Tax Act* 1946 (No. 78). That Act was assented to on 14th December 1946, that is to say while this action was pending. By s. 4 a tax is imposed and shall be levied and paid in respect of all wheat which has been acquired by the Commonwealth and the tax shall be payable by the grower of the wheat. By s. 6 (1) the Commonwealth or the Australian Wheat Board may deduct any amount of the tax payable by any grower from any moneys payable by the Commonwealth or the Board to that grower on any account whatever and the amount deducted is to be applied in payment of the tax.

This latter provision is attacked by the plaintiffs as dealing with a matter other than the imposition of taxation and, therefore, void and of no effect by reason of s. 55 of the Constitution.

But also the validity of the imposition of the tax is attacked. The ground is that it is an attempt to take back part of the compensation payable in respect of the compulsory acquisition and, therefore, contrary to the requirement of just terms.

(1) *Ante*, p. 513.

Section 5 prescribes the method of fixing the rate of tax. In effect it is by a formula that cannot be finally calculated until the end of the season. The Board is first to make the estimate or computation provisionally and report it to the Minister who is to confirm or vary it and notify the rate so fixed in the *Gazette* as the provisional rate. As soon as practicable after the Board has completed its export or disposal for export of the season's wheat, it makes the final calculation and reports it to the Minister who notifies it in the *Gazette*. Under s. 6 (2) in the meantime until the provisional rate is fixed the Board withholds from the wheat growers what the Minister thinks is enough to pay the tax. To calculate the rate, it is necessary to ascertain the average price per bushel f.o.r. at the seaboard of f.a.q. bagged wheat of all the wheat of that season which the Board has exported. Fifty per cent of the excess of this average over 5s. 2d. is then multiplied by the number of bushels of wheat of that season exported by the Board in the form of wheat or wheat produce or sold by the Board for such export. The sum thus produced is to represent the total amount of the tax and the rate is obtained by dividing the sum by the total amount of wheat of that season in respect of which the tax is imposed, that is to say, by the total amount of the wheat of that season acquired by the Commonwealth.

By a notification in the *Gazette*, dated 30th January 1947, the Minister fixed the provisional rate of tax in respect of the season commencing on 1st October 1945 at 1s. 1⅛d. per bushel.

The question, in effect, is whether that amount is to be deducted from the 7s. 9d. bulk and 8s. bagged which otherwise this judgment would award.

There is authority under s. 5 to prescribe a lower average price as a basis for the computation of the total tax, but that does not affect the present question.

The tax collected is to go into a Wheat Prices Stabilization Fund established by s. 31 of the *Wheat Industry Stabilization Act* 1946 (No. 24). The moneys of the fund are to be applied under other provisions of the Act in support of a plan to make up to growers a return of 5s. 2d. a bushel on their wheat should prices fall below that level. But the operation of the several sections of the Act is to commence on such dates as are fixed by proclamation and so far only s. 31 has been proclaimed. It commenced on 13th March 1947 (*Gazette* 1947, p. 828).

It will be seen that wheat tax of 1946 is imposed on the grower of wheat in respect of his wheat acquired by the Commonwealth. The only wheat which under the operation of the order of 16th

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November 1939 has not been compulsorily acquired is wheat which falls under one or other of the exceptions specified in the order, of which that covering seed wheat may be the most important. The question is whether a tax which has such an incidence can be reconciled with s. 51 (xxxi.) of the Constitution, which makes it imperative that the compulsory acquisition of property by the Commonwealth shall be upon just terms. If it be assumed that the assessment of compensation affords the just terms and so fulfils the requirement, how can acquisition be chosen as the basis of a tax which must diminish the compensation? It will be noticed that this question so framed assumes that compensation is to be assessed at large and not by pooling, but, if the dividend in a pool was similarly to be diminished by a tax based on the acquisition, a closely analogous question would arise, namely whether the pooling could any longer be considered to constitute just terms. The answer made in argument on behalf of the Commonwealth is that, properly understood, the tax is not based on the acquisition, not directed at diminishing or taking part of the compensation, but that it forms part of a plan for imposing a levy on all wheat that is designed to take into the fund part of the high export parity.

