Appl Allgas Energy Ltd v Brisbane Gas Co Ltd 14 ACLR 448
Foll Webb v Action Home Loan Pty Ltd (1985) 63 ALR 113
Appl R v Brisbane TV Ltd; Ex parte Criminal Justice C'sion (No2) [1998] 2 QdR 483

[HIGH COURT OF AUSTRALIA.]

CARTER AND OTHERS . . . . APPELLANTS;
DEFENDANTS,

AND

THE POTATO MARKETING BOARD . . RESPONDENT.
COMPLAINANT,

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BRISBANE, *June* 19, 20, 21.

MELBOURNE, *Oct.* 17.

Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ.

Constitutional Law (Cth.)—Freedom of inter-State trade, commerce and intercourse—State marketing legislation—Marketing Board—Compulsory delivery of declared commodity to board—Prohibition on selling or delivery to, or buying or receiving declared commodity from person other than board—Severability—Operation of legislation subject to Commonwealth Constitution—Purchase by resident of New South Wales from Queensland producer—Commodity consigned in name of purchaser to and received by person in Queensland—Re-sale in Queensland—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*The Primary Producers' Organisation and Marketing Acts*, 1926 *to* 1946 (*Q.*) (17 *Geo. V. No.* 20—11 *Geo. VI. No.* 13), *ss.* 1A, 15 (1), (3).

Section 15 of *The Primary Producers' Organisation and Marketing Acts*, 1926 *to* 1946 (Q.) provides: "(1) Save as hereinafter prescribed, all the commodity shall be delivered by the growers thereof to the Marketing Board or their authorised agents within such times, at such places, and in such manner as the Board may fix, or as may be prescribed. . . . (3) Any person who, save as hereinafter prescribed, sells or delivers any of the commodity to or buys or receives any of the commodity from any person other than the Board, shall be liable to a penalty . . ."

Section 1A of the Act provides that the Act shall be read and construed subject to the Commonwealth Constitution and so as not to exceed the legislative power of the State, to the intent that where any enactment contained in the Act would but for this section have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

Held: (1) that s. 15 (3) is capable of a severable and distributive application which, under s. 1A, is confined to transactions not protected by s. 92 of the Constitution;

(2) that s. 15 (3) is severable from s. 15 (1), and would be severable even if s. 15 (1) were wholly invalid; and

(3) that s. 15 (1) has a distributive application and must under s. 1A remain capable of applying to any failure to deliver a commodity, unprotected by s. 92.

A resident of New South Wales, whose place of business was on the New South Wales side of the Queensland border, instructed his agent in Queensland to purchase potatoes, a declared commodity under *The Primary Producers' Organisation and Marketing Acts*, 1926 *to* 1946, from Queensland growers. After the sale the potatoes were consigned by rail in the name of the buyer to his agent in Queensland. On instructions from the buyer, the appellants, a firm of produce merchants in Brisbane received the potatoes and sold them in Brisbane on behalf of the buyer to whom they accounted and sent the purchase price less commission and expenses. They were convicted under s. 15 (3) of *The Primary Producers' Organisation and Marketing Acts*, 1926 *to* 1946 of receiving a declared commodity from a person other than the board.

Held, that the transaction was not one of inter-State trade and did not come within the protection of s. 92 of the Constitution.

Section 92 of the Constitution does not protect acts which may or may not lead to transactions of inter-State trade and at best can only be preparatory to transactions which may or may not prove to have an inter-State character.

Peanut Board v. *Rockhampton Harbour Board*, (1933) 48 C.L.R. 266, distinguished.

Matthews v. *Chicory Marketing Board (Vict.)*, (1938) 60 C.L.R. 263; *Bank of New South Wales* v. *Commonwealth*, (1948) 76 C.L.R. 1, referred to.

APPEAL, by way of order to review, from a Court of Petty Sessions of Queensland.

The Potato Marketing Board, Queensland, commenced proceedings by complaint against the members of a firm, A. J. Carter and Sons, Brisbane, alleging that at Brisbane on 17th May 1950 they received from a person other than the Potato Marketing Board sixty-one bags of potatoes being a declared commodity under and for the purposes of *The Primary Producers' Organisation and Marketing Acts* 1926 *to* 1946 (Q.), which potatoes were not exempted by the Potato Marketing Board from the operation of s. 15 of those Acts.

A. J. Carter and Sons carried on business at Roma Street, Brisbane, as wholesale fruit and produce merchants. By a telephone conversation H. C. Butt, a resident of New South Wales and a partner of J. E. Long & Co. of Jennings on the New South Wales side of the Queensland border, instructed the firm's agent, Profke, at Lowood, Queensland, to buy potatoes on behalf of the firm from

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local growers in Queensland. Profke accordingly bought sixty-one bags of potatoes, which were paid for by J. E. Long & Co.'s cheque and consigned by rail by Profke in the name of J. E. Long & Co. to Roma Street railway station, Brisbane. On 17th May 1950, the day the potatoes arrived at Roma Street, Butt by telephone instructed the appellants to take delivery of the consignment and sell the potatoes on commission. The appellants took delivery of the consignment and sold the potatoes. They sent J. E. Long & Co. the account sales accompanied by a cheque for the proceeds of the sale less freight cartage and commission.

The complaint was heard before a stipendiary magistrate at Brisbane, and the defendants were convicted of an offence under s. 15 (3) of the Acts and fined.

From this conviction they appealed to the High Court by way of order to review on the following grounds :—

(1) That *The Primary Producers' Organisation and Marketing Acts* 1926 *to* 1946 are, or alternatively s. 15 thereof, is invalid, in that the said Acts, or alternatively the section, conflict with s. 92 of the Constitution, in that the said Acts, or alternatively the said section, prohibits or unlawfully restricts trade commerce and intercourse among the States of the Commonwealth.

(2) Alternatively, that by reason of s. 1A of the said Acts, s. 15 thereof was not applicable to the transaction in respect of which the appellants were convicted.

(3) That the decision of the stipendiary magistrate was against the evidence and the weight of evidence.

G. E. Barwick K.C. (with him *M. Hanger* K.C. and *R. K. Bradley*), for the appellants. The first submission is that s. 15 (1) of *The Primary Producers' Organisation and Marketing Acts* 1926 *to* 1946 (Q.) is invalid; the second that it is unsusceptible of a construction which without change of meaning or of policy, would make it valid in any relevant respect; the third that s. 15 (3) is but ancillary to s. 15 (1) and falls with it, or fourthly as an alternative s. 15 (3) is invalid as enacted and, so regarded, is unsusceptible of a construction which would make it valid at least in respect of the word "receives". There is a further alternative that if s. 15 (3), whether regarded as ancillary to s. 15 (1) or as independent of it, can be construed so as to be valid in any respect, the facts and circumstances of the instant case do not fall within it as so construed. The provisions of s. 15 (1) of the Act in requiring the growers to deliver to a particular person are invalid : *Peanut Board* v. *Rockhampton Harbour Board* (1). The effect of s. 1A has to be

(1) (1933) 48 C.L.R. 266.

considered. The first thing is to ascertain what the enacted provisions in s. 15 mean. That meaning is never lost, and the function of a reading-down provision is never to change the meaning of the enacted provision: *Bank of New South Wales* v. *The Commonwealth* (1). The only way in which it could be suggested that s. 15 (1) could be accommodated to the Constitution would be by the insertion of some form of exception in the Act. That exception must not change the meaning or the policy of the Act and the terms of the exception must be clearly indicated in the Act itself. Section 1A is merely a command or a requirement that the court should find what is the secondary intention of Parliament if its primary intention for total operation should fail. Under s. 1A the court must be able to discover in the Act itself that secondary intention, not re-draw the Act to make it valid because Parliament says there is no intention to breach the Constitution. The nature of the exception should be enacted in the Act itself. Apart from the words "Save as hereinafter prescribed", which relate to an exemption, there is no exception of any kind in s. 15. The exceptions mentioned in the other sections are of a very limited form and there is no exception in the provisions of the Act from the generality of s. 15 (1). The policy of the Act required for its operation and its practical effect, the control of all of the commodity and the delivery of all of the commodity to the board, and s. 1A has not altered the policy of the Act at all, which remains exactly the same as before. If the Act is invalid it cannot be construed back to validity by s. 1A, which section has done nothing. It has not changed the meaning or policy of the legislation, which calls for delivery of all of the commodity to the board. It is still entirely restrictive in its meaning of all trade by the grower: *Peanut Board* v. *Rockhampton Harbour Board* (2). The protection of s. 92 of the Constitution extends to every trader, including both a grower and an owner, in respect of his goods until he has irrevocably decided not to engage them in inter-State trade. It has been more usual to look at this right from the positive point of view and say that he has been protected in respect of his goods in inter-State trade. That has been expressed somewhat colourfully by the expression that s. 92 only covers trade "in being and in motion" and, unless he has already dedicated his goods to inter-State trade, s. 92 affords him no protection. That is quite inconsistent with the decision in *Bank of New South Wales* v. *The Commonwealth* (3). A protection is an immunity from laws which

(1) (1948) 76 C.L.R., at pp. 372, 374.
(2) (1933) 48 C.L.R., at pp. 275, 276, 285.
(3) (1948) 76 C.L.R. 1.