Originally the fund established by the *Wheat Industry Stabilization Act* 1946 (No. 24) was to be raised by the charge imposed by the *Wheat Export Charge Act* 1946 (No. 25). Both Acts were assented to on the same day, 9th August 1946. They were meant to operate for five years at least from the beginning of the 1945-1946 season and then they might be terminated by proclamation: see s. 36 of No. 24 and s. 6 of No. 25. But the plan was not then brought into effect and the Australian Wheat Board under the regulations has continued. The export charge as then framed is now to be imposed on wheat exported after 1st December 1947. The charge was to be a levy on all wheat harvested after 1st October 1945 and exported after 1st December of that year by a new Board to be established under the *Wheat Industry Stabilization Act* 1946, or by any other person. It was feared, however, so we are informed, that growers sending in their wheat to the new Board might claim to trace their wheat, and, if it could not be shown that it was exported, that they might dispute the liability of their wheat to bear a proportion of the charge paid over to the fund by the Board.

However that may be, the *Wheat Tax Act* 1946 (No. 78) and the *Wheat Export Charge Act* (*No.* 2) 1946 (No. 79) were enacted on the same day, 14th December 1946. The latter Act made the expression "the Board" cover both the old and the new Board in succession and postponed the operation of the old charge to wheat

exported after 1st December 1947. It imposed a charge, however, on wheat harvested after 1st October 1945 and exported after 1st December 1945 limited in its application to wheat harvested before 1st October 1947 and in its incidence to persons, other than the Board, who exported it. The *Wheat Tax Act* 1946 (No. 78) which also was assented to on 14th December 1946 is, according to the argument, no more than a revision of so much of the former charge as applied to wheat exported by the Board, a revision in the interests of administration and of certainty of recovery.

The foregoing explanation of the reasons of the *Wheat Tax Act* 1946 may remove any criticisms of the motives underlying it, but it does not change its character. Nor is the character of the tax changed by combining it with the *Wheat Export Charge Acts* 1946 (No. 25 and No. 79). Indeed it is not easy to see how any one but the present Board could export wheat and so become liable to the charge while that Board continues.

It remains true that the wheat tax is imposed only on growers whose wheat is acquired and that it taxes them in respect of the acquisition. The fact that it is for the purpose of creating a fund to benefit wheat growers cannot be legally material. It is none the less a tax, an involuntary exaction. In any case wheat growers are a changing class, and the fund will not necessarily enure for the benefit of the same persons as are taxed. The basis of the tax is the acquisition under reg. 14 of the Wheat Acquisition Regulations and its operation in reducing the net payment of compensation is clear. Indeed s. 6 insures that the deduction is made.

In these circumstances the matter comes back to the question whether compensation under reg. 14 is not the measure of just terms. The view of the regulations upon the acceptance of which I am proceeding, means that there is no other measure supplied. I do not see how the Court can inquire whether compensation reduced by the tax still affords just terms. *Ex hypothesi* the means adopted of giving just terms was to authorize an award of compensation. I cannot see how an award of compensation less a sum of money withheld by or retained by the Commonwealth can be considered by a Court still to give a recompense sufficient to comply with the requirement of just terms.

I think that the attempt to impose the tax is invalid and that the plaintiffs are not liable to have the amount of the tax deducted from their compensation.

This conclusion makes it unnecessary to discuss the interesting argument addressed to us upon the question whether s. 6 was not rendered of no effect by s. 55 of the Constitution.

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The plaintiffs claimed interest upon the amount of compensation. But for the reasons I gave in *The Commonwealth* v. *Huon Transport Pty. Ltd.* (1) I think that we should apply the decision of the House of Lords in *Swift & Co.* v. *Board of Trade* (2) and hold that interest cannot be recovered by the plaintiffs.

The result is that I would award as compensation 7s. 9d. a bushel for the plaintiffs' bulk wheat and 8s. a bushel for their bagged wheat, which totals £5,666 14s. 9d. From that there should be deducted £3,441 10s. 4d. which the plaintiffs have already received, leaving £2,225 4s. 5d.

I repeat that I would award this sum in consequence, not of my personal conception of the operation of the Wheat Acquisition Regulations, but as a consequence of that which I think I should accept as by common consent flowing from the Court's decision in *Tonking's Case* (3).