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burden or hinder trade, as distinct from regulation. The antithesis is between burden and hindrance and regulation. Outright prohibition is an example *par excellence* of burden or hindrance. The view has been taken that you look to see whether there is some act or transaction, whether the owner of the goods has dedicated them to inter-State trade, and provided he has not the goods may be taken from him. On behalf of the appellants the very reverse of that is submitted. The right way to look at s. 92 is to say that a trader has the right to determine whether he may sell his goods and where he may sell them subject to laws as to regulation. He has the right to decide for himself where and to whom and in what quantities, he shall sell his goods; and that is the ability to decide to put them into inter-State trade. That remains with him until he himself has made it impossible. He can always put them into inter-State trade until that point of time where he, by his own doing, has put that beyond his own reach. [He referred to *James* v. *South Australia* (1); *W. & A. McArthur Ltd.* v. *Queensland* (2).] Unless the trader is free to select where, to whom, and in what quantities he sells his goods there is an infringement of s. 92. If any legislation removes the property or the trader's right of disposition before he has exercised it, that is an infringement. It is easy to look at the trade outwards from Queensland to New South Wales, but, looked at from the point of view of the residents of other States, they have a right and an interest under Queensland legislation to protect their trade into Queensland. Nothing excites trade more than the possession of stock. If a trader has stock he can make sales. If a trader has stock, the buyer is excited into a transaction. If a grower is denuded of his stock, an inter-State buyer is prevented from exercising his right. The operation of that on the buyer's right is just as direct as the acquisition is on the seller's right. In this case the taking of stock away from the grower whilst he still would have the right and the ability to put it into inter-State trade is an infringement of s. 92: *Peanut Board* v. *Rockhampton Harbour Board* (3). One has to look to the buyer as well as to the seller and it must be borne in mind that trade is always reciprocal: *Duncan* v. *State of Queensland* (4). There are expressions of opinion in *Matthews* v. *Chicory Marketing Board (Vict.)* (5), which might appear to be contrary to these submissions. So far as the actual decision in that case was concerned it was

(1) (1927) 40 C.L.R. 1.
(2) (1920) 28 C.L.R. 530.
(3) (1933) 48 C.L.R., at p. 275.
(4) (1916) 22 C.L.R. 556, at pp. 596, 602, 603.
(5) (1938) 60 C.L.R. 263.

decided on s. 90. The remarks made in that case were in error, being influenced generally by prevailing conceptions, not now acceptable, namely, that the subject matter of the law was relevant and was a determining factor. Far too much significance was given to the effect produced on the goods or the movement or the passage of them. No place is found in the remarks that the idea of reciprocal trade is to be looked at from the point of view of the local resident owner and the external resident who has to trade. Quite a different approach is necessary in considering all the exceptions, and full rein has to be given to the protection or immunity of s. 92. The problem in relation to s. 1A of the Act is to find a formula which would give the owner of the goods, on the one hand, the right to determine for himself where and to whom he would sell the goods and, on the other hand, which would preserve for the buyer access to the goods to be bought or goods in the hands of the owner free to sell inter-State. There is not a construction open with the aid of s. 1A giving it its fullest rein which will confine s. 15 within constitutional limits. Section 15 (3) is the counterpart of s. 15 (1) and depends upon s. 15 (1) for its efficacy. If s. 15 (1) falls because there is no power to require the delivery of all the commodity, then it would not be possible for s. 15 (3) to stand. Viewed independently in relation to the word "receives", s. 15 (3) infringes s. 92 in that by its operation it places a burden or hindrance on inter-State trade. It is not possible by the aid of s. 1A to reduce the construction of s. 15 (3) so as to bring it within constitutional limits, and, on the other hand, change neither the policy nor the meaning of the provisions of the Act. If the remarks in the case of *Matthews* v. *Chicory Marketing Board (Vict.)* (1) fully express the relevant immunity given by s. 92, then the subject goods were required or intended for inter-State trade. In relation to the facts at the time of the receipt the transaction was outside the scope of the Act. The offence is complete at the moment the agent received the goods. The relevant finding is that they were handed over or received by the defendants from a resident of New South Wales. At that time the resident of New South Wales, who was the principal, could have intended the goods for inter-State trade.

A. D. McGill K.C. (with him *G. Seaman*), for the respondent. On the facts it is quite clear that Long was trading in Queensland-grown potatoes. He had a buying agent at Lowood and a selling agent in Brisbane and none of the transactions wore the slightest

(1) (1938) 60 C.L.R. 263.

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complexion of an inter-State transaction. Some effect must be given to s. 1A. It is a plain requirement of the legislature that s. 15 must be read in such a way as to be within the power. Section 15 can and should stand as read in the light of s. 1A by reading the words "all commodities" as being those commodities subject to the legislative power of the Parliament of Queensland: *Matthews* v. *Chicory Marketing Board (Vict.)* (1). There is a residual operation in s. 15, when it is read subject to s. 1A, in a field which is not covered by s. 92. This amending section was deliberately inserted in the Acts after the decision in *Peanut Board* v. *Rockhampton Harbour Board* (2). The effect of s. 1A is that some enactment must be construed into the Acts, including s. 15, as being within the legislative power of the Queensland Parliament. The protection of s. 92 does not extend to a trader in respect of his goods until he has irrevocably decided not to engage them in inter-State trade. The protection extends only to goods which are either actually in inter-State trade or are intended for inter-State trade: *Australian National Airways Pty. Ltd.* v. *Commonwealth* (3). So that there may be an inter-State character in the instant case it must be shown that there was either actual or contemplated movement of goods or persons across the border of the two States. *Clements and Marshall Pty. Ltd.* v. *Field Peas Marketing Board (Tas.)* (4); *Peanut Board* v. *Rockhampton Harbour Board* (5).

D. I. Menzies K.C. (with him *N. S. Stable*), for the States of New South Wales, Victoria, Queensland and Western Australia (intervening by leave). The contention of the appellants is in effect that *W. & A. McArthur Ltd.* v. *Queensland* (6) was wrongly decided, not because it went too far, but because it did not go far enough, and that the three transactions, which the court decided in that case were outside trade and commerce among the States, should have been classified as within it. The argument of the appellants is inconsistent with *Matthews* v. *Chicory Marketing Board (Vict.)* (7), and with *Graham* v. *Paterson* (8). Furthermore, the argument goes to the extent that the goods always have the potentialities of being committed to inter-State trade and therefore the protection that their owner has, exists until he has lost the goods. That protection would go from buyer to buyer and there could not be an Act that was valid. So far as potatoes are concerned, the effect of the argument is that every potato in

(1) (1938) 60 C.L.R. 263, at p. 274.
(2) (1933) 48 C.L.R. 266.
(3) (1945) 71 C.L.R. 29, at p. 56.
(4) (1948) 76 C.L.R. 401, at p. 409.
(5) (1933) 48 C.L.R. 266, at p. 277.
(6) (1920) 28 C.L.R. 530.
(7) (1938) 60 C.L.R. 263.
(8) (1950) 81 C.L.R. 1.

Australia from the time it is dug till the time it is eaten, is the subject of inter-State trade and the owner of every potato is protected. If this contention is right the court has gone to unending trouble unnecessarily in determining whether trades were protected by s. 92. [He referred to *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [*No.* 2] (1); *Field Peas Marketing Board* (*Tas.*) v. *Clements and Marshall Pty. Ltd.* (2).] By the Acts the grower is given the opportunity of committing his goods to inter-State trade. If he does so he gets the protection of s. 92. When s. 15 (1) is read with s. 1A the result is not at all dissimilar to *Matthews* v. *Chicory Marketing Board* (*Vict.*) (3), because any transaction which is inter-State trade is excluded. Then it becomes a matter for consideration in each case whether or not a particular transaction is inter-State trade, because s. 1A deals not merely with construction but with operation as well. The effect of s. 1A is to deprive s. 15 (1) or s. 15 (3) of any operation that could interfere with the freedom of inter-State trade. That is the decision in *Graham* v. *Paterson* (4). The extent of the right given by s. 92 is a right to sell goods inter-State, and all that it is necessary for legislation to do is to avoid infringing that freedom. A person may be stopped from selling intra-State or overseas, but it cannot be said that to protect his right to inter-State trade he must be given an unrestricted right to sell anywhere at any time as and when he likes. That is the claim made by the appellants, that the protection that s. 92 grants is only effective if he is entirely at liberty to sell to any person at any time. The freedom given by s. 92 is not freedom of trade, but freedom to trade inter-State. It was argued that the matter must be looked at from the point of view of the buyer and that all goods must be kept available for the possibility of inter-State transactions. The consequence would be that, as the ownership moves from one person to another, the protection would continue. It would continue from the time the goods came into existence until they were destroyed, not the time when they are sold. That is not an argument that inter-State trade is to be free but that all trade is free. However, this is not the case of an inter-State transaction. The test is not the residence of the parties in different States, but whether there has been movement. There can be a transfer or movement of intangibles as well as of tangibles as in *Bank of New South Wales* v. *The Commonwealth* (5). The argument in the instant case is that the

(1) (1935) 51 C.L.R. 677.
(2) (1948) 76 C.L.R. 414.
(3) (1938) 60 C.L.R. 263.
(4) (1950) 81 C.L.R. 1.
(5) (1948) 76 C.L.R. 1.

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goods are the subject of inter-State trade, because in the future there may be some inter-State transaction to which the owner is a party and which affects the goods. This contention is far-reaching. It would mean that all marketing schemes must be bad, and that it is impossible to frame any saving provision which would give them operation within constitutional limits. If this Court were to depart from the view that has been accepted with regard to s. 51 (i.) and s. 92, so far as the meaning of " trade and commerce among the States " in s. 92 is concerned, it would not be long before the same view is taken with regard to s. 51 (i.). Therefore there would be no reason why the Commonwealth should not make laws with regard to any goods, because those goods may be engaged in inter-State trade. It opens up a new path to Commonwealth power, which would be to the disadvantage of the States. Goods could never be got out of inter-State trade because they are liable to be committed by their owners to inter-State trade. If the argument of the appellants is right this Court was wrong in *W. & A. McArthur Ltd.* v. *Queensland* (1) in holding that the first three transactions enumerated in that case were not inter-State trade. Furthermore, if the argument for the appellants is right, there was no case for any decision in *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (2) and in *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [*No.* 2] (3), that the Vacuum Oil Co. Pty. Ltd. was subject to s. 92 and the conclusion in those cases was that there was a valid operation as to petrol which was not the subject of inter-State trade. In this case, as in other cases, the Court is dealing with the delivery of particular goods, and there is no difficulty whatever in giving sub-s. (1) or sub-s. (3) a distributive operation and using s. 1A to confine the operation of the section to matters which do not fall within the realm of inter-State trade. [He referred to *Andrews* v. *Howell* (4); *Milk Board* (*N.S.W.*) v. *Metropolitan Cream Pty. Ltd.* (5); *Crothers* v. *Sheil* (6); *Field Peas Marketing Board* (*Tas.*) v. *Clements and Marshall Pty. Ltd.* (7).] In *Commonwealth* v. *South Australia* (8) the Court instanced that petrol, which was at one time the subject of inter-State trade, ceased to be the subject of inter-State trade once it came to rest in the State to which it had been sent and therefore was not covered by the freedom given by s. 92. That is inconsistent with the appellants' argument,

(1) (1920) 28 C.L.R. 530.
(2) (1934) 51 C.L.R. 108.
(3) (1934) 51 C.L.R. 677.
(4) (1941) 65 C.L R., at pp. 255, 263, 279, 280.
(5) (1939) 62 C.L.R. 116.
(6) (1933) 49 C.L.R. 399.
(7) (1948) 76 C.L.R. 414, at pp. 422, 428, 429.
(8) (1926) 38 C.L.R. 408, at pp. 411, 429.

which must be that the petrol is still in trade and could be sold to a person in some other State. The appellants' argument is also inconsistent with *Roughley* v. *New South Wales*; *Ex parte Beavis* (1). The decision in *Graham* v. *Paterson* (2) is important in these aspects. First of all it is inconsistent with the appellants' general proposition; secondly it shows how a clause such as s. 1A should be employed and thirdly it shows that where a person who is not himself engaged in inter-State trade and is prosecuted under an enactment which he himself has contravened, he cannot rely upon the fact that the enactment is totally invalid. The result is that s. 1A applies only to transactions to which it is applicable and not to every transaction: *Graham* v. *Paterson* (3). There is nothing in s. 92 that protects dealings by residents of different States. What is protected is inter-State trade, and there is a great difference between a contract between residents of different States and inter-State trade. The mere fact that inter-State lines of communication are used does mean that there is inter-State intercourse at least. But it does not mean that everything that is arranged by long distance telephone or everything that is arranged by correspondence is automatically and for all purposes an inter-State transaction. *Bank of New South Wales* v. *Commonwealth* (4) was a particular case, because it was these communications that passed from one State to another that effected the movement of intangibles, such as credit, from one State to another. The view the Court took in that case was that when the entries were made in one State and then in another State it was equivalent to the passage of credit: *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Commissioners of Income Tax for Trinidad and Tobago* (5); *James* v. *South Australia* (6); *James* v. *Cowan* (7). The result is that s. 15 (1) must be read, with the aid of s. 1A, as subject to a proviso—provided that the provisions of the section shall not apply to any portion of a commodity which the grower is using for the purpose of inter-State trade or intends to use for the purpose of inter-State trade. The grower is bound to deliver to the board and unless the commodity is used in inter-State trade he is not an inter-State trader. If at that time he is engaged in or had entered into an obligation to be engaged in inter-State trade he is exempt on the footing that what was said in *Matthews*

(1) (1928) 42 C.L.R. 162.
(2) (1950) 81 C.L.R. 1.
(3) (1950) 81 C.L.R. 1, at pp. 15, 16, 20.
(4) (1948) 76 C.L.R. 1.
(5) (1945) A.C. 1.
(6) (1927) 40 C.L.R. 1, at pp. 25, 26, 39.
(7) (1932) A.C. 542, at pp. 542, 555, 559; 47 C.L.R. 386, at pp. 386, 393, 394, 397.

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v. *The Chicory Marketing Board (Vict.)* (1) is right, but if that case does not go far enough, then the proviso to be read into s. 15 (1) depends upon the meaning to be attributed to s. 92, because the object is to exclude anything that would be protected by s. 92. The appellants' contention is contrary to what was decided in *W. & A. McArthur Ltd.* v. *Queensland* (2) and in the cases starting with *McArthur's Case* (2) and finishing with the recent case *Graham* v. *Paterson* (3). Section 1A deals with the operation as well as the construction of the Acts, and it is not necessary to be able to find some short form of words that can be inserted in every provision of the Acts to form a qualification. The real intention of s. 1A is to test the operation of each section in the particular circumstances of the time. If the operation involves an infringement of s. 92 then the section does not authorize it, otherwise it does authorize it. Furthermore, s. 15 (3) has a life of existence which is not dependent on s. 15 (1). It could and would operate before s. 15 (1) became effective, and deals with different matters. In conclusion, there is no evidence upon which anyone can draw a conclusion that the potatoes were in inter-State trade or that there was any intention that they should be in inter-State trade. They were received by the appellants to be sold in Queensland.