The result of this opinion would be that the appeal should be allowed with costs and judgment entered for the plaintiffs for £2,225 4s. 5d. and costs.

McTIERNAN J. I am of opinion that the appeal should be dismissed.

The various claims which the appellant made in this action have been set out in the preceding judgments. The only claims which it is necessary to consider are the claim for damages for alleged conversion and the alternative claim for compensation. The latter claim is made upon the footing that the wheat the subject of the action was validly expropriated by the Commonwealth. I am of opinion that the appellant is not entitled to succeed upon either of these claims.

If there was any doubt that the appellant's wheat was lawfully expropriated by the Minister's order of 16th November 1939, s. 11 of the *Wheat Industry Stabilization Act* 1946 effectively extinguished any right of action which the appellant had arising from the taking and disposal of its wheat. Furthermore, the appellant waived by conduct any tort of which the respondents were guilty if they took and sold the appellant's wheat without lawful authority.

The other claim is based upon reg. 14 of the Wheat Acquisition Regulations. It is made upon the assumption that an action lies to enforce the claim for compensation into which the regulation converts the rights of any person in wheat expropriated by means of an order made under the regulation. In such an action the

(1) (1945) 70 C.L.R., at pp. 323-326.
(2) (1925) A.C. 520.
(3) (1942) 66 C.L.R. 77.

measure of compensation would be the value of that person's wheat to him at the time of acquisition, and it would be necessary to determine the value upon general principles. But the basis of compensation is very clearly stated in reg. 19. That is the measure of compensation which it is the intention of the Regulations to provide. It would not be the criterion of value which could be applied in an action for compensation. The basis of compensation is so explicitly stated by reg. 19 (2A) that it is, I think, impossible to hold that the remedy provided by reg. 19 is but an alternative remedy to a right of action for compensation. The only remedy which the appellant is entitled to pursue is to forward a claim to the Board in accordance with reg. 19. That conclusion is, I think, required by the express terms of the regulations.

Unaided by authority, I should, in the light of the terms of the regulations and the exposition of them given by my brother *Dixon*, entertain no doubt that reg. 14 gives no right of action and that this regulation and reg. 19 are interdependent. But *Australian Apple and Pear Marketing Board* v. *Tonking* (1) should not, I think, lead to the conclusion that the present regulations give an expropriated owner alternative remedies. There was no provision similar to reg. 19 (2A) in the Apple and Pear Acquisition Regulations, upon which *Tonking's Case* (1) was decided. The measure of compensation was less clearly stated in those regulations. I think that the present regulations clearly manifest the intention that the basis of compensation is that provided by reg. 19 (2A) and that it is the sole standard or criterion of value. I think, therefore, that reg. 14 does not imply a right of action to enforce the claim for compensation given by that regulation. In *Andrews* v. *Howell* (2) it was decided that the constitutional condition of acquisition upon just terms was met by an expropriation upon the terms that the expropriated grower of fruit could enforce his claim to compensation only in the manner provided by reg. 17 of the regulations in that case. See per *Starke* J. (3) and *Dixon* J. (4).

In *Tonking's Case* (5) the Court declared that it would not reconsider the decision in *Andrews* v. *Howell* (2) and the former case was argued and decided upon the basis that reg. 17 satisfied the condition that the grower's fruit must be acquired upon just terms. See the argument (5) and per *Latham* C.J. (6).

It is not therefore the case that this constitutional condition would not be satisfied by the present regulations unless the remedy

(1) (1942) 66 C.L.R. 77.
(2) (1941) 65 C.L.R. 255.
(3) (1941) 65 C.L.R., at p. 271.
(4) (1944) 65 C.L.R., at pp. 282, 283.
(5) (1942) 66 C.L.R., at p. 93.
(6) (1942) 66 C.L.R., at p. 102.

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given by reg. 19 is alternative to a right of action which if it exists, could only be implied. There is therefore no warrant in the existing regulations for an action for compensation. But if the regulations should be read as providing alternative remedies, it is clear from the facts (they are set out in the judgment of the Chief Justice) that the appellant unambiguously elected to pursue the remedy provided by reg. 19 to enforce its claim for compensation. I agree with the Chief Justice that this election bars the appellant's right to bring this action for compensation. The appellant is seeking to enforce by the action a claim which is not compatible with the claim which it has already so unequivocally pursued.