P. D. Phillips K.C. (with him *C. G. Wanstall*), for the Commonwealth (intervening by leave). It is obviously unduly optimistic to eliminate the possibility that the Commonwealth in the not far distant future may have to rely upon the defence power in real circumstances of peril and, as past experience has shown, the power to amass or acquire commodities and deal with them appears to be inevitable and necessary as an element in conducting the defence of the country. If the arguments of the appellants are accepted the consequences upon the power of acquisition or of controlling commodities under the defence powers would become vastly more difficult. There are five issues which arise and they are (1) What is inter-State trade? (2) What is the nature of the immunity provided by s. 92 to those engaged in inter-State trade? (3) Do the Acts, on their face, resort to improper unconstitutional limits of immunity when properly construed? (4) If upon their face the Acts do intrude upon the immunity carried on, are they capable of being read, including s. 1A so as not to intrude upon that immunity? (5) If yes to (4), if capable of being so read, how should they be read so as not to intrude upon

(1) (1938) 60 C.L.R. 263.
(2) (1920) 28 C.L.R. 530.
(3) (1950) 81 C.L.R. 1.

the immunity? On the first question, whether inter-State trade requires a flow of goods, commodities, services between the States, or whether legal institutions having contact with more than one State makes inter-State commerce is not really vital to this case. The incidence of inter-State trade may extend very far, but that must be incidence of trade and commerce among the States. It does not follow that because there is an inter-State transaction that you have got commerce between the States. There cannot be commerce between the States without inter-State transactions, but it must not be concluded from that, that every inter-State transaction is commerce between the States. A transaction may be part of a total process of moving goods in trade between the States; then it is part of trade and commerce. Or it may be an inter-State transaction unrelated to moving goods between the States, then it is (1) an inter-State transaction, but (2) not part of trade and commerce between the States: *Dahnke-Walker Milling Co.* v. *Bondurant* (1). There must be genuine inter-State business, not merely local arrangements by persons connected with more than one State. Mere contract or a business contract which has contact with more than one State, either because the parties have contact with more than one State or the thing is in a different State from where the parties are, is not inter-State commerce. Broadly, inter-State commerce contemplates the movement of goods and services across State lines and it is conceivable that the whole thing might be done by acts and transactions which are in themselves intra-State. [He referred to *Lemke, as A.G. for North Dakota* v. *Farmers' Grain Co. of Embden* (2); *Shafer, as A.G. for North Dakota* v. *Farmers' Grain Co. of Embden* (3).] The nature of the immunity provided by s. 92 cannot be deduced from simple generalization referring to the rights of the trader. The Parliaments of the States and the Commonwealth may make laws the import of which if it is indirect or consequential upon inter-State trade, may have a very considerable effect upon it and they may make laws which are regulatory and permissible and not hindering or burdening. In consequence the relative immunity of the trader must be considered in the light of legislative capacity. The trader may be affected if the law is indirect and consequential, but the effect may be very considerable upon him. He may be affected by laws which are regulatory and it is therefore impossible to make a simple deduction and say that the trader may trade

(1) (1921) 257 U.S. 282 [66 Law. Ed. 239].
(2) (1921) 258 U.S. 50 [66 Law. Ed. 458].
(3) (1924) 266 U.S. 593 [69 Law. Ed. 458].

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and is not to be told where or to what extent or in what way he may trade, because both as to where and to what extent they may be valid—if, for instance, they happen to be laws which are indirect or consequential and whose impact, upon inter-State trade will nevertheless affect him in a very vital way. So that it is totally fallacious to jump to some simple conclusion as to the nature of the immunity and the consequences of it. A law to be unconstitutional would have to give unconditional interference with inter-State trade. If a law is indirect or inconsequential in its impact it is permissible. The cases *James* v. *South Australia* (1); *James* v. *The Commonwealth* (2); and *James* v. *Cowan* (3) are no authority other than to say that the legislature of the State may not directly impose a quantitive limitation upon the goods which the trader is presently selling inter-State. It is not justifiable to go beyond that as a deduction from it. *James* v. *South Australia* (4) shows that the Act may be validated *pro tanto*, whereas the argument for the appellant is that it cannot be validated under any circumstances. The limitation to the fourth category in *W. & A. McArthur Ltd.* v. *Queensland* (5), however necessary it may have been under the construction of the particular statute there, does not provide a suitable basis for the definition of inter-State trade. In the United States of America, where, as a rule, a restricted view is not taken of inter-State trade, there are a series of cases in which all the permutations of out-of-State vendors sending commercial travellers into another State, soliciting orders, supplying their stock out of the State, establishing retail agencies in the State and a vast number of complicated situations have been worked out by out-of-State corporations seeking to escape tax and other laws of the State. Every possible permutation or a great many permutations have been examined for the purpose of seeing whether the result is inter-State trade or not and it is a complicated problem. But there is one basic feature in all these cases, namely, a flow of goods across State lines: *McLeod, Commissioner of Revenues for Arkansas* v. *J. E. Dilworth Co.* (6); *General Trading Co.* v. *State Tax Commission for State of Iowa* (7). Whatever be the difficulties and complications of fact which call for classifications, the transaction in this case is not inter-State trade. It lacks the one essential, that when goods are being bought and sold, from that aspect of commerce, inter-State trade among the States means

(1) (1927) 40 C.L.R. 1.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1932) A.C. 542; 47 C.L.R. 386.
(4) (1927) 40 C.L.R., at pp. 26, 39.
(5) (1920) 28 C.L.R. 530.
(6) (1943) 322 U.S. 327 [88 Law. Ed. 1034].
(7) (1943) 322 U.S. 335 [88 Law Ed. 1309].

movement of the goods among the States. As to the nature of the limitation the argument of Mr. *Menzies* is adopted. The decision in *Matthews* v. *Chicory Marketing Board* (*Vict.*) (1) has received judicial approval in *Hopper* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) (2), and doubts which may have been spelt out of *Matthews' Case* (1) have been resolved. The basic operation of s. 15 of the Acts is to be found in s. 15 (3) and not in s. 15 (1), because if s. 15 contained sub-s. (3) only, then the whole Act could operate. In this way s. 15 (3) is the essential one and s. 15 (1) is ancillary. That being so it is of primary importance to qualify s. 15 (3). That may be done without any real difficulty by the expression " any of the commodity other than any of the commodity the subject-matter of inter-State trade or in the course of inter-State trade ". There is no logical or constitutional difficulty in taking any expression like " any of the commodity " and saying that if it is construed to mean including a commodity in trade and commerce among the States, it is too wide and offends the Constitution. That is what *Isaacs* J. obviously had in mind in *Roughley* v. *New South Wales*; *Ex parte Beavis* (3), where, after referring to *Macleod* v. *Attorney-General for N.S.W.* (4), he said that the Act would be invalid to regulate activities for all State principles, but that it was valid within State principles and only invalid out of State principles. In these Acts the expression " any of the commodity " should be read down by saying " in inter-State trade and commerce ", or " in or intended or required for inter-State trade and commerce ". Here the relationship between the statutory power, the taking or the universal compulsory delivery and problematical future trade is not sufficiently direct to offend against the constitutional dictates. The effect upon that trade should be considered indirect or consequential merely. It is because it is potential and inchoate and not actual, that the interference with it should be treated as constitutionally permissible, being classified as indirect or consequential. As to whether the potatoes were in inter-State trade is a question to be determined on the facts and circumstances. Inter-State trade is a complex thing and the difficult commercial situations are very numerous. The total complex of what is trade among the States has not been the subject of any particular judicial inquiry. It is not to be solved by merely looking at the legal situation or the existence of some legal relationship such as contract. It turns

(1) (1938) 60 C.L.R. 263.
(2) (1939) 61 C.L.R. 665, at pp. 669, 677.
(3) (1928) 42 C.L.R. 162, at pp. 182-191.
(4) (1891) A.C. 455.

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upon legal transactions, business transactions and a number of facts including expressions of intention. The appellants' argument is that every person should be free in case he might turn into an inter-State trader at some time. There is no constitutional immunity to be free to be possibly hereafter a trader. Trade is to be free and the co-relative is that the person trading is not to be impeded or hindered. In *Bank of New South Wales* v. *Commonwealth* (1) if the banks had had no inter-State trade but said that they wanted to engage in inter-State trade at some future time they would not have got protection from s. 92. The problematical inter-State trade of the banks was not entitled to protection. It is the inter-State trader who is involved. Here there is a general marketing Act capable of application to a whole series of commodities and the Act has to be considered as "an all or nothing" Act, not in relation to a particular commodity, but in relation to all commodities to which it could refer.

G. E. Barwick K.C., in reply. The critical proviso to s. 18 is s. 15 (1). That is the section from which the board derives its power. There could be no s. 18 without s. 15 (1). Then s. 15 (3) presupposes that the board will have the goods to sell. The only way to look at the Acts is to treat s. 15 (1) as the governing portion in relation to the various sub-sections. If the relationship of s. 15 (1) to s. 15 (3) is to be considered it is necessary to consider first what limitation would have to be put on s. 15 (1) to reduce it to validity. In the first part of the Acts there is an obligation to deliver the whole of the commodity to the board and s. 15 (3) then naturally falls into its subsidiary situation. The situation is not one in which s. 15 (1) is reduced to a point where it has no operation and then one looks to see what is the significance of s. 15 (3). In this way s. 15 (1) unreduced is invalid. The question is whether by dint of s. 1A it can be reduced into validity, not given an operation so as to construe it back to validity. It cannot be said that the receival of the goods was an intra-State transaction. These Acts do place a burden upon inter-State trade. In a marketing Act where the acquisition is for the purpose of marketing, the operation of the law of acquisition directly burdens the trade of the grower: *New South Wales* v. *Commonwealth* (*Wheat Case*) (2); *Peanut Board* v. *Rockhampton Harbour Board* (3). In the latter case the acquisition was bad at a time when no inter-State trade was found

(1) (1948) 76 C.L.R. 1.
(2) (1915) 20 C.L.R. 54
(3) (1933) 48 C.L.R. 266.

to be on foot, and indeed when no peanuts were on the wharf. There was no evidence that they had been sold or were in the course of sale. As to the word "receive" there could be the situation where a person by a complete intra-State delivery has goods held for him which he may enter into inter-State trade. The problem is the same as in the case of the word "deliver". An owner is entitled to have his goods sent to a place and have them received there until he makes up his mind as to their disposal.

Section 1A is not a delegation of legislative power. It is merely a direction to construe, so as to read validity into the Acts, if possible. The argument for the appellants is that that cannot be done. Section 1A is not the equivalent of writing into s. 15 the words "subject to section 92 of the Constitution". As a reading-down provision s. 1A cannot be regarded in any sense as any authority to legislate, or alter the policy of the Acts. It is no more than a requirement that, if s. 15 without a change in meaning or policy can be construed so as to be valid, that shall be done. The immunity and the freedom, in the sense of s. 92, from a burdensome law would give to the grower on the one hand and the buyer on the other an immunity or freedom as to his goods and his right of disposition. No part of s. 15 (1) can be reduced, and s. 15 (3) must be approached with the situation that all the commodity is to be delivered to the board. Then the construction and operation of s. 15 (3) is approached with s. 15 (1) as enacted, because no reducing formula can be put in to validate s. 15 (1) and leave it unattached. In this way s. 15 (3) cannot be the main provision as argued on behalf of the Commonwealth. The arguments put forward for the States and the Commonwealth are really that, if the States can attack earlier than the latest transaction it is not a burden on inter-State trade. They ignore the radical change in the focal point, which *Bank of New South Wales* v. *Commonwealth* (1) effected, namely, it is not the subject matter or extrinsic motive but what the law actually is. Since the decision in this case, former cases will have to be looked at with these things in mind, as many of them are coloured by the subject matter, many by the idea that the law had to be aimed at as distinct from affecting the operations, and many by the thought that it is only the passage of the goods on which attention should be fixed. *Andrews* v. *Howell* (2); *Crothers* v. *Sheil* (3) and *Roughly* v. *New South Wales*; *Ex parte Beavis* (4) are distinguishable and have no application to the instant case. In those cases the Court held there was

(1) (1948) 76 C.L.R. 1.
(2) (1941) 65 C.L.R. 255.
(3) (1933) 49 C.L.R. 399.
(4) (1928) 42 C.L.R. 162.

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a sufficient residuum to cover the case, on the construction of the particular statute. Here, on the strict interpretation of s. 15 (1), that cannot be done. These cases will require reconsideration in view of the decision in the *Banks Case* (1). The combined effect of all the authorities considered in the light of *W. & A. McArthur Ltd.* v. *Queensland* (2) and the *Banks Case* (1) is that the idea of having movement has nothing to do with trade. There may be plenty of trade without movement, but because it has to be inter-State trade it is necessary to acknowledge a geographical division and have a recognition of a geographical boundary: *Dean Milk Co.* v. *City of Maddison* (3). Leaving out the matter of the passage of goods across the border, the element of inter-State trade which attracts s. 92 is the making of the contract across the State line. In conclusion, the effect of s. 1A is if a construction can be put on s. 15 (1) without changing its meaning and without making a different Act in the sense of policy, the section may be so construed. But such a construction cannot be put on s. 15 (1) and there is no formula by which it can be reduced.

J. D. Holmes K.C. (with him *D. B. Hunter*), applied for leave to intervene for the Egg Marketing Board of New South Wales and the Potato Marketing Board of New South Wales, but the application was refused.

Cur. adv. vult.

Oct. 17.

The Court delivered the following written judgment:—

The appeal is brought from the Court of Petty Sessions at Brisbane under s. 39 (2) (*b*) of the *Judiciary Act* 1903-1950. Upon a complaint by the respondent, the Potato Marketing Board, the stipendiary magistrate sitting as the Court of Petty Sessions convicted the appellants of an offence under s. 15 (3) of *The Primary Producers' Organisation and Marketing Acts* 1926 *to* 1946 (Q). The charge upon which the appellants were so convicted, stated briefly, was that at Brisbane on 17th May 1950 they received from a person other than the Potato Marketing Board (the respondent) sixty-one bags of potatoes forming part of what had been declared to be a commodity under and for the purposes of those Acts, which potatoes were not exempted by the respondent board from the operation of s. 15. Sub-section (3) of s. 15 provides that any person who, save as in the Act afterwards prescribed, sells or delivers any of the

(1) (1948) 76 C.L.R. 1.
(2) (1920) 28 C.L.R. 530, at pp. 544, 545, 565, 569.
(3) (1950) 340 U.S. 349 [95 Law Ed. 329].

commodity to or buys or receives any of the commodity from any person other than the board shall be liable to a penalty not exceeding £500.

The answer made to the charge on behalf of the appellants depends upon s. 92 of the Constitution. The validity of sub-s. (3) is attacked as an attempted impairment of the freedom of trade commerce and intercourse among the States of a kind incapable of any severable or distributable operation which would support the charge. The validity of the sub-section was attacked also as inseverably connected with sub-s. (1). The text of sub-s. (1) of s. 15 will be set out later. All that now need be said is that according to the appellants' claim sub-s. (1) is inconsistent with the freedom of inter-State trade and incapable of a severable or distributable application to or operation upon the domestic trade of the State of Queensland.

The legislation contains a severability clause, and, unless the transaction to which the charge relates is itself one of inter-State commerce falling within the protection of s. 92, the questions raised by the contentions for the appellants will depend upon the application of that clause with respect to sub-s. (3). That is to say, it will depend upon the extent to which, having regard to the scope of the protection afforded by s. 92, the severability clause validly may give an operation to the material part of sub-s. (3) and upon the extent to which, as a matter of interpretation, it does so. This will be true also of sub-s. (1), if the partial validity of that sub-section becomes important, as it would if it were found that sub-s. (3) is inseparable from sub-s. (1) so that it must fall unless sub-s. (3) possesses some operation.

That the appeal must depend upon the possibility of giving the provisions a severable or distributive application is apparent almost from a bare perusal of the provisions in question. For, consistently with the decided cases, it would not be easy to deny that if the general language of sub-s. (3) were given a literal application it would include transactions of inter-State commerce and interfere with the freedom of trade commerce and intercourse among the States. On the other hand it is just as difficult to deny that if by appropriate words of restriction or exception or by a corresponding implication, the operation of sub-s. (3) was confined to the domestic trade of the State and the possibility of interference with the freedom of inter-State commerce was excluded, it would be competent to the State to enact such a law. The same thing will be found to be true of sub-s. (1), notwithstanding a somewhat greater difficulty perhaps in framing the restriction or exception.

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But a further contention was advanced which depends in some degree upon the facts of the case. It was that if it were found possible to give to sub-s. (3) of s. 15 a partial operation that was valid, it could only be by excluding whatever of the commodity was subject to, needed for the purpose of, or intended to be used for inter-State commerce (as exemplified by *Matthews* v. *Chicory Marketing Board* (*Vict*). (1)), and that upon the facts a sufficient inter-State element existed to place the case outside the residual operation so conceded to sub-s. (3). It is seldom, if ever, desirable to decide any question of constitutional validity *in abstracto* and independently of the facts but this contention makes necessary a consideration of the precise circumstances.