If, contrary to what I have decided, there is a right of action under reg. 14 and it was not barred by an election to pursue the remedy under reg. 19, the question of the value of the appellant's wheat at the time of acquisition would have to be decided upon assumed facts and speculations upon those facts. It would be necessary to assume that the appellant's wheat had not been acquired, and I think that would involve the assumption that there had not been a general acquisition of the wheat of that season. In order to succeed in the action it would be necessary for the appellant to prove that it would have obtained more for its wheat than the sums which it received and is entitled to receive from the Board. The appellant claims that it would have received the export price less expenses at or about the time its wheat was acquired, that is, at the time of harvesting. Whether it would have done so is a matter of speculation.

I agree with the reasoning of the Chief Justice upon the evidence relating to this issue. I am not satisfied that there was a probability that the appellant would have obtained a better return for its wheat if it had retained the property in it and it had not been acquired by the Commonwealth and put in the pool.

WEBB J. I too think the plaintiff company's wheat was lawfully acquired by the Wheat Board, and I have nothing to add to the reasons for that view given by other members of the Court.

I agree with the Chief Justice that the company delivered its wheat to the Board upon the terms that it was to be dealt with in No. 9 Pool and so adopted reg. 19, if that regulation provides only an alternative means of payment. As to whether it provides the only means of payment or an alternative means, I am inclined to agree with *Dixon* J. that it is possible to say that *Australian Apple and Pear Marketing Board* v. *Tonking* (1) was decided on regulations

(1) (1942) 66 C.L.R. 77.

providing a different context and that the Wheat Acquisition Regulations should be interpreted independently. But as I think the company adopted reg. 19 as the means of payment for its wheat, I need not decide the question whether it is the only means; and it is undesirable that I should decide it in the absence of argument.

However, if the company were entitled under reg. 14 to compensation measured by what it would get for its wheat if sold in a "free market," I agree with the Chief Justice that the amounts paid and still to be paid to the company by the Board have not been shown to be less than the compensation payable under reg. 14. In arriving at such compensation it would not, I think, be proper for the Court to assume that legislation would be enacted or other political action taken. In the private—and perhaps sound—opinion of the judge it might be probable that Parliament would be induced to legislate; or that Parliament and the electors would be induced to act to alter the Commonwealth Constitution; or that the voting strength of the wheat growers might be used to effect a change of government. But he could not properly give effect in the judgment to any such opinion.

The Court could, however, properly take into consideration the probability that action would be taken under existing legislation. Even then the Court would not be at liberty to assume there would be, under existing legislation, another form of compulsory acquisition, or even, concerted action short of that by different authorities, to bring about the same result. The Court would be entitled to take into account that there would be an embargo under the *Customs Act* to keep in Australia sufficient wheat for local requirements and that such action would be taken without regard to the price that would be paid for such wheat and its products, and without collaboration with the State or Federal price-fixing authorities. On the other hand, the Court would be entitled to assume that the price-fixing authorities would not be influenced in fixing the price by the fact that the embargo would prevent the wheat being sent outside Australia at a higher price.

But it is contended that there should be no assumption by the Court that these fixed prices would not be increased. There should, of course, be no assumption that prices would not be increased to meet the cost of production and to allow a fair profit from time to time. However, an assumption should not be made that prices here would be increased merely to bring them into line with high prices overseas due to a great shortage of wheat in foreign countries and a consequent heavy demand for wheat, as any such increase would tend to defeat the very purpose of price fixing, i.e., to protect

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Australian consumers against excessive prices when there is no scarcity here. As such increased prices would not be assumed, subsidies and consequent taxation to meet them need not be considered.

Then having assumed an embargo under the *Customs Act* and the continuance of price fixing in the ordinary way, the Court would be justified in finding that the overseas price or parity would not be obtained for all wheat; and so that compensation could not be assessed on the basis that each grower could obtain in a "free market" the overseas price or parity for the whole of his wheat.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *J. W. Maund & Kelynack.*

Solicitor for the respondents, *George A. Watson*, Acting Crown Solicitor for the Commonwealth.

B. P. M.