The appellants are a firm carrying on business at Roma Street, Brisbane, as wholesale fruit and produce merchants. On the New South Wales and Queensland border at the town called Wallangarra on the Queensland side and Jennings on the New South Wales side, a firm named J. E. Long & Co. carry on business as wholesale fruit, vegetable and produce merchants. The place of business of the firm is in Jennings on the New South Wales side of the border and so is the place of residence of the partner concerned in this transaction, H. G. Butt. The post office, however, is on the Queensland side and the firm's letters are delivered there in a post office box. The border is marked by a fence open at the railway station. The firm had an agent named Profke, who bought produce for them in Queensland. In a telephone conversation, apparently conducted from Jennings in New South Wales to Lowood in Queensland, Butt instructed Profke to buy potatoes for the firm from local growers. Profke accordingly bought seven bags of potatoes from a grower named Heise and fifty-four bags from a grower named Sippel. They were paid for by J. E. Long & Co.'s cheque. Under the terms of purchase the potatoes were to be delivered at the Lowood railway station, whence Profke consigned them in the name of J. E. Long & Co. to Roma Street railway station, Brisbane, naming J. E. Long & Co. as consignees. Lowood lies east of Brisbane and is connected with Brisbane by rail through Ipswich. The potatoes reached Roma Street on 17th May 1950. On that day Butt telephoned to the appellants' firm at Roma Street, Brisbane, and informed them that potatoes were coming from Lowood consigned to J. E. Long & Co., Roma Street, and instructed them to take delivery of the consignment and to sell the potatoes on commission. The firm accordingly took delivery of the sixty-one bags of potatoes at the Roma Street railway sheds and obtained

(1) (1938) 60 C.L.R. 263, at pp. 273, 274 and 283.

an advice note showing the number of bags, the place of consignment, the freight and the consignor and consignee. They took the potatoes to their stand in the market. There they sold them. On 16th May 1950 J. E. Long & Co. had instructed the Roma Street station master to deliver the potatoes to the appellants' firm and on 19th May Butt wrote to the firm that he trusted they had received from Lowood the sixty-one bags of potatoes which he had asked them to dispose of on account of J. E. Long & Co., and that he looked forward to the account sales in due course. The appellants' firm sent J. E. Long & Co. the account sales accompanied by a cheque for the proceeds of the potatoes less freight cartage and commission.

It will be seen that there is no inter-State element in the whole transaction except that Butt's instructions to Profke and to the appellants' firm appear to have been communicated or transmitted from Jennings. Possibly the cheque paid to the growers for the potatoes also came from Jennings. The account sales and the cheque for the proceeds were doubtless delivered to the box in the post office at Wallangarra and, if taken across the border, were so taken by J. E. Long & Co. themselves.

The receiving of the potatoes, which is made the basis of the charge against the appellants under s. 15 (3) is the receiving of the commodity into their possession in Brisbane by taking delivery of the sixty-one bags of potatoes at the Roma Street railway sheds and placing them on their stand at the markets whence they were sold. Obviously no inter-State trade was involved in the sale and delivery of the potatoes to Profke on behalf of J. E. Long & Co., the consignment to Brisbane, the receipt of the potatoes by the appellants and their subsequent sale and delivery of the potatoes by the appellants acting for J. E. Long & Co. The fact that J. E. Long & Co. were in Jennings across the border does not alter the intra-State nature of the transaction in which they were concerned. The communications of J. E. Long & Co. with Profke and the appellants' firm may in themselves have amounted to inter-State intercourse, but that does not make the transaction entered into as the result of those communications inter-State trade. It is accordingly clear that, considered as a whole, the completed transaction of which the receipt by the appellants of the potatoes forms a part does not fall within the protection of s. 92.

A contention is made that no law is consistent with s. 92 if it forbids the commercial receipt of goods for purposes of sale or resale, because to do so is to deprive the recipient or his principal

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of an opportunity of selling them into another State, if he so chooses. But, apart from this contention, the facts make it necessary for the appellants to rely not upon any protection given by s. 92 to them or to J. E. Long & Co. in the transaction in which they engaged, but upon a claim that because the terms in which s. 15 is expressed would interfere with the freedom of inter-State commerce it is incapable of a full valid operation and that sub-s. (3) cannot be severed and cannot be read down so as to possess any valid operation within which the appellants' case would fall.

The Primary Producers' Organisation and Marketing Acts 1926 *to* 1930 (Q.) were the subject of the decision of this Court in *Peanut Board* v. *Rockhampton Harbour Board* (1). Peanuts as a commodity had been vested in the Peanut Board by an Order in Council pursuant to a provision of the Acts, s. 9 (2). A consignment of peanuts was found in the possession of the Rockhampton Harbour Board whilst in the course of inter-State transit. They had never been delivered to the Peanut Board and had been consigned without its authority. The Harbour Board refused to deliver them up to the Peanut Board and the latter brought an action to vindicate its title to the peanuts and to compel the Harbour Board to deliver them up. The claim failed because in the language of *Rich* J. (2) the "Act of 1926-1930 and the Order in Council thereunder are ineffectual to prevent the grower of peanuts from disposing of them in inter-State trade and commerce and the (Peanut) Board had no title to the peanuts the subject of the action". *Starke* J. closed his judgment by saying (3): "I think the Act operates in contravention of s. 92 of the Constitution, and so far as it does so is necessarily void". *McTiernan* J., however, in stating his conclusion said (4) that he was clearly of opinion that the Peanut Board was not validly constituted and that it could not assert any rights as an owner to the consignment of peanuts, which, his Honour added, in fact had been placed on the Harbour Board's wharf for shipment to Sydney. The conclusion *Dixon* J. expressed (5) was that the Order in Council could not operate to deprive the grower of peanuts of his liberty to dispose of them in inter-State commerce, and, accordingly, that the Peanut Board was not entitled to claim them from the Harbour Board. It was not necessary for the Court to consider whether the Acts were wholly invalid and, apart from what is implied by the language employed in the foregoing passages, the Court did not consider whether, as

(1) (1933) 48 C.L.R. 266.
(2) (1933) 48 C.L.R., at p. 277.
(3) (1933) 48 C.L.R., at p. 285.
(4) (1933) 48 C.L.R., at p. 314.
(5) (1933) 48 C.L.R., at p. 288.

a consequence of its decision, the material provisions of the Act and the Order in Council must, in relation to the control of peanuts as a commodity, be entirely ineffectual or, on the contrary, might be capable of an operation governing peanuts which remained the subject of the domestic trade of Queensland.

Some two years after this decision the Queensland legislature, by way of amendment of the Acts, introduced the "severability clause". It stands as s. 1A and is in terms apparently based on s. 2 of the *Acts Interpretation Act* 1930 (Vict.), which in turn was founded on the familiar s. 15A of the *Acts Interpretation Act* 1901-1950 (Cth.), a section passed earlier in the year 1930. Section 1A of *The Primary Producers' Organisation and Marketing Acts* is in the following terms:—

"This Act and any Proclamation, Order in Council or regulation made thereunder shall be read and construed subject to the *Commonwealth of Australia Constitution Act*, and so as not to exceed the legislative power of the State, to the intent that where any enactment contained in this Act or provision contained in any such Proclamation, Order in Council, or regulation would but for this section have been construed as being in excess of that power, it shall nevertheless be a valid enactment or provision to the extent to which it is not in excess of that power."

The Commonwealth and the Victorian provisions are enactments applying to statutes generally, while s. 1A is directed specifically to the constitutional operation of the Acts now in question and moreover is evidently directed to the problem of severability raised by the decision of the Court that the legislation involved an inconsistency with s. 92. These circumstances provide a consideration which must weigh against arguments that provisions in the Act cannot, consistently with their meaning, be severed or given a distributive application which excludes inter-State trade or any interference with its freedom.

A most important difference between the present case and that of the Peanut Board is that potatoes as a commodity have not been vested in the Potato Marketing Board. Under s. 9 (1) the Governor in Council may, if certain conditions are fulfilled, declare a product of the soil of Queensland to be a commodity and he may constitute a board in relation to the commodity and extend the provisions of the Act, either wholly or with all such modifications thereof or additions thereto as are deemed by him to meet the particular circumstances, to such commodity and the board so constituted and all persons and things concerned. This may be done without vesting the commodity in the board. An Order in

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Council purporting to be made under the provision has, on gazettal, the same effect as if enacted in the Act: s. 9 (9). Boards may be marketing boards or have more limited functions: s. 9 (6) and s. 2, definition of "Board", and s. 11 (3). The marketing board is appointed by the Minister of the prescribed number of elected representatives of the growers of the commodity and of a director of marketing: s. 11 (1). Subject to the Act a marketing board may sell or arrange for the sale of the commodity and do all acts, matters and things necessary or expedient in that behalf: s. 14.

This appeal ultimately depends on the first three sub-sections of s. 15 and it is desirable to set them out. They are as follows:—

"(1) Save as hereinafter prescribed, all the commodity shall be delivered by the growers thereof to the Marketing Board or their authorised agents within such times, at such places, and in such manner as the Board may fix, or as may be prescribed.

(2) All the commodity so delivered shall be deemed to have been delivered to the Board for sale by the Board on behalf of the growers thereof.

(3) Any person who, save as hereinafter prescribed, sells or delivers any of the commodity to or buys or receives any of the commodity from any person other than the Board, shall be liable to a penalty not exceeding five hundred pounds."

Section 15 contained three further sub-sections, but by Order in Council they were replaced for the purpose of potatoes as a commodity by a new section numbered 15A. The substituted provision is as follows:—

"The Board may from time to time and upon such terms and conditions as it may determine either generally or in particular cases grant such exemption or partial exemption as it may deem fit in respect of any Act, matter or thing under the said Acts, or any regulation or Order in Council made thereunder. The Board may, at any time, revoke such exemption."

Section 16 of the Act provides that all the commodity delivered to the board shall be delivered in the name of the grower and if so prescribed the grower shall furnish with each consignment a certificate of merchantable quality. Section 17 provides that the tendering of the commodity by any person to an authorized agent, that is, to any person authorized by the board to take delivery of the commodity on their behalf in the exercise of their powers under the Act, for acceptance of delivery by him shall be prima-facie evidence of an intention to deliver it to the board to be disposed of by the board in accordance with the Act. Orders in Council have, for the purpose of potatoes as a commodity, replaced

s. 18 of the statute with another s. 18, consisting of seven sub-sections. Sub-section (1) provides that subject to sub-s. (3), which deals with zoning production, the Potato Marketing Board shall not refuse to accept from any grower any of the commodity which is of the prescribed quality or conforms with the prescribed standard or is accompanied by a certificate of merchantable quality, if one is prescribed, "provided that the commodity is delivered in accordance with this Act at or within such time or times as shall from time to time be fixed by the Board". Sub-section (2) provides for a return to the grower on a pooling basis. It is as follows:—

"Subject to this Act, the Board shall, out of the proceeds of the commodity disposed of by the Board under this Act, make payments to each grower of the commodity delivered to the Board, in respect of the commodity, delivered by him, on the basis of the net proceeds of the sales of all of the commodity of the same quality or standard delivered to and sold by the Board from such portions of the State and/or during or covering such periods of time as may be prescribed and the proportions of such commodity so delivered by such grower from each portion of the State and/or during each such period of time."

By sub-s. (3) a power is given to the board to regulate deliveries of the commodity by growers to the board according to a method elaborately prescribed. In effect the board is empowered to fix production zones, determine according to the acreage planted the proportionate quantity of potatoes each grower may deliver and refuse to accept the excess or, if the board accepts such excess, deal with it in a special manner. Sub-section (4), for the purpose of ascertaining the net amount payable to the grower, makes final the board's decision on quality, dockages, charges and deductions. Sub-section (5) relieves the board of liability to the grower for damage to the commodity before delivery to the board. Sub-section (6) authorizes a deduction from the net proceeds of sales of two per cent for working expenses. Sub-section (7) empowers the board to issue licences to persons to trade in the commodity as wholesale dealers and prescribes the form of licence, which is expressed to be subject to the Acts and Regulations and to any exemption therefrom granted under s. 15A. Presumably the licensee is exempted under s. 15A. Section 19 of the Act provides for the issue to the grower delivering the commodity of a certificate in a prescribed form. The only other provision that it is necessary to mention is s. 20, which enables the board to invalidate contracts relating to the sale of the commodity. The contract may be

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made in or outside Queensland and before or after the extension of the Act to the commodity. Dependent or collateral contracts with respect to the commodity are invalidated with the principal contract. Sub-section (3) of s. 20 provides that nothing in the section shall apply to a commodity the subject of an inter-State contract. The purpose of invalidating the contracts probably is to make certain that there shall be no liability in damages and the inclusion of contracts made in Queensland after an extension of the Act to the commodity notwithstanding s. 15 may be due to a doubt whether the illegality arising from that section would afford an answer to actions for damages covering every case. The form of sub-s. (3) of s. 20 excludes, not inter-State contracts, but a commodity subject to an inter-State contract. It is a provision of the Act of 1926 and is apparently based on the assumption that what puts a commodity into inter-State trade is "an inter-State contract" and that thereupon all transactions in reference to it are protected by s. 92 from invalidation by State law.

In dealing with the questions that have been raised upon the foregoing provisions in their application to the circumstances that have been stated it is logical to begin with sub-s. (3) and its operation. For it is upon sub-s. (3) that the charge rests and it needs no argument to show that independently of the invalidating effect of s. 92 the facts fall exactly within its words. The appellants' firm did receive potatoes, being a commodity within the meaning of the Act, from a person other than the board, namely, from the Queensland Government Railways at Roma Street. The transaction in the course of which the commodity was so received involved no actual inter-State trade. Why should it not be within the application of sub-s. (3)? Certainly the language in which sub-s. (3) is expressed, interpreted naturally, and without the imposition of any artificial restriction by reference to constitutional limitations, extends to inter-State transactions upon which it cannot validly operate. To that extent it would be invalid. But it is a provision applying distributively, that is to say, it applies to each and every receipt of a commodity or purchase or sale or delivery within its terms separately and independently of every other receipt purchase sale or delivery. The very purpose of such provisions as s. 1A as understood in this Court and repeatedly applied is to establish a presumption that to the extent that its operation is within the power of the legislature a law is to be valid notwithstanding that as expressed it is in excess of power: see *Bank of N.S.W.* v. *The Commonwealth* (1). Two answers were given, each

(1) (1948) 76 C.L.R., at p. 369.

depending upon a conception of the extent of the protection conferred by s. 92. The first arises upon the facts. It is as follows. When the appellants received the sixty-one bags of potatoes the offence, if offence there be, was complete and it mattered not that afterward they were sold in an intra-State transaction. The receipt of the goods was for and on behalf of a principal in New South Wales. Section 92, so it is argued, protects him, and his agent, from interference by State law in obtaining or accumulating goods for importation or sale into New South Wales. He cannot trade into New South Wales without goods and he is protected in the essential steps towards that end, not only with respect to goods devoted to sale for delivery into New South Wales, but in respect of goods which may or may not be disposed of in an inter-State transaction, pending a decision between inter-State and intra-State sale or delivery. There is no basis in fact for this contention. For when, before the arrival of the potatoes in Brisbane, Butt telephoned to the appellants' firm at Roma Street, Brisbane, and instructed them to take delivery of the consignment of potatoes and sell them on commission, that amounted to an instruction to sell them in the ordinary domestic trade of Queensland. Thus, before the actual receipt of the potatoes constituting the offence, the owner had decided upon intra-State sale of the potatoes. This is what the magistrate meant when he said that he was of opinion that when the owner of the potatoes decided to let them remain in Brisbane and be sold there, s. 15 had full application.

The second answer consists in a contention made on the footing that s. 92 protects the receipt of goods in anticipation of a sale or other disposition which may turn out to be inter-State or intra-State according to the recipient's decision or events. On that footing it is impossible, so it is contended, to place upon the application of the word "receive" in s. 15 (3) any limitation which will at once take it outside s. 92 and leave it to any real operation. Again the facts provide no basis for this contention, for the receipt of the potatoes by the appellant was in anticipation of and for the purposes of their being sold in Queensland.

There is, it will be seen, but one basis for both these contentions. They attempt to give to s. 92 an operation which goes beyond the protection of transactions of inter-State trade and commerce, even beyond the protection of acts and transactions antecedent to inter-State trade but inseparably connected with it, and extends the constitutional protection to acts which may or may not lead to transactions of inter-State trade and at best can only be preparatory to transactions which may or may not prove to have an

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inter-State character. It is an attempt to give a new application to s. 92. It has no support in any decided case or judicial pronouncement and it involves an unwarranted extension of the operation of the provision going beyond the widest purpose hitherto ascribed to it.

But an alternative contention was made for the appellants with reference to sub-s. (3) of s. 15, considered apart from sub-s. (1). The contention, which was mentioned in an earlier part of this judgment, invokes as an authoritative illustration of what must be excluded from the operation of such a provision in order to satisfy s. 92, the description of excluded transactions contained in the Victorian legislation dealt with in *Matthews* v. *Chicory Marketing Board* (*Vict.*) (1), and accepted as sufficient by *Latham* C.J. and *Starke* J. With such support as this illustration lends, it is then urged that an attempt to confine the application of the word " receives " in s. 15 (3) so as to work an exclusion of a like description of transaction would leave the receipt of the sixty-one bags of potatoes on 17th May 1950 by the appellants outside the residual operation of the sub-section.

This contention fails in fact and in law. It fails in fact because the sixty-one bags of potatoes were not the subject of inter-State commerce, they were not required for the purpose of inter-State commerce and they were not intended to be used in inter-State commerce. This is the language of the Victorian provision and to say this negatives the application of the criteria it adopted, the criteria said to have been judicially accepted. The contention fails in law because it adopts an erroneous approach to the question whether, as a result of the " severability clause ", s. 1A, sub-s. (3) validly operates within constitutional limits and yet embraces the facts of this case. What s. 1A does is to confine the distributive application of s. 15 (3) to the field left open by s. 92. Once it is seen that the receipt of the sixty-one bags of potatoes belongs entirely to that field and that the transaction in which it forms a step falls within it, that is enough.

It follows from what has been said that, considering sub-s. (3) of s. 15 independently of sub-s. (1), it has a valid operation which prohibited the appellants from receiving the commodity from the Queensland Government Railways on the occasion charged. But it is denied, on behalf of the appellants, that sub-s. (3) can be considered independently of sub-s. (1). The validity of sub-s. (1) is attacked and it is claimed that sub-s. (3) is dependent upon it and must fall with it. But is the relation of sub-s. (3) to sub-s. (1)

(1) (1938) 60 C.L.R. 263, at pp. 273, 274, 283.

such that s. 1A cannot effect a severance, assuming that sub-s. (1) proves to be invalid? Sub-section (1) provides that all the commodity shall be delivered by the growers to the marketing board within the times, at the places and in the manner the board fixes or the Governor in Council prescribes. That is a positive command. It is clumsily framed in the passive voice and no penalty is fixed. But it may be taken that it was intended that a failure to perform the duty it imposes should amount to an offence, and s. 31 (3) provides that a person committing an offence against the Act for which no other penalty or punishment is expressly provided shall be liable to a penalty not exceeding £50. Clearly enough, however, it was meant to impose a duty on each grower in respect of the commodity he produced and not a duty upon all jointly and collectively in respect of all the commodity produced, so that each would be responsible for the delivery, not only of his own product, but of the product of all other growers.

It is argued that sub-s. (3) was intended to be ancillary to or consequential upon the obligation thus imposed by sub-s. (1). In other words the sub-section imposed a prohibition to take effect only because sub-s. (1) required the delivery of the entire commodity (save for the statutory exceptions allowed) to the marketing board. To this there is more than one answer. In the first place, the argument has no support in the actual text of the two sub-sections and is but a speculative explanation of the supposed policy of the provisions. In the second place, a more probable explanation of the provisions is that sub-s. (3) was intended to drive the producers of the commodity to deliver to the marketing board by heavily penalizing any other disposition by them or by any other person who might obtain the commodity from a producer. Thus it may be regarded as a parallel provision designed to induce deliveries to the board. Thirdly, the operation of sub-s. (1) is dependent on the Governor in Council prescribing, or the marketing board fixing, times, places and a manner for delivery, whilst the operation of sub-s. (3) awaits the fulfilment of no condition precedent. The prohibition contained in sub-s. (3) therefore applies before the duty under sub-s. (1) arises and even though, because of inaction on the part of the authorities, it never arises. This is a strong indication that sub-s. (3) does not so depend upon sub-s. (1) that notwithstanding s. 1A it could not survive the invalidation of the latter sub-section. On the other side there exists in the form of s. 15 a consideration to which attention was directed by *McTiernan* J. during the argument. It was pointed out that in sub-s. (2) the commodity which is to be deemed to be

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delivered to the board for sale on behalf of the growers is the commodity "so delivered", that is to say, delivered in conformity with the directions contained in or given pursuant to sub-s. (1). From this, it was suggested, it might follow that if the deliveries were made independently of sub-s. (1) on the footing that the sub-section had no compulsive force there would be nothing to require the board to sell the commodity on behalf of the growers. But a scrutiny of the legislation, including s. 18 as replaced by the orders in council, shows that even were there no other sub-section in s. 15 than sub-s. (3) the scheme of the Act for marketing potatoes would work in the same way. Section 18 (1) prevents the board from refusing to accept the potatoes, if they are of the required quality and standard and are accompanied by a certificate of merchantable quality, unless the refusal is in pursuance of the zoning provision contained in sub-s. (3). The reference in the proviso to s. 18 (1) to delivery in accordance with the Act cannot deprive s. 18 of operation simply because a compulsive provision requiring delivery is found to be without force. The delivery cannot for that reason be any the less in accordance with the Act. Nor does the reference to times fixed by the board have such an effect. It allows of the board fixing times, that is all, whether they do so in purported pursuance of s. 15 (1) or they leave it, under that sub-section, to be prescribed by regulation. Sub-section (2) deals with the distribution of the proceeds of sale of the commodity and so makes it impossible to assign to sub-s. (2) of s. 15 the role of a provision indispensable to the scheme.

For these reasons sub-s. (3) ought not to be considered as inseverable from sub-s. (1) if sub-s. (1) proved to be wholly invalid.

But is it possible to regard sub-s. (1) as wholly invalid? Let it be supposed that s. 92 necessitates a drastic restriction of sub-s. (1) to ensure the freedom of inter-State trade in commodities. Yet sub-s. (1), as has already been pointed out, has a distributive application. It applies to each and every grower in respect of so much of the commodity as he has produced. Moreover, it is a general provision applying not only to potatoes but to all commodities for which a marketing board may be established. However drastic may be the restriction imposed upon sub-s. (1), such a provision having such a distributive application must under s. 1A remain capable of applying to any failure to deliver unprotected by s. 92. It is argued in effect that a failure to deliver can never be unprotected by s. 92, because a law which imposes upon the producer or for that matter any other owner of a commodity an obligation to deliver it to a marketing authority can have no operation which is not opposed to s. 92. For *non constat* that the

owner may not sell it inter-State or otherwise put it into inter-State trade, and he must not be hindered or prevented from exercising his choice so to dispose of it on the one hand or on the other to sell it in the course of the domestic trade of the State. It is not the occasion to examine this view of s. 92. For a simple illustration will show that there must be room for the valid operation of s. 15 (1). The reason is that there may be cases where the failure to deliver is the result of the disposal of the commodity by an intra-State sale. Suppose a grower of potatoes in Queensland as soon as he plants his acreage contracts with a merchant whose trade is confined to the domestic market to sell the potatoes to him and that the grower delivers the potatoes on his farm to the buyer as he digs them. The supposition means that the time fixed by the board has not elapsed. How could he by invoking s. 92 avoid the application to him of sub-s. (1), after the time has elapsed ? What inter-State trade in those potatoes could there be for which he could claim the protection of s. 92 ? Plainly s. 92 can have nothing to say to such a case. But, once it is seen that some operation must be conceded to s. 15 (1) as the result of s. 1A, then all foundation disappears for the argument that sub-s. (3) fails because of the invalidity of sub-s. (1).

In the end the case comes back to two familiar and perhaps simple considerations, namely, that a severability clause operates to confine a general prohibition to cases within the legislative power of which s. 92 does not deprive a State, and that acts, matters and things which do not go outside the domestic trade of a State are within that power. Accordingly the appeal should be dismissed with costs.

Appeal dismissed and order nisi discharged with costs.

Solicitors for the appellants : *Feez Ruthning & Co.*

Solicitors for the respondents : *Macnish Macrossan & Dowling.*

Solicitor for the States of New South Wales, Victoria, Queensland and Western Australian (intervening) : *H. T. O'Driscoll*, Crown Solicitor for Queensland.

Solicitor for the Commonwealth (intervening) : *D. D. Bell*, Crown Solicitor for the Commonwealth.

Solicitors for the Egg Marketing Board of New South Wales and the Potato Marketing Board of New South Wales (applying for leave to intervene) : *Carruthers, Hunter & Co.*, Sydney, by *Macnish Macrossan & Dowling.*

B. J. J